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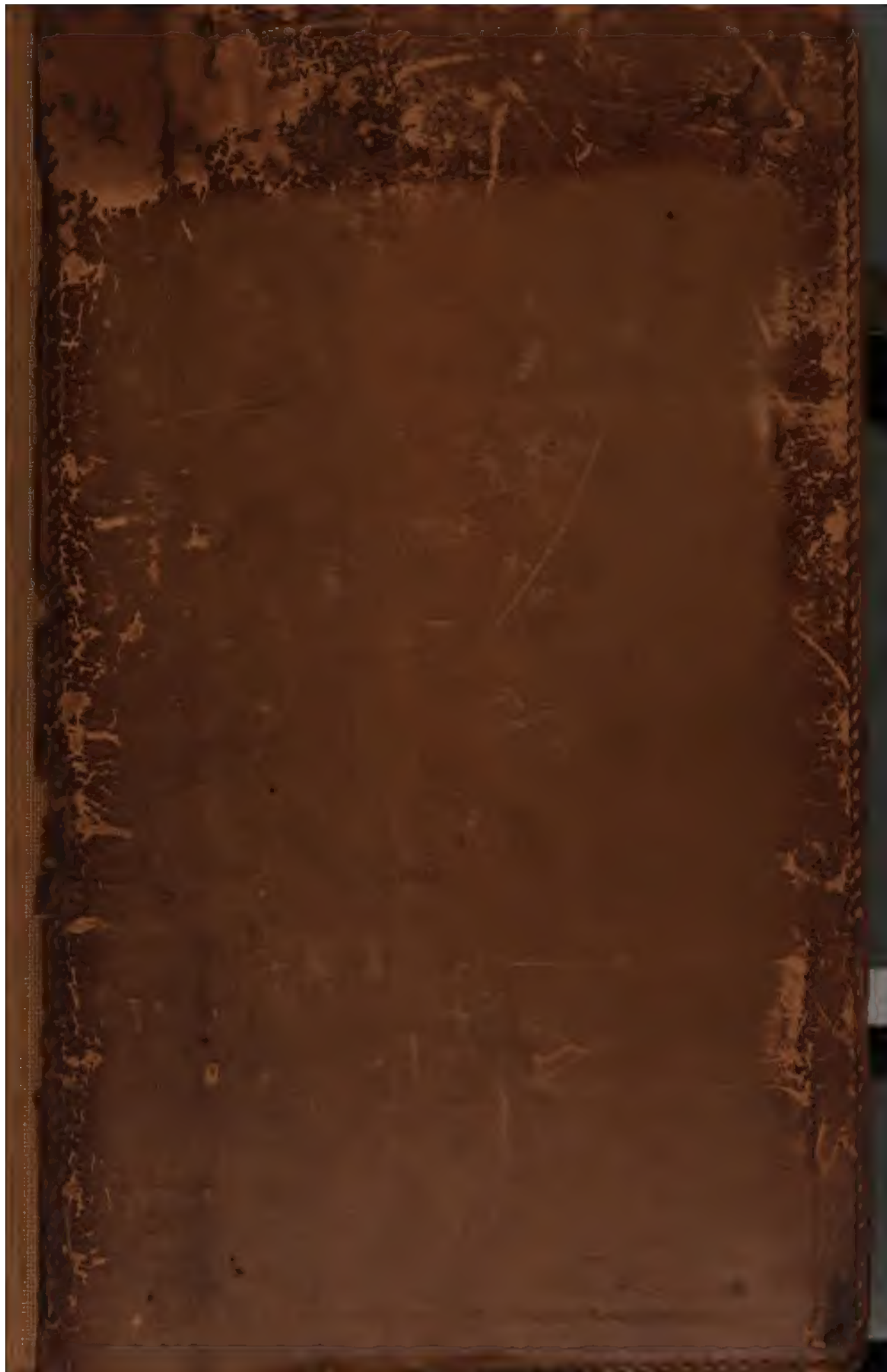
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THE HIGH COURT OF CHANCERY

THOMAS WATSON  
GATE OF THE HIGH COURT OF CHANCERY



**C A S E S**

**ARGUED AND ADJUDGED**

**IN**

**The High Court of Chancery,**

**BY**

**THOMAS VERNON,**

**LATE OF THE MIDDLE TEMPLE, ESQ.**





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**ARGUED AND ADJUDGED**

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**ORIGINALLY PUBLISHED BY ORDER OF THE COURT,  
FROM THE MANUSCRIPTS**

**OF**

**THOMAS VERNON,**

**LATE OF THE MIDDLE TEMPLE, ESQ.**

---

**WITH REFERENCES**

**TO THE**

**PROCEEDINGS IN THE COURT, AND TO LATER CASES;**

**TOGETHER WITH TABLES OF THE**

*Names of the Principal Cases, and of the Cases cited in the Notes;*

**ALSO, OF**

**THE PRINCIPAL MATTERS AND OF THE MATTERS CONTAINED IN THE NOTES.**

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**By JOHN RAITHBY,**

**OF LINCOLN'S INN, ESQ. BARRISTER AT LAW.**

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**THE THIRD EDITION,  
WITH REFERENCES CONTINUED TO THE PRESENT TIME.**

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**WE** do allow and approve of the Printing and Publishing of the Cases argued and adjudged in the High Court of *Chancery*, as they are collected by **THOMAS VERNON**, late of the *Middle Temple*, Esq., well knowing the great Learning, Ability, and Judgment of the Author.

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A

# T A B L E

OF

## THE NAMES OF THE CASES,

TO THE

### SECOND VOLUME,

Alphabetically disposed, in such a double order, as that the Cases may be found  
by the Names either of the Plaintiffs or Defendants.

N. B. Where “ *versus* ” follows the first Name, it is that of the Plaintiff where “ *and*,”  
it is the Name of the Defendant.

| A.                                      |     | Page  |
|---|-----|---|
| Ackland <i>v.</i> Ackland               | 687 | Addison <i>v.</i> Dawson 678                  |
| Adams <i>v.</i> Buckland                | 514 | African Company <i>v.</i> Parish 244          |
| Askham <i>and</i> Berry                 | 26  | Alkinson <i>and</i> Wingfield 673             |
| Abell <i>and</i> Therman                | 64  | Alkis <i>and</i> Brompton 566                 |
| Abney <i>and</i> Cherrington            | 646 | Arthington <i>v.</i> Fawkes 356               |
| Albemarle (Ducissam) <i>and</i> Clarges | 245 | Ashfield <i>v.</i> Ashfield (Dominam) 287     |
| Mil.                                    | 31  | Aspinwall <i>v.</i> Leigh 218                 |
| Alderne <i>and</i> Luke                 | 588 | Atkins (Sir Jonathan) <i>and</i> Knights 20   |
| Allen <i>and</i> Keat                   | 368 | Atkinson <i>and</i> Hall 463                  |
| — <i>v.</i> Sayer                       | 655 | — <i>v.</i> Webb 478                          |
| Anderson <i>and</i> Hickman             | 120 | Abbot <i>v.</i> Lee 284                       |
| Andrew <i>and</i> Back                  | 8   | Acton <i>v.</i> Peirce 480                    |
| Archer <i>v.</i> Mosse                  | 37  | Alcock <i>v.</i> Sparhawk 228                 |
| Atleo <i>and</i> Buccle                 | 192 | Alford <i>v.</i> Earle 209                    |
| Awdley <i>v.</i> Awdley                 | 47  | Alston <i>and</i> Bentham 136, 204            |
| Axtell <i>and</i> Bissell               | 129 | Anon. 100, 133, 176, {177, 197, 199, 405, 707 |
| Aynesley <i>v.</i> Vaughan              |     | Arnott <i>and</i> Colchester 383              |



## A TABLE OF THE NAMES OF THE CASES.

|                                 | Page     |                                     | Page     |
|---------------------------------|----------|-------------------------------------|----------|
| Ascough v. Johnson              | 66       | Baynard and Gundry                  | 479      |
| Ashton (Sir Ralph) and Trafford | 660      | Bayntun (D'nam) and Whitchurch      | 272      |
| Aston v. Aston                  | 452      | Blackbourne and Parker              | 369      |
| —— v. Smallman                  | 556      | Bladon and Countess of Plymouth     | 32       |
| Attorney-General v. Barnes      | 597      | Blagrove v. Clunn                   | 533, 576 |
| ———— v. Burdet                  | 755      | Blake and Woodman                   | 166, 222 |
| ———— v. Dominam Floyer          | 748      | Blandy v. Widmore                   | 709      |
| ———— v. Guise                   | 266      | Blatchford and Laurence             | 457      |
| ———— v. Hesketh                 | 549      | Brackley and Small                  | 602      |
| ———— v. Hewer                   | 387      | Bradbury and Weld                   | 705      |
| ———— v. Hughes                  | 105      | Bradley v. Bradley                  | 163      |
| ———— v. Mayor of Coventry       | 397, 713 | ——— and Ward                        | 23       |
| ———— v. Rye                     | 453      | Bradshaw and Key                    | 102      |
| ———— v. Smith                   | 746      | Brandling v. Owen                   | 462      |
| ———— v. Sothon                  | 497      | Brayfield and Wilkinson             | 307      |
| Austin and Tate                 | 689      | ——— and Woodhouse                   | ibid.    |
| Amhurst v. Dawling              | 401      | Beachcroft v. Beachcroft            | 690      |
| Arundell v. Phillpot            | 69       | Beake and Tyrrel                    | 155      |
| Ayliffe and Peyton              | 312      | ——— and Wiseman                     | 121      |
|                                 |          | Beale and Jones                     | 381      |
|                                 |          | ——— and Saunders                    | 62       |
|                                 |          | Bean and Bachelor                   | 61       |
|                                 |          | Beaufort(Dux) v. Dom'. Dundonald    | 739      |
|                                 |          | ——— (Dutchess of) and Lady Granvill | 648      |
|                                 |          | Beckford v. Beckford                | 281      |
|                                 |          | Beddingfield and Delabeere          | 103      |
|                                 |          | Beeton v. Darkin                    | 168      |
|                                 |          | Bell and Robinson                   | 146      |
|                                 |          | ——— and Taylor                      | 171      |
|                                 |          | Bellasis (Domina) v. Compton        | 294      |
|                                 |          | ——— v. Churchill                    | 682      |
|                                 |          | Bence and Fane                      | 234      |
|                                 |          | Bendlowes and Wainwright            | 718      |
|                                 |          | Bennet v. Edwards                   | 392      |
|                                 |          | ——— and Roberts                     | 136, 204 |
|                                 |          | ——— and Com'. Salisbury             | 223      |
|                                 |          | Benson v. Benson                    | 263      |
|                                 |          | ——— and Richardson                  | 764      |
|                                 |          | ——— and Turton                      | ibid.    |
|                                 |          | Bentham v. Alston                   | 136, 204 |
|                                 |          | Bergavenny (Dominam) and Richards   | 334      |
|                                 |          | Berkeley and Clarke                 | 720      |
|                                 |          | Berny v. Pitt                       | 14       |
|                                 |          | Berry v. Askham                     | 26       |
|                                 |          | ——— and Kelly                       | 35       |
|                                 |          | Bertie and Lord Viscount Falkland   | 333      |
|                                 |          | Best v. Stampford                   | 520      |
|                                 |          | Beverley v. Beverley                | 131      |
|                                 |          | Bletsoe and Carter                  | 617      |
|                                 |          | ——— and Sawyer                      | 328      |
|                                 |          | Breary and Roundell                 | 482      |
|                                 |          | Brett and Sir Brazil Firebrass      | 70       |
|                                 |          | ——— and Stribblehill                | 445      |
|                                 |          | Bretton v. Lethulier                | 653      |

## A TABLE OF THE NAMES OF THE CASES.

|   |                           |   |                           |
|---|---------------------------|---|---------------------------|
| <b>Brewer and Hills</b>                         | <b>Page</b><br><b>104</b> | <b>Burkitt v. Burkitt</b>                     | <b>Page</b><br><b>498</b> |
| <b>Bickerstaff, Mil'. and Chichester, Bart.</b> | <b>295</b>                | <b>Burley and Holt</b>                        | <b>651</b>                |
| <b>Bill and Humble</b>                          | <b>444</b>                | <b>Burlington (Earl of) and Lady Clifford</b> | <b>379</b>                |
| <b>Billingsley and Baldwin</b>                  | <b>539</b>                | <b>———— (Countess of) and Franklyn</b>        | <b>512</b>                |
| <b>Bindon and Sweetapple</b>                    | <b>536</b>                | <b>Burnett v. Kinnaston</b>                   | <b>401</b>                |
| <b>Bird v. Lockey</b>                           | <b>744</b>                | <b>Burrel v. Harrison</b>                     | <b>231</b>                |
| <b>Birkhead v. Coward</b>                       | <b>116</b>                | <b>Burroughs and Smith</b>                    | <b>346</b>                |
| <b>Bishop v. Sharp</b>                          | <b>469</b>                | <b>Burton v. Knight</b>                       | <b>514</b>                |
| <b>———— and Webster</b>                         | <b>444</b>                | <b>Butler v. Duncomb</b>                      | <b>760</b>                |
| <b>Bissell v. Axtell</b>                        | <b>47</b>                 | <b>Buxton v. Hutchinson</b>                   | <b>46</b>                 |
| <b>Brice v. Whiteing</b>                        | <b>642</b>                | <b>Bruce (Dominum) and Grimston</b>           | <b>594</b>                |
| <b>Briddock (Dr.) and Parsons</b>               | <b>608</b>                | <b>Bruen v. Bruen</b>                         | <b>439</b>                |
| <b>Bridge and Tilley</b>                        | <b>519</b>                | <b>Bruges v. Curwin</b>                       | <b>575</b>                |
| <b>Bridger and Steward</b>                      | <b>516</b>                | <b>Bruning and Smith</b>                      | <b>392</b>                |
| <b>Bridges and Kingdon</b>                      | <b>67</b>                 | <b>Bruton and Jervis</b>                      | <b>251</b>                |
| <b>Briggs and Shelberry</b>                     | <b>249</b>                | <b>Blyman v. Brown</b>                        | <b>232</b>                |
| <b>Bristol (Comes) v. Hungerford</b>            | <b>524, 645</b>           |   |                           |
| <b>Bodington and Wilkes</b>                     | <b>599</b>                |   |                           |
| <b>Bond v. Kent</b>                             | <b>281</b>                | <b>C.</b>                                     |                           |
| <b>Bonython and Colwall</b>                     | <b>547</b>                | <b>Cage and Harrison</b>                      | <b>85</b>                 |
| <b>Bookey and Randall</b>                       | <b>425</b>                | <b>Calliford and Holland</b>                  | <b>662</b>                |
| <b>Booth and Brown</b>                          | <b>184</b>                | <b>Callow v. Mince</b>                        | <b>472</b>                |
| <b>———— and Hooley</b>                          | <b>359</b>                | <b>———— and Williams</b>                      | <b>752</b>                |
| <b>Botlace and Draper</b>                       | <b>370</b>                | <b>Carleton v. Earl of Dorset</b>             | <b>17</b>                 |
| <b>Bothomley v. Dominum Fairfax</b>             | <b>750</b>                | <b>Carrington and Cressey</b>                 | <b>79</b>                 |
| <b>Bowater v. Elly</b>                          | <b>344</b>                | <b>Carter v. Bletsoe</b>                      | <b>617</b>                |
| <b>Bowden and Parrot</b>                        | <b>37</b>                 | <b>Carteret and Toller</b>                    | <b>494</b>                |
| <b>Bowers and Fairebeard</b>                    | <b>202</b>                | <b>Cary v. Taylor</b>                         | <b>302</b>                |
| <b>———— and Fawcet</b>                          | <b>238</b>                | <b>Cass v. Ruddle</b>                         | <b>280</b>                |
| <b>Bowyer and Clerkson</b>                      | <b>66</b>                 | <b>Castleton (Lord) and Sheffield</b>         | <b>393</b>                |
| <b>Blois v. Viscountess Hereford</b>            | <b>501</b>                | <b>Cave (Domina) v. Cave, Bart.</b>           | <b>508</b>                |
| <b>Bromley v. Jefferies</b>                     | <b>415</b>                | <b>Chadwell and Godfrey</b>                   | <b>601</b>                |
| <b>Brompton v. Alkis</b>                        | <b>566</b>                | <b>Chadwick v. Doleman</b>                    | <b>528</b>                |
| <b>Brooking and Crook</b>                       | <b>50, 106</b>            | <b>Chaffin v. Gawden</b>                      | <b>278</b>                |
| <b>Brotherton v. Hatt</b>                       | <b>574</b>                | <b>Champante (Sir John) and Lord Rane-</b>    |                           |
| <b>Brown v. Booth</b>                           | <b>184</b>                | <b>laugh</b>                                  | <b>395</b>                |
| <b>———— and Blynman</b>                         | <b>232</b>                | <b>Champernoon v. Gubbs</b>                   | <b>382</b>                |
| <b>———— v. Dawson</b>                           | <b>498</b>                | <b>Chapman v. Derby</b>                       | <b>117</b>                |
| <b>———— and Lynes</b>                           | <b>306</b>                | <b>———— v. Duncombe</b>                       | <b>142</b>                |
| <b>———— (Sir George) and Wareham</b>            | <b>153</b>                | <b>———— v. Salt</b>                           | <b>646</b>                |
| <b>———— v. Trant</b>                            | <b>426</b>                | <b>Clare v. Wordell</b>                       | <b>548</b>                |
| <b>Browne and Saunders</b>                      | <b>46</b>                 | <b>Clarendon (Earl of) and Draper</b>         | <b>518</b>                |
| <b>Buckle v. Atleo</b>                          | <b>37</b>                 | <b>Clarges, Mil'. v. Ducissam Albemarle</b>   | <b>245</b>                |
| <b>Buckland and Adams</b>                       | <b>514</b>                |   |                           |
| <b>———— and Hawker</b>                          | <b>106</b>                | <b>Clarke v. Berkeley</b>                     | <b>720</b>                |
| <b>Buckle and Griffith</b>                      | <b>13</b>                 | <b>Clavering v. Sir James Clavering</b>       | <b>473</b>                |
| <b>Buckley and Deakins</b>                      | <b>240</b>                | <b>Claxton v. Claxton</b>                     | <b>152</b>                |
| <b>Buckworth and Morse</b>                      | <b>443</b>                | <b>Clay and Snell</b>                         | <b>324</b>                |
| <b>Budgin and Christ's Hospital</b>             | <b>683</b>                | <b>Cracroft and Palmer</b>                    | <b>578</b>                |
| <b>Bunce v. Philips</b>                         | <b>50</b>                 | <b>Crane v. Drake</b>                         | <b>616</b>                |
| <b>Burchett and Goodfellow</b>                  | <b>298</b>                | <b>———— and Fox</b>                           | <b>304</b>                |
| <b>Bardet and Attorney-General</b>              | <b>755</b>                | <b>Crawley and Seeling</b>                    | <b>386</b>                |
| <b>Bardett and Knightly</b>                     | <b>10</b>                 | <b>Cecil v. Comes Salisbury</b>               | <b>224</b>                |
| <b>———— v. Willett</b>                          | <b>638</b>                |   |                           |

|   | Page     |  | Page     |
|---|----------|--|----------|
| Cecil and Ward                              | 711      | Corpus Christi College Oxen v. Paroch' | 507      |
| Cheele and Stapleton                        | 673      | de Naunton                             | 5        |
| Cherrington v. Abney                        | 646      | Cotterel (Sir John) v. Serjeant Hamp-  | 990      |
| Cherry and Ferrars                          | 384      | son                                    | 990      |
| Cheyney and Hunsden                         | 150      | Cottle v. Fripp                        | 397, 713 |
| Clerk v. Clerk                              | 323      | Cotton v. Cotton                       | 116      |
| — by Committee v. Rich. Clerk               | 412      | Coventry (Mayor of) and Attorney-      | 877      |
| Clerke v. Leatherland                       | 98       | General                                | 664      |
| Clerkson v. Bowyer                          | 66       | Coward and Birkhead                    | 570      |
| Clever and Smith                            | 38, 59   | Cowper and Procter                     | 302      |
| Creagh v. Wilson                            | 572      | Cox v. Higford                         | 47, 82   |
| Cressey v. Carrington                       | 79       | — and Murrell                          | 647      |
| Chichester, Bart. v. Bickerstaff, Mil'. 295 | 568      | Coxeter and Cutler                     | 50, 106  |
| — and French                                | 61, 226  | Chomley v. Chomley                     | 124      |
| Child and Baker                             | 71       | Cromwell and Gibson                    | 595      |
| — v. Danbridge                              | 727      | Crook v. Brooking                      | 118      |
| — (Sir Richard) and Edwards                 | 743      | Crooke v. Watt                         | 706      |
| Chir v. Philpott                            | 283      | Crouch v. Martin                       | 375      |
| Christ-college, in Cambridge v. Widd-       | 683      | — and Sanderson                        | 247      |
| rington                                     | 379      | Crowder ex parte                       | 575      |
| Christ's Hospital v. Budgin                 | 486      | Culpepper (Lord) v. Fairfax            | 237      |
| Clifford (Lady) v. Earl of Burlington       | 65       | Cunningham v. Mellish                  | 593      |
|   | 116      | Curwin and Bruges                      | 302      |
| Clifton v. Jackson                          | 340      | Curzon and Owen                        | 682      |
| Coates v. Needham                           | 34, 200  | Cuthbert v. Peacock                    | 523, 576 |
| Cobb and Fines                              | 383      | Cutler v. Coxeter                      |          |
| Coddington v. Webb                          | 79       | Churchill and Bellasis                 | D.       |
| Cokes v. Mascall                            | 219, 296 | Clunn and Blagrove                     |          |
| Colchester v. Arnott                        | 670      |  |          |
| Cole v. Gray                                | 692      |  |          |
| — and Lord Stowell                          | 235      |  |          |
| Coleman and Baile                           | 635      |  |          |
| Coles v. Jones                              | 547      |  |          |
| Collins v. Goodall                          | 591      |  |          |
| — v. Plummer                                | 471      |  |          |
| Colwall v. Bonython                         | 90       |  |          |
| Combs v. Dowell                             | 294      |  |          |
| Combes v. Spencer                           | 638      |  |          |
| Comer v. Hollingshead                       | 375      |  |          |
| Compton and Domina Bellasis                 | 465      |  |          |
| — and Lillcott                              | 545      |  |          |
| Constable v. Constable                      | 235      |  |          |
| Cornwallis (Lord) and Lassells              | 262      |  |          |
| Cook v. Cook                                | 36       |  |          |
| — v. Sadler                                 | 429      |  |          |
| Cooke and Battily                           | 265      |  |          |
| — v. Cooke                                  | 109      |  |          |
| — v. Parsons                                | 640, 655 |  |          |
| Cooper v. Cooper                            | 148      |  |          |
| Cooth and Hide                              | 190      |  |          |
| Corbett v. Maydwell                         | 705      |  |          |
| Cordell v. Noden                            | 465      |  |          |
| Corie and Howman                            |          |  |          |
| Corneforth v. Geer                          |          |  |          |
| Cornwallis (Dominum) and Lassells           |          |  |          |

## A TABLE OF THE NAMES OF THE CASES.

|  |              |   |              |
|--|--------------|---|--------------|
|  | Page         |   | Page         |
| <i>Dew and Sanders</i>                         | 271          | <i>Englefield v. Englefield</i>                       | 286          |
| <i>Dobere v. Beddingfield</i>                  | 103          | <i>Edwin v. East India Company</i>                    | 210          |
| <i>Delaware (Lord) and Dean</i>                | 628          | — <i>v. Thomas</i>                                    | 75           |
| <i>Delawne and Sprignall</i>                   | 36           | <i>Eglinton (Countess of) and Portington</i>          | 189          |
| <i>Desmainbray v. Metcalfe</i>                 | 691, 698     | <i>Elie v. Osborne</i>                                | 754          |
| <i>Derby and Chapman</i>                       | 117          | <i>Elkin and Pinbury</i>                              | 758, 766     |
| — ( <i>Comitissa</i> ) <i>v. Earl of Derby</i> | 666          | <i>Elliot v. Hancock</i>                              | 143          |
| — ( <i>Lord</i> ) <i>and Lord Fairfax</i>      | 612          | <i>Elliott v. Davenport</i>                           | 521          |
| — <i>and Hanson</i>                            | 392          | <i>Eyles and Hooper</i>                               | 480          |
| — (' <i>Com</i> ') <i>and Nash</i>             | 537          | <i>Eyton v. Eyton</i>                                 | 380          |
| — ( <i>Earl of</i> ) <i>and Earl of Rivers</i> | 72           | <i>Elly and Bowater</i>                               | 344          |
| <i>De Roven and Duplex</i>                     | 540          |   |              |
| <i>Desbrough and Vandeancker</i>               | 96           |   |              |
| <i>Devon' (Dux') v. Kinton</i>                 | 719          | F.  |              |
| <i>Daggett and Pawlet</i>                      | 86           | <i>Fairebeard v. Bowers</i>                           | 202          |
| <i>Doleman and Chadwick</i>                    | 528          | <i>Fairchild and Lancy</i>                            | 101          |
| <i>Dolman v. Smith</i>                         | 740          | <i>Fairfax (Dominum) and Bothomley</i>                | 750          |
| <i>Dormer and Sheldon</i>                      | 310          | — <i>and Lord Culpepper</i>                           | 375          |
| <i>Dorset (Earl of) and Carleton</i>           | 17           | — ( <i>Lord</i> ) <i>v. Lord Derby</i>                | 612          |
| <i>Douglas v. Vincent</i>                      | 202          | <i>Falkland (Lord Viscount) v. Bertie</i>             | 333          |
| <i>Dowdeswell v. Nott</i>                      | 317          | <i>Fane and Barnardiston</i>                          | 366          |
| <i>Dowell and Coombs</i>                       | 591          | — <i>v. Bence</i>                                     | 234          |
| — <i>and Squire</i>                            | <i>ibid.</i> | <i>Farnham and Woodroffe</i>                          | 291          |
| <i>Dowler and Higgins</i>                      | 600          | <i>Farr and Le Pypre</i>                              | 716          |
| <i>Dabois v. Hole</i>                          | 613          | <i>Farrand and Jackson</i>                            | 424          |
| <i>Dask and Kirsley</i>                        | 684          | <i>Farrer, School Master, and Sir William Reresby</i> | 414          |
| <i>Duffield and Smith</i>                      | 177, 258     | <i>Fawcett v. Bowers</i>                              | 288          |
| <i>Dulwich College v. Johnson</i>              | 49           | <i>Fawkes and Arthington</i>                          | 356          |
| <i>Duncomb and Butler</i>                      | 760          | <i>Franklin v. Green</i>                              | 137          |
| <i>Duncombe and Chapman</i>                    | 142          | <i>Franklyn v. Countess of Burlington</i>             | 512          |
| <i>Dundonald (Dom') and Dux Beaufort</i>       | 739          | <i>Fellowes v. Owen</i>                               | 504, 515     |
| <i>Dupleix v. De Roven</i>                     | 543          | <i>Ferrars v. Cherry</i>                              | 384          |
| <i>Dugate and Robinson</i>                     | 181          | <i>Fleete (Sir John) and Sir John Heathcoate</i>      | 442          |
| <i>Dulvall and Thynn</i>                       | 117          | <i>Fleming and St. John's College</i>                 | 320          |
| <i>Dye and Thwaytes</i>                        | 80           | <i>Fletcher v. Dominam Sedley</i>                     | 490          |
| <i>Dyer v. Tymewell</i>                        | 123          | — <i>v. Stone</i>                                     | 273          |
|  |              | <i>Freeman v. Freeman</i>                             | 233          |
| E.   |              | — <i>and Thomas</i>                                   | 563          |
| <i>Earl v. Stocker</i>                         | 251          | <i>French v. Chichester</i>                           | 568          |
| <i>Earl and Alford</i>                         | 209          | <i>Fretwell v. Stacy</i>                              | 434          |
| — <i>and Hungerford</i>                        | 261          | <i>Fielding and Hillersden</i>                        | 763          |
| <i>East India Company and Edwin</i>            | 210          | — <i>and Wilson</i>                                   | <i>ibid.</i> |
| — <i>and Harvey</i>                            | 395          | <i>Finch v. Newnham</i>                               | 216          |
| — <i>and Dr. Steward</i>                       | 380          | — <i>v. Tucker</i>                                    | 184          |
| <i>Ebrall and Waters</i>                       | 606          | — <i>v. Resbridger</i>                                | 390          |
| <i>Edwards and Bennet</i>                      | 392          | <i>Fines v. Cobb</i>                                  | 116          |
| — <i>v. Sir Richard Child</i>                  | 727          | <i>Firebrass (Sir Brazill) v. Brett</i>               | 70           |
| <i>England and Eeles</i>                       | 466          | <i>Fish v. Jesson</i>                                 | 114          |
| <i>Edes and Mitchell</i>                       | 391          | <i>Fripp and Cottle</i>                               | 220          |
| <i>Eeles v. England</i>                        | 466          | <i>Foach (Sir John) and Lydiatt</i>                   | 410          |
| <i>Egerton and Garth</i>                       | 285          | <i>Fortrey v. Fortrey</i>                             | 134          |
| <i>Emerton and Gilbert</i>                     | 503          |   |              |

### A TABLE OF THE NAMES OF THE CASES.

|                                       | Page |  | Page     |
|---------------------------------------|------|--|----------|
| Foster v. Foster                      | 386  | Goodfellow v. Burchett                   | 298      |
| Fotherby v. Hartridge                 | 21   | Gooding and Richardson                   | 293      |
| Fothergill v. Kendrick                | 234  | Goodman and Dafforne                     | 362      |
| Fotherley and Tredway                 | 367  | — and Smith                              | 586      |
| — and Wankford                        | 392  | Goodwin <i>ex parte</i>                  | 696      |
| Fowkes v. Joyce                       | 129  | Gore v. Knight                           | 535      |
| Fox v. Crane                          | 304  | Goreing and Hungerford                   | 38       |
| Floyer (Dominam) and Attorney General | 748  | Gorray v. Ustwick                        | 192      |
|                                       |      | Gosse v. Truacy                          | 699      |
|                                       |      | Gower and Solley                         | 6        |
|                                       |      | Grover and Tabor                         | 367      |
|                                       |      | Grout and Toulson                        | 492      |
|                                       |      | Gubbs and Champernoon                    | 362      |
|                                       |      | Gudgeon v. Ramsden                       | 274      |
|                                       |      | Guise and Attorney General               | 266      |
|                                       |      | Gundry v. Baynard                        | 479      |
|                                       |      | Gyles and Moyse                          | 385      |
|                                       |      | — and Thomas                             | 232      |
|                                       |      | — and Woodward                           | 119      |
|                                       |      | Grymes and Stratton                      | 357      |
|                                       |      |  |          |
|                                       |      | H.                                       |          |
|                                       |      | Haines v. Haines                         | 441      |
|                                       |      | Hales v. Van Berchen                     | 617      |
|                                       |      | — and James                              | 267      |
|                                       |      | Halfpenny v. Ballet                      | 373      |
|                                       |      | — and Mackdowell                         | 484      |
|                                       |      | Hall v. Atkinson                         | 563      |
|                                       |      | — v. Hall                                | 277      |
|                                       |      | Halifax (Marquis of) v. Higgins          | 134      |
|                                       |      | Hamilton (D.) v. Dominum Mohan           | 652      |
|                                       |      | Hampson (Serjeant) and Sir John Cotterel | 5        |
|                                       |      | Hampton v. Spencer                       | 288      |
|                                       |      | Hanbury and Mathew                       | 187      |
|                                       |      | — and Walton                             | 593      |
|                                       |      | Hancock and Elliot                       | 143      |
|                                       |      | — v. Hancock                             | 605, 665 |
|                                       |      | Hanman and Lamlee                        | 466, 499 |
|                                       |      | Hanson v. Derby                          | 392      |
|                                       |      | Harcourt v. Sherrard                     | 434      |
|                                       |      | Harding and Maw                          | 233      |
|                                       |      | Harman v. Vanhatton                      | 717      |
|                                       |      | Harris v. Mitchell                       | 485      |
|                                       |      | Harrison and Burrel                      | 231      |
|                                       |      | — v. Cuge                                | 85       |
|                                       |      | Hartridge and Fotherby                   | 21       |
|                                       |      | Harvey v. East India Company             | 395      |
|                                       |      | — v. Harvey                              | 659      |
|                                       |      | Hastings and Tooke                       | 97       |
|                                       |      | Hatt and Brotherton                      | 574      |
|                                       |      | Haughton and Scot                        | 560      |
|                                       |      | Hawes v. Warner                          | 477      |
|                                       |      | Hawker v. Buckland                       | 106      |

# **! A TABLE OF THE NAMES OF THE CASES.**

|  | Page     |   | Page     |
|--|----------|---|----------|
| <b>Hawkins v. Taylor</b>                       | 29       | <b>Huntington (Com') v. Countess of</b> |          |
| <b>Hathcoate (Sir John) v. Sir John Fleete</b> | 442      | <b>Huntington</b>                       | 437      |
| <b>Hedges v. Hedges</b>                        | 615      | <b>Hurrell and Penhay</b>               | 370      |
| <b>Hereford (Viscountess) and Blois</b>        | 501      | <b>Hutchinson and Buxton</b>            | 46       |
| <b>Herne (Domina) v. Herne</b>                 | 555      | <b>Hutton v. Simpson</b>                | 722      |
| <b>Hesketh and Attorney General</b>            | 549      |   |          |
| <b>Heveningham v. Heveningham</b>              | 355      | <b>I. &amp; J.</b>                      |          |
| <b>Hewer and Attorney General</b>              | 387      |   |          |
| <b>Hickman v. Anderson</b>                     | 655      | <b>Jackson and Clifton</b>              | 486      |
| <b>———— and Ledsome</b>                        | 611      | <b>———— v. Farrand</b>                  | 424      |
| <b>———— and Earl of Plymouth</b>               | 167      | <b>———— v. Rawlins</b>                  | 195      |
| <b>Hide v. Cooth</b>                           | 109      | <b>James v. Hales</b>                   | 267      |
| <b>———— and Lomax</b>                          | 185      | <b>———— v. Oades</b>                    | 402      |
| <b>———— and Mead</b>                           | 120      | <b>Jefferies and Bromley</b>            | 415      |
| <b>———— v. Parrat</b>                          | 331      | <b>Jenkins v. Powell</b>                | 115      |
| <b>———— and Sagitary</b>                       | 44       | <b>Jennings v. Moore</b>                | 609      |
| <b>Higford and Cox</b>                         | 664      | <b>———— and Turner</b>                  | 612, 685 |
| <b>Higgins v. Dowler</b>                       | 600      | <b>———— v. Ward</b>                     | 520      |
| <b>———— and Marquis of Halifax</b>             | 134      | <b>Jervis v. Brutton</b>                | 251      |
| <b>Hill v. Wiggett</b>                         | 547      | <b>Jesson and Fish</b>                  | 114      |
| <b>Hillersden v. Fielding</b>                  | 763      | <b>———— v. Jesson</b>                   | 255      |
| <b>Hills v. Brewer</b>                         | 104      | <b>Johnson and Ascough</b>              | 66       |
| <b>Hinsworth Hospital and Watson</b>           | 596      | <b>———— and Dulwich College</b>         | 49       |
| <b>Hitchcock v. Sedgwick</b>                   | 156      | <b>———— v. Milksop</b>                  | 112      |
| <b>Hitchens v. Hitchens</b>                    | 408      | <b>———— and Nevil</b>                   | 447      |
| <b>Hitchman and Gladwyn</b>                    | 135      | <b>———— v. Sir Edward Northey</b>       | 407      |
| <b>Hobart v. Comitiss. Suffolk</b>             | 644      | <b>———— and Nott</b>                    | 27       |
| <b>Hodgson v. Hodgson</b>                      | 593      | <b>Jolliffe (Sir Wm.) v. Pitt</b>       | 694      |
| <b>Hole and Dubois</b>                         | 613      | <b>Jones v. Beale</b>                   | 381      |
| <b>Holland v. Calliford</b>                    | 662      | <b>———— and Coles</b>                   | 692      |
| <b>Hollis (Domina) v. Wyse</b>                 | 289      | <b>———— v. Mitchell</b>                 | 197      |
| <b>Hollingshead and Comer</b>                  | 90       | <b>———— and Dame Mary Vernon</b>        | 241      |
| <b>Holt v. Burley</b>                          | 651      | <b>Ibbottson v. Rhodes</b>              | 554      |
| <b>———— v. Holt</b>                            | 322      | <b>Joyce and Fowkes</b>                 | 129      |
| <b>———— (Lord Ch. Justice) v. Mill</b>         | 279      |   |          |
| <b>Honour v. Honour</b>                        | 658      | <b>K.</b>                               |          |
| <b>Hook v. Taylor</b>                          | 561      |   |          |
| <b>Hooley v. Booth</b>                         | 359      | <b>Keat v. Allen</b>                    | 588      |
| <b>Hooper and Davy</b>                         | 665      | <b>Kelley v. Berry</b>                  | 35       |
| <b>———— v. Eyles</b>                           | 480      | <b>Kemeys and Thomas</b>                | 348      |
| <b>———— and Nicholls</b>                       | 686      | <b>Kendar v. Milward</b>                | 440      |
| <b>Houlditch and Stephenson</b>                | 491      | <b>Kendrick and Fothergill</b>          | 234      |
| <b>How and Nicholls</b>                        | 389      | <b>Kent and Bond</b>                    | 281      |
| <b>Howell v. Price</b>                         | 701      | <b>———— and Sheppard</b>                | 435      |
| <b>Howman v. Cowrie</b>                        | 190      | <b>Key and Bradshaw</b>                 | 102      |
| <b>Hudson and Otway</b>                        | 583      | <b>King v. Ballett</b>                  | 248      |
| <b>Hughes and Attorney General</b>             | 105      | <b>Kingdon v. Bridges</b>               | 67       |
| <b>Humberston v. Humberston</b>                | 737      | <b>Kingsman v. Kingsman</b>             | 559      |
| <b>Humble v. Bill</b>                          | 444      | <b>Kinnaston and Burnett</b>            | 401      |
| <b>Hungerford and Comes Bristol</b>            | 524, 645 | <b>Kinton and Dux Devon'</b>            | 719      |
| <b>———— v. Earle</b>                           | 261      | <b>Kirsley v. Duck</b>                  | 684      |
| <b>———— v. Goreing</b>                         | 38       | <b>Knight and Burton</b>                | 514      |
| <b>———— and Mildmay</b>                        | 243      | <b>———— and Gore</b>                    | 535      |
| <b>Hunsden v. Cheyney</b>                      | 150      | <b>Knightly v. Burdett</b>              | 10       |
| <b>Hunt v. Hunt</b>                            | 83       | <b>Knights v. Sir Jonathan Atkins</b>   | 20       |

# A TABLE OF THE NAMES OF THE CASES.

| L.   |          | Page |
|--|----------|------|
| <i>Lamas v. Bayly</i>                      | 637      |      |
| <i>Lamb v. Parker</i>                      | 495      |      |
| <i>Lamlee v. Hanman</i>                    | 466, 499 |      |
| <i>Lamplugh v. Smith</i>                   | 77       |      |
| <i>Lancaster and Lovel</i>                 | 183      |      |
| <i>Lancy v. Fairechild</i>                 | 101      |      |
| <i>Lane and Searle</i>                     | 37, 88   |      |
| <i>— v. Williams</i>                       | 277, 293 |      |
| <i>Langher and Pritchard</i>               | 197      |      |
| <i>Langley and Ramsden</i>                 | 536      |      |
| <i>Lassells v. Dominum Cornwallis</i>      | 465      |      |
| <i>Lawrence v. Blatchford</i>              | 457      |      |
| <i>Lawrence v. Lawrence</i>                | 305      |      |
| <i>Leatherland and Clerke</i>              | 98       |      |
| <i>Ledsome v. Hickman</i>                  | 611      |      |
| <i>Lee and Abbot</i>                       | 284      |      |
| <i>— v. Lee</i>                            | 548      |      |
| <i>— and Pocock</i>                        | 604      |      |
| <i>Legatt v. Sewell</i>                    | 551      |      |
| <i>Legriel v. Barker</i>                   | 39       |      |
| <i>Le Hooke and Margrave</i>               | 207      |      |
| <i>Leigh and Aspinwall</i>                 | 218      |      |
| <i>— and Stiddolph</i>                     | 75       |      |
| <i>Leighton and Bishop of Oxon</i>         | 376      |      |
| <i>Leighton's (Colonel) Case</i>           | 173      |      |
| <i>Leonard v. Com.' Sussex</i>             | 528      |      |
| <i>Le Pypre v. Farr</i>                    | 716      |      |
| <i>Lethulier and Bretton</i>               | 653      |      |
| <i>Levet v. Needham</i>                    | 111      |      |
| <i>Ligo v. Smith</i>                       | 263      |      |
| <i>Lillicott v. Compton</i>                | 638      |      |
| <i>Lingard v. Griffin</i>                  | 189      |      |
| <i>Lister v. Lister</i>                    | 68       |      |
| <i>Litchford and Oldham</i>                | 506      |      |
| <i>Little and Moyses</i>                   | 194      |      |
| <i>Lock v. Lock</i>                        | 666      |      |
| <i>Lockey and Bird</i>                     | 744      |      |
| <i>Lomax v. Hide</i>                       | 185      |      |
| <i>London (City of) v. Garway</i>          | 571      |      |
| <i>— v. Richmond</i>                       | 421      |      |
| <i>Long and Martin</i>                     | 151      |      |
| <i>— and Short</i>                         | 756      |      |
| <i>Lovel v. Lancaster</i>                  | 183      |      |
| <i>Lloyd and Winne</i>                     | 603      |      |
| <i>Luke v. Alderne</i>                     | 31       |      |
| <i>Lupton v. Tempest</i>                   | 626      |      |
| <i>Lydiatt v. Sir John Foach</i>           | 410      |      |
| <i>Lynes v. Brown</i>                      | 306      |      |
| <i>Lynn and Spearling</i>                  | 376      |      |
| <i>Manlove v. Ball</i>                     |          | 84   |
| <i>Manning and Bainham</i>                 |          | 243  |
| <i>— v. Westernne</i>                      |          | 606  |
| <i>Marbury and Tarback</i>                 |          | 510  |
| <i>Margrave v. Le Hooke</i>                |          | 207  |
| <i>Marsh and Porey</i>                     |          | 182  |
| <i>Marshfield v. Weston</i>                |          | 176  |
| <i>Martin and Crouch</i>                   |          | 595  |
| <i>— v. Long</i>                           |          | 151  |
| <i>Mascal and Cokes</i>                    | 34,      | 200  |
| <i>Mascall and Norton</i>                  |          | 24   |
| <i>Massey and Meynel</i>                   |          | 1    |
| <i>Matthew v. Hanbury</i>                  |          | 187  |
| <i>Maw v. Harding</i>                      |          | 233  |
| <i>Maydwell and Corbett</i>                | 640,     | 655  |
| <i>Mayot and Garbrand</i>                  |          | 105  |
| <i>Mead v. Hide</i>                        |          | 120  |
| <i>Mellish and Cunningham</i>              |          | 247  |
| <i>Mesgrett v. Mesgrett</i>                |          | 580  |
| <i>Metcalf and Demainbray</i>              | 691,     | 698  |
| <i>Meynel v. Massey</i>                    |          | 1    |
| <i>Mildmay v. Hungerford</i>               |          | 243  |
| <i>Milksop and Johnson</i>                 |          | 112  |
| <i>Mill v. Darrel</i>                      |          | 309  |
| <i>— and Gofton</i>                        |          | 141  |
| <i>— and Lord Ch. Just. Holt</i>           |          | 279  |
| <i>Miller v. Warren</i>                    |          | 207  |
| <i>Milward and Kendar</i>                  |          | 440  |
| <i>Mince and Callow</i>                    |          | 472  |
| <i>Minshull v. Lord Mohun</i>              |          | 672  |
| <i>Mitchell v. Edes</i>                    |          | 391  |
| <i>— and Harris</i>                        |          | 155  |
| <i>— and Jones</i>                         |          | 197  |
| <i>Mohun (Dominum) and D. Hamilton</i>     |          | 652  |
| <i>— (Lord) and Minshull</i>               |          | 672  |
| <i>— and Orby</i>                          |          | 542  |
| <i>— (Lady) and Lady Orby</i>              |          | 532  |
| <i>Molesworth and Darrel</i>               |          | 378  |
| <i>Molineux and Rutland</i>                |          | 64   |
| <i>Montague (Duchess of) and Rawlinson</i> |          | 667  |
| <i>Moor and Towers</i>                     |          | 98   |
| <i>Moore v. Godfrey</i>                    |          | 620  |
| <i>— and Jennings</i>                      |          | 609  |
| <i>— and Papworth</i>                      |          | 283  |
| <i>Mordant and Noy</i>                     |          | 581  |
| <i>— and Underwood</i>                     |          | 238  |
| <i>Morgan and Powell</i>                   |          | 90   |
| <i>Morse v. Buckworth</i>                  |          | 443  |
| <i>Morret v. Westernne</i>                 |          | 603  |
| <i>Mosse and Archer</i>                    |          | ■    |
| <i>Mountague v. Tidcome</i>                |          | 518  |
| <i>Moyse v. Gyles</i>                      |          | 385  |
| <i>Moyes v. Little</i>                     |          | 194  |
| <i>Mumma v. Mumma</i>                      |          | 19   |
| M.   |          |      |
| <i>Mackdowell v. Halfpenny</i>             | 484      |      |



# A TABLE OF THE NAMES OF THE CASES.

|  | Page     |                                     | Page        |
|--|----------|-------------------------------------|-------------|
| <b>Murrell v. Cox</b>  | 570      | <b>Oxon (Bishop of) v. Leighton</b> | 376         |
| <b>Mury v. Wyse</b>  | 564      | <b>Orby (Lady) v. Lady Mohun</b>    | 531         |
| <b>Musgrave v. Dashwood</b>                                    | 45, 63   | <b>—— v. Lord Mohun</b>             | 542         |
| <b>—— v. Parry</b>   | 710      |                                     |             |
|  |          | <b>P.</b>                           |             |
| <b>N.</b>  |          |                                     |             |
| <b>Nash v. Com. Derby</b>                                      | 537      | <b>Palmer v. Cracroft</b>           | 576         |
| <b>Natchbolt v. Porter</b>                                     | 112      | <b>Papworth v. Moore</b>            | 283         |
| <b>Naunton (Paroch'. de) and Corpus Christi College, Oxon.</b> | 507      | <b>Parish and African Company</b>   | 244         |
| <b>Needham and Coates</b>                                      | 65       | <b>Parker v. Blackbourne</b>        | 369         |
| <b>—— and Levet</b>  | 138      | <b>—— and Lamb</b>                  | 495         |
| <b>—— v. Smith</b>   | 463      | <b>—— and Strode</b>                | 316         |
| <b>Nelson v. Oldfield</b>                                      | 76       | <b>—— and Bishop of Worcester</b>   | 255         |
| <b>Nevil v. Johnson</b>  | 447      | <b>Parrat and Hide</b>              | 331         |
| <b>—— and Saunders</b>   | 428      | <b>Parrot v. Bowden</b>             | 37          |
| <b>Nevill v. Nevill</b>  | 431      | <b>—— v. Wells</b>                  | 127         |
| <b>Newcomen v. Barkham</b>                                     | 729      | <b>Parry and Musgrave</b>           | 710         |
| <b>Newman v. Barton</b>  | 205      | <b>Parsons v. Dr. Briddock</b>      | 608         |
| <b>Newnham and Finch</b>                                       | 216      | <b>—— and Cooke</b>                 | 429         |
| <b>New River Company v. Graves</b>                             | 431      | <b>Pawlett v. Dogget</b>            | 86          |
| <b>Newton and Baylis</b>                                       | 28       | <b>Pawlin and Whitacre</b>          | 229         |
| <b>Nicol v. Wiseman</b>  | 46       | <b>Platt and Stanton</b>            | 753         |
| <b>Nicholls (Sir Edward) v. Danvers</b>                        | 671      | <b>—— v. Sprigg</b>                 | 303         |
| <b>Nicholls v. Hooper</b>                                      | 686      | <b>Peacock and Cuthbert</b>         | 593         |
| <b>—— v. How</b>   | 369      | <b>—— v. Spooner</b>                | 43, 195     |
| <b>Nichols v. Tolley</b>                                       | 388      | <b>Peirce and Acton</b>             | 480         |
| <b>Noble and Rous</b>  | 249      | <b>Pelham and Strish</b>            | 647         |
| <b>Noden and Cordell</b>                                       | 148      | <b>Pembroke (Earl of) and Baden</b> | 52, 213     |
| <b>Norfolk v. Gifford</b>                                      | 208      | <b>Pendleton v. Grant</b>           | 517         |
| <b>Northey (Sir Edward) and Johnson</b>                        | 407      | <b>Penhay v. Hurrel</b>             | 370         |
| <b>Norton v. Mascall</b>                                       | 24       | <b>Penry and Walker</b>             | 42, 78, 145 |
| <b>Nott and Dowdeswell</b>                                     | 317      | <b>Perry v. Perry</b>               | 505         |
| <b>—— v. Johnson</b>   | 27       | <b>Peter v. Russell</b>             | 726         |
| <b>Noys v. Mordaunt</b>  | 581      | <b>Peters v. Soame</b>              | 428         |
|  |          | <b>Peyton v. Ayliffe</b>            | 315         |
| <b>O.</b>  |          | <b>Phetiplace and Yates</b>         | 416         |
| <b>Oades and James</b>   | 402      | <b>Pilkington v. Shaller</b>        | 374         |
| <b>Oldham v. Litchford</b>                                     | 506      | <b>—— v. Stanhope</b>               | 317         |
| <b>Otway v. Hudson</b>   | 583      | <b>Pinbury v. Elkin</b>             | 758, 766    |
| <b>Orme v. Smith</b>   | 681      | <b>Pitt and Berny</b>               | 14          |
| <b>Owen and Brandling</b>                                      | 462      | <b>—— and Sir William Jolliffe</b>  | 694         |
| <b>—— v. Curzon</b>  | 237      | <b>Philips and Bunce</b>            | 50          |
| <b>—— and Fellowes</b>   | 504, 515 | <b>Phillips v. Phillips</b>         | 430         |
| <b>Oxenden (Domina) v. Sir James Oxenden</b>                   | 493      | <b>—— v. Willcox</b>                | 637         |
| <b>Oldfield and Nelson</b>                                     | 76       | <b>Phillpot and Arundell</b>        | 69          |
| <b>Onions v. Tyrer</b>   | 741      | <b>Philpott and Chir</b>            | 743         |
| <b>Oxwith v. Plummer</b>                                       | 636      | <b>Phiney v. Phiney</b>             | 638         |
| <b>Onslow and Pope</b>   | 286      | <b>Price and Howell</b>             | 701         |
| <b>Osborne and Elie</b>  | 754      | <b>—— and Whitley</b>               | 78          |
|  |          | <b>Pring v. Pring</b>               | 99          |
|  |          | <b>Pritchard v. Langher</b>         | 197         |
|  |          | <b>Pritty and Garret</b>            | 293         |
|  |          | <b>Poeock v. Lee</b>                | 604         |
|  |          | <b>Pope v. Onslow</b>               | 286         |



## A TABLE OF THE NAMES OF THE CASES.

|                                     |          |   |          |
|-------------------------------------|----------|---|----------|
|                                     | Page     |   | Page     |
| Popham and Bamfield                 | 427, 449 | Ruddle and Cass                             | 280      |
| Porey v. Marsh                      | 182      | Rumball and Stewart                         | 509      |
| Porter and Natchbolt                | 112      | Rumsey and Sanson                           | 561      |
| Portington v. Countess of Eglington | 189      | Rundle v. Rundle                            | 252, 264 |
| Portland (Countess of) v. Prodgers  | 104      | Rutland v. Molineux                         | 64       |
| Pote and Raw                        | 239      | Russel (Dominam) and Sir Litton Strode      | 621      |
| Powel and Seabourne                 | 11       | Russell and Peter                           | 726      |
| Powell and Bayley                   | 361      | Rutter and Symons                           | 227      |
| — and Greaves                       | 248, 302 | Rye and Attorney General                    | 453      |
| — and Jenkins                       | 115      |   |          |
| — v. Morgan                         | 90       | S.  |          |
| Plowman v. Plowman                  | 289      |   |          |
| Procter v. Cowper                   | 377      |   |          |
| Prodgers and Countess of Portland   | 104      | Sadler and Cook                             | 235      |
| Pullen and Gardener                 | 394      | — and Stanton                               | 30       |
| Plummer and Collins                 | 635      | Sagitary v. Hide                            | 44       |
| — and Oxwith                        | 636      | St. John v. Turner                          | 418      |
| Pyke v. Williams                    | 455      | — John's College v. Fleming                 | 320      |
| Plymouth (Countess of) v. Bladon    | 32       | Salisbury (Com') v. Bennet                  | 223      |
| — (Earl of) v. Hickman              | 167      | — (Comes.) and Cecil                        | 224      |
|                                     |          | Salt and Chapman                            | 646      |
|                                     |          | Samyne and Tudor                            | 270      |
|                                     |          | Sanderson v. Crouch                         | 118      |
|                                     |          | Sanson v. Rumsey                            | 561      |
|                                     |          | Saul v. Wilson                              | 118      |
|                                     |          | Saunders v. Beale                           | 62       |
|                                     |          | — v. Browne                                 | 46       |
|                                     |          | — v. Dehew                                  | 271      |
|                                     |          | — v. Nevil                                  | 428      |
|                                     |          | Sawyer v. Bletsoe                           | 328      |
|                                     |          | Sayer and Allen                             | 368      |
|                                     |          | — v. Sayer                                  | 688      |
|                                     |          | Shaftsbury (Comes) v. Comitissam Shaftsbury | 747      |
|                                     |          | Shaller and Pilkington                      | 374      |
|                                     |          | Sharp and Bishop                            | 469      |
|                                     |          | Sharpe v. Gamon                             | 32       |
|                                     |          | Shaw v. Lady Standish                       | 326      |
|                                     |          | Small v. Brackley                           | 602      |
|                                     |          | Smallnan and Aston                          | 556      |
|                                     |          | Sparhawk and Alcock                         | 228      |
|                                     |          | Sparkes v. Smith                            | 275      |
|                                     |          | Spranger and Ballet                         | 301      |
|                                     |          | Stacy and Fretwell                          | 434      |
|                                     |          | Stafford v. Selby                           | 589      |
|                                     |          | — v. Southwick                              | 285      |
|                                     |          | Staker and Styant                           | 250      |
|                                     |          | — and Weeks                                 | 301      |
|                                     |          | Stamford (Com') and Walton                  | 279      |
|                                     |          | Stamper and Graham                          | 146      |
|                                     |          | Stampford and Best                          | 520      |
|                                     |          | Standish (Lady) and Shaw                    | 326      |
|                                     |          | Staniforth v. Staniforth                    | 460      |
|                                     |          | Stanton v. Platt                            | 753      |

# A TABLE OF THE NAMES OF THE CASES.

|                                       | Page     |  | Page     |
|---------------------------------------|----------|--|----------|
| <i>Stanton v. Sadler</i>              | 30       | <i>Stribblehill v. Brett</i>           | 445      |
| <i>Sanhope and Pilkington</i>         | 317      | <i>Strish v. Pelham</i>                | 647      |
| <i>Stapleton v. Cheele</i>            | 673      | <i>Soame and Peters</i>                | 428      |
| <i>Stratton v. Grymes</i>             | 357      | <i>Solley v. Gower</i>                 | 61       |
| <i>Swayne and Woodford</i>            | 254      | <i>Sothon and Attorney General</i>     | 497      |
| <i>Seabourne v. Powel</i>             | 11       | <i>Southwick and Stafford</i>          | 265      |
| <i>Searl and Batchellor</i>           | 736      | <i>Scholefield v. Whitehead</i>        | 127      |
| <i>Searle v. Lane</i>                 | 37, 88   | <i>Scot v. Haughton</i>                | 560      |
| <i>Sedgwick and Hitchcock</i>         | 156      | <i>Short v. Long</i>                   | 756      |
| <i>Sedley (Dominam) and Fletcher</i>  | 490      | <i>Shouldham v. Shouldham</i>          | 321      |
| <i>Seeling v. Crawley</i>             | 386      | <i>Spooner and Peacock</i>             | 43, 195  |
| <i>Selby and Stafford</i>             | 589      | <i>Stocker and Earl</i>                | 251      |
| <i>Sewell and Legatt</i>              | 551      | <i>Stone and Fletcher</i>              | 273      |
| <i>Sheffield v. Lord Castleton</i>    | 393      | <i>Stowell (Lord) v. Cole</i>          | 219, 296 |
| <i>Shelberry v. Briggs</i>            | 249      | <i>Strode v. Parker</i>                | 316      |
| <i>Sheldon v. Dormer</i>              | 310      | —— (Sir Litton) <i>v. Dominam Rus-</i> |          |
| <i>Sheppard v. Kent</i>               | 435      | <i>sel</i>                             | 621      |
| <i>Sherman v. Sherman</i>             | 276      | <i>Suffolk (Comitiss') and Hobart</i>  | 644      |
| <i>Sherrard and Harcourt</i>          | 434      | <i>Sussex (Com') and Leonard</i>       | 526      |
| <i>Snell v. Clay</i>                  | 324      | <i>Squire v. Dowell</i>                | 591      |
| <i>Spearing v. Lynn</i>               | 376      | <i>Sydenham and Richardson</i>         | 447      |
| <i>Speerman v. Degrave</i>            | 643      | <i>Symes v. Vernon</i>                 | 553      |
| <i>Spencer and Combes</i>             | 471      | <i>Symonds v. Gibson</i>               | 308      |
| —— <i>and Hampton</i>                 | 288      | <i>Symons v. Rutter</i>                | 227      |
| <i>Stephens v. Gaule</i>              | 701      | <i>Styant v. Staker</i>                | 250      |
| <i>Stephenson v. Houlditch</i>        | 491      |  |          |
| —— <i>v. Wilson</i>                   | 325      |  |          |
| <i>Steward v. Bridger</i>             | 516      |  |          |
| —— (Dr.) <i>v. East India Company</i> |          |  |          |
|                                       | 380      |  |          |
| <i>Stewart v. Rumball</i>             | 509      | <i>Tabor v. Grover</i>                 | 367      |
| <i>Sweetapple v. Bindon</i>           | 536      | <i>Tarback v. Marbury</i>              | 510      |
| <i>Simpson and Hutton</i>             | 722      | <i>Tate v. Austin</i>                  | 699      |
| —— <i>and Whorwood</i>                | 186      | <i>Taylor v. Bell</i>                  | 171      |
| <i>Smith and Attorney General</i>     | 746      | —— <i>and Cary</i>                     | 302      |
| —— <i>and Ball</i>                    | 633, 675 | —— <i>and Hawkins</i>                  | 29       |
| —— <i>v. Burroughs</i>                | 346      | —— <i>and Hook</i>                     | 561      |
| —— <i>v. Bruning</i>                  | 392      | —— <i>v. Wheeler</i>                   | 564      |
| —— <i>v. Clever</i>                   | 38, 59   | —— <i>and White</i>                    | 435      |
| —— <i>and Dolman</i>                  | 740      | <i>Thwaytes v. Dye</i>                 | 80       |
| —— <i>v. Duffield</i>                 | 177, 258 | <i>Tracy and Gosse</i>                 | 699      |
| —— <i>v. Goodman</i>                  | 586      | <i>Trafford v. Sir Ralph Ashton</i>    | 660      |
| —— <i>and Lamplugh</i>                | 77       | <i>Trant and Brown</i>                 | 426      |
| —— <i>and Ligo</i>                    | 263      | <i>Tempest and Lupton</i>              | 626      |
| —— <i>and Needham</i>                 | 463      | <i>Therman v. Abell</i>                | 64       |
| —— <i>and Orme</i>                    | 681      | <i>Tredway v. Fotherley</i>            | 367      |
| —— <i>and Sparkes</i>                 | 275      | <i>Trelawney v. Williams</i>           | 483      |
| —— <i>v. Smith</i>                    | 92, 178  | <i>Tidcombe and Mountague</i>          | 518      |
| —— <i>and Webber</i>                  | 103      | <i>Tilley v. Bridge</i>                | 519      |
| <i>Smithwick and Dale</i>             | 151      | —— <i>v. Wharton</i>                   | 378, 419 |
| <i>Spindlar v. Wilford</i>            | 16       | <i>Toller v. Carteret</i>              | 494      |
| <i>Sprigg and Platt</i>               | 303      | <i>Tolley and Nichols</i>              | 388      |
| —— <i>v. Sprigg</i>                   | 394      | <i>Took v. Took</i>                    | 198      |
| <i>Sprignall v. Delawne</i>           | 36       | <i>Tooke v. Hastings</i>               | 97       |
| <i>Stiddolph v. Leigh</i>             | 75       | <i>Tovey v. Young</i>                  | 437      |
|                                       |          | <i>Toulson v. Grout</i>                | 432      |

T.

# A TABLE OF THE NAMES OF THE CASES.

|                                    | Page.       |  | Page.    |
|------------------------------------|-------------|--|----------|
| <b>Towers v. Moor</b>              | 98          | <b>Wareham v. Sir George Brown</b>                 | 153      |
| <b>Towne and Thompson</b>          | 319         | <b>Warner and Hawes</b>                            | 477      |
| <b>Townshend v. Windham</b>        | 546         | <b>Warren and Miller</b>                           | 207      |
| <b>Thomas and Edwin</b>            | 75          | <b>Warwick v. Gerrard</b>                          | 7        |
| <b>—— v. Freeman</b>               | 563         | <b>Waters v. Ebrall</b>                            | 606      |
| <b>—— v. Gyles</b>                 | 232         | <b>Watson v. Hinsworth Hospital</b>                | 596      |
| <b>—— v. Kemeys</b>                | 348         | <b>Watt and Crooke</b>                             | 124      |
| <b>—— v. Thomas</b>                | 513         | <b>Wharton and Tilly</b>                           | 378, 419 |
| <b>Thompson v. Towne</b>           | 319         | <b>—— v. Wharton</b>                               | 3        |
| <b>Thornburgh and White</b>        | 702         | <b>Wray, Bart. v. Lady Williams</b>                | 378,     |
| <b>—— and Whittingham</b>          | 206         |  | 680      |
| <b>Trott v. Vernon</b>             | 708         | <b>Webb and Atkinson</b>                           | 478      |
| <b>Tucker and Finch</b>            | 184         | <b>—— and Coddington</b>                           | 240      |
| <b>—— and Woots</b>                | 120         | <b>—— (Eliz.) Widow v. John Webb</b>               | 110      |
| <b>Tudor v. Samyne</b>             | 270         | <b>—— v. Webb</b>                                  | 668      |
| <b>Turner v. Jennings</b>          | 612, 685    | <b>Webber v. Smith</b>                             | 103      |
| <b>—— v. Richmond</b>              | 81          | <b>Webster v. Bishop</b>                           | 444      |
| <b>—— and St. John</b>             | 418         | <b>Weeks v. Staker</b>                             | 301      |
| <b>Turton v. Benson</b>            | 764         | <b>Weld v. Bradbury</b>                            | 705      |
| <b>Tymewell and Dyer</b>           | 123         | <b>Wells and Parrot</b>                            | 127      |
| <b>Tyter and Onions</b>            | 741         | <b>Westerne and Manning</b>                        | 606      |
| <b>Tyrrel v. Beake</b>             | 155         | <b>—— and Morret</b>                               | 663      |
| <b>Thym v. Duvall</b>              | 117         | <b>Weston and Marshfield</b>                       | 176      |
|                                    |             | <b>Wheeler and Taylor</b>                          | 564      |
|                                    |             | <b>Widdrington and Christ College in Cambridge</b> | 283      |
|                                    |             | <b>Widmore and Blandy</b>                          | 709      |
|                                    |             | <b>Wiggett and Hill</b>                            | 547      |
|                                    |             | <b>Wilcocks v. Wilcocks</b>                        | 558      |
|                                    |             | <b>Wilford and Spindlar</b>                        | 16       |
|                                    |             | <b>Wilkes v. Bodington</b>                         | 599      |
|                                    |             | <b>Wilkinson v. Brayfield</b>                      | 307      |
|                                    |             | <b>Willcox and Phillips</b>                        | 637      |
|                                    |             | <b>Willet and Burdett</b>                          | 638      |
|                                    |             | <b>Williams v. Callow</b>                          | 752      |
|                                    |             | <b>—— and Lane</b>                                 | 277, 292 |
|                                    |             | <b>—— and Pyke</b>                                 | 455      |
|                                    |             | <b>—— and Trelawny</b>                             | 483      |
|                                    |             | <b>—— (Lady) and Wray, Bart.</b>                   | 378, 680 |
|                                    |             | <b>Wilson and Creagh</b>                           | 572      |
|                                    |             | <b>—— v. Fielding</b>                              | 763      |
|                                    |             | <b>—— and Saul</b>                                 | 118      |
|                                    |             | <b>—— and Stephenson</b>                           | 325      |
|                                    |             | <b>Windham and Townshend</b>                       | 546      |
|                                    |             | <b>Wingfield v. Alkinson</b>                       | 673      |
|                                    |             | <b>Winne v. Lloyd</b>                              | 603      |
|                                    |             | <b>Wiseman v. Beake</b>                            | 121      |
|                                    |             | <b>—— and Niccol</b>                               | 46       |
|                                    |             | <b>—— v. Vandeputt</b>                             | 203      |
|                                    |             | <b>Whitacre and Gibson</b>                         | 83       |
|                                    |             | <b>Whitacre v. Pawlin</b>                          | 229      |
|                                    |             | <b>Whitchurch v. D'nam Bayntun</b>                 | 272      |
|                                    |             | <b>White and Baker</b>                             | 215      |
|                                    |             | <b>—— v. Taylor</b>                                | 435      |
| <b>V. &amp; U.</b>                 |             |  |          |
| <b>Van Berchem and Hales</b>       | 617         |  |          |
| <b>Vandenanker v. Desbrough</b>    | 96          |  |          |
| <b>Vandeputt and Wiseman</b>       | 203         |  |          |
| <b>Vane v. Lord Barnard</b>        | 738         |  |          |
| <b>Vanhatton and Harman</b>        | 717         |  |          |
| <b>Vaughan and Aynesley</b>        | 129         |  |          |
| <b>Vernon (Dame Mary) v. Jones</b> | 241         |  |          |
| <b>—— and Symes</b>                | 553         |  |          |
| <b>—— and Trott</b>                | 708         |  |          |
| <b>Vincent and Douglas</b>         | 202         |  |          |
| <b>Underwood v. Mordaunt</b>       | 238         |  |          |
| <b>Ustwick and Gotray</b>          | 192         |  |          |
| <b>W.</b>                          |             |  |          |
| <b>Wainwright v. Bendlowes</b>     | 718         |  |          |
| <b>Walker v. Penry</b>             | 42, 78, 145 |  |          |
| <b>Walton v. Hanbury</b>           | 592         |  |          |
| <b>—— v. Com. Stamford</b>         | 279         |  |          |
| <b>Wankford v. Fotherley</b>       | 322         |  |          |
| <b>Warburton v. Warburton</b>      | 420         |  |          |
| <b>Ward v. Bradley</b>             | 23          |  |          |
| <b>—— v. Cecil</b>                 | 711         |  |          |
| <b>—— and Jennings</b>             | 520         |  |          |

# A TABLE OF THE NAMES OF THE CASES.

|                           | Page     |                                 | Page |
|---------------------------|----------|---------------------------------|------|
| White v. Thornburgh       | 702      | Woots v. Ticker                 | 120  |
| — v. White                | 43       | Worcester (Bishop of) v. Parker | 255  |
| Whitehead and Scholefield | 127      | Wordell and Clare               | 548  |
| Whiteing and Bruce        | 642      | Whorwood v. Simpson             | 186  |
| Whitley v. Price          | 78       | Wyse and Domina Holles          | 289  |
| Whittingham v. Thornburgh | 206      | — and Murry                     | 564  |
| Wood and Green            | 632      |                                 |      |
| Woodford v. Swayne        | 254      |                                 |      |
| Woodhouse v. Brayfield    | 307      | Y.                              |      |
| Woodman v. Blake          | 166, 222 |                                 |      |
| Woodroffe v. Farnham      | 291      | Yardley and Drapers' Company    | 662  |
| Woodward v. Glasbrook     | 388      | Yates v. Phettiplace            | 416  |
| — v. Gyles                | 119      | Young and Tovey                 | 437  |



AN  
I N D E X  
OF  
CASES REFERRED TO BY THE NOTES  
OF THE  
SECOND VOLUME.

---

**A.**

|  | Page              |  | Page               |
|--|-------------------|--|--------------------|
| <i>Abbey and Hancox</i>                | 719               | <i>Alcock and Knollys</i>              | 209                |
| <i>Abbot v. Lee</i>                    | 228               | ——— <i>v. Sparhawk</i>                 | 506                |
| <i>Abery v. Williams</i>               | 162, 600          | <i>Alexander v. Alexander</i>          | 80                 |
| <i>Abingdon and Prowse</i>             | 424               | ——— <i>v. Vaughan</i>                  | 162                |
| <i>Abney v. Miller</i>                 | 209               | <i>Alford v. Alford</i>                | 209, 465           |
| <i>Acherley v. Vernon</i>              | 209               | ——— <i>v. Earle</i>                    | 538, 722           |
| ——— <i>v. Roe</i>                      | 391               | <i>Alie and Leman</i>                  | 463                |
| <i>Ackland v. Ackland</i>              | 105, 562          | <i>All Souls College v. Codrington</i> | 137, 538           |
| ——— <i>and Hopewell</i>                | 562               | <i>Alleine and South</i>               | 60                 |
| <i>Ackroyd v. Smithson</i>             | 20, 139, 248, 641 | <i>Allen and Brown</i>                 | 111, 434, 688, 757 |
| <i>Acton and Case</i>                  | 481               | ——— <i>and Dunn</i>                    | 549                |
| <i>Adair and Maitland</i>              | 381, 522          | ——— <i>and Goodright</i>               | 562                |
| ——— <i>v. New River Company</i>        | 422               | ——— <i>v. Sayer</i>                    | 419                |
| <i>Adam and Wilkinson</i>              | 705               | <i>Alston and Attorney-General</i>     | 390                |
| <i>Adams v. Broughton</i>              | 239               | <i>Ambrose v. Ambrose</i>              | 277                |
| ——— <i>v. Cole</i>                     | 69                | <i>Ancaster (Duke of) v. Mayer</i>     | 719                |
| ——— <i>and Daniel</i>                  | 61                | <i>Anderson v. Maltby</i>              | 429                |
| <i>Adderley v. Dixon</i>               | 394               | ——— <i>and Camden</i>                  | 269                |
| <i>Addersley and Gresley</i>           | 41                | <i>Andrew and Maddison</i>             | 705                |
| <i>Addison v. Hindmarsh</i>            | 747               | ——— <i>v. Wrigley</i>                  | 616                |
| <i>Adlington v. Cann</i>               | 598               | <i>Andrews and Attorney-General</i>    | 499, 598           |
| <i>African Company and Curson</i>      | 396, 499, 699     | ——— <i>and Back</i>                    | 68                 |
| <i>Airey and Ellison</i>               | 580, 705          | ——— <i>and Charles</i>                 | 366                |
| <i>Albemarle (Duke of) and Clarges</i> | 59, 332           | ——— <i>v. Partington</i>               | 705                |
|  |                   | ——— <i>v. Southhouse</i>               | 562                |

## INDEX OF CASES REFERRED TO BY

|   | Page          |                                   | Page          |
|---|---------------|-----------------------------------|---------------|
| Andrews and Towers  | 700           | Attorney-General v. Andrews       | 499, 598      |
| Angell and Hayward  | 478           | _____ v. Barnes & Ux.             | 454, 499, 625 |
| Anglesea (Earl of) and Phipps   | 395           | _____ v. Baxter                   | 266           |
| Angier v. Angier  | 47, 386       | _____ v. Bristol                  | 397, 400      |
| Annand v. Honeywood   | 556           | _____ v. Burdet                   | 454           |
| Annesley and Hovenden   | 369           | _____ v. Crispin                  | 705           |
| Anon. (2 Vez. 621)  | 38            | _____ v. Downing                  | 209           |
| Anon. 2, 27, 37, 41, 79, 85, 120, 131, 147, 176, 199, 205, 209, 219, 221, 248, 249, 268, 284, 311, 325, 381, 391, 406, 421, 422, 463, 481, 504, 673, 695, 697, 700, 761 |               | _____ v. Foundl. Hosp.            | 401           |
| Ansell ex parte   | 433           | _____ v. Heelis                   | 422           |
| Amhurst and Bate  | 545           | _____ v. Hickman                  | 378, 454      |
| _____ and Bawdes  | 373           | _____ v. Lloyd                    | 743           |
| _____ v. Dawling  | 550           | _____ and Pawlett                 | 313           |
| Archer v. Mosse   | 47, 73        | _____ v. Reg. Prof. in Cam-bridge | 342           |
| _____ v. Pope   | 481           | _____ v. Robins                   | 434           |
| _____ and Griffin   | 380           | _____ v. Rye and Warwick & Al'.   | 755           |
| Arglasse v. Muschamp  | 495           | _____ v. Sawtell                  | 454, 499, 598 |
| Armiger v. Clarke   | 416           | _____ v. Scarisbrick              | 400           |
| Arnham and Cook   | 377, 391      | _____ v. Sudell & Al'.            | 313           |
| _____ and Cook  | 391           | _____ v. Syderfin                 | 266           |
| Arnold and Bechinall  | 701           | _____ v. Tancred                  | 454           |
| _____ v. Kempstead  | 66            | _____ and Thruxton                | 390           |
| Arnott and Colchester   | 103           | _____ v. Vernon                   | 307           |
| Arran (Countess of) v. Crispe   | 307           | _____ v. Vigor                    | 721           |
| Arrowsmith and Lady Shaftsbury  | 463           | _____ v. Waring (Rich.)           | 751           |
| Arthington v. Fawkes  | 301           | _____ v. Warren                   | 597           |
| Arundel and the King & Lord Hunsdon   | 380           | _____ v. Whorwood                 | 97            |
| Arundell v. Phillpot  | 379, 465      | _____ v. Wyburgh                  | 318           |
| Ash and Parker  | 23, 517       | Atwood and Kettleby               | 55, 537, 562  |
| Ashburner and Fletcher  | 537           | Austin and Tate                   | 438, 604      |
| Ashdown and Stileman  | 491, 684      | Aveling v. Knipe                  | 456           |
| Ashe and Ive  | 308           | Axtell and Bissell                | 77, 700       |
| Ashley and Harvey   | 366, 449, 605 | Aylesbury (Lady) and Popham       | 20            |
| Ashton v. Ashton  | 386           | Aylet v. Dodd                     | 119           |
| _____ and Trafford  | 310, 531      | Ayleworth and Sackvill            | 414, 678      |
| Askew and Carey   | 499, 582, 598 | Ayliffe v. Mr. Just. Tracy        | 693           |
| Askham and Berry  | 311           | Aynscomb and Frederick            | 47            |
| Aspinwall v. Leigh  | 153           | Aynsley v. Wordsworth             | 205           |
| Aston v. Aston  | 739           | Ayres v. Willis                   | 66            |
| _____ v. Lord Exeter  | 463           | Ayton v. Ayton                    | 705           |
| _____ v. Smallman   | 545           |                                   |               |
| _____ and Woodward  | 471           |                                   |               |
| Atfield and Thompson  | 8             |                                   |               |
| Atkins and Duke of Devon  | 185, 720      |                                   |               |
| _____ v. Rowe   | 627           |                                   |               |
| _____ v. Hill   | 205           |                                   |               |
| _____ v. Wright   | 463           |                                   |               |
| Atkinson v. Hutchinson  | 88            |                                   |               |
| _____ v. Leonard  | 299           |                                   |               |
| _____ v. Webb   | 261, 485, 493 |                                   |               |
| Attersoll and Smith   | 108           |                                   |               |
| Attorney-General v. Alston  | 390           |                                   |               |

# THE NOTES OF THE SECOND VOLUME.

|                                      | Page                        |  | Page               |
|--------------------------------------|-----------------------------|--|--------------------|
| <b>Baden v. Earl of Pembroke</b>     | 61, 366                     | <b>Barrington (Sir John) and Shales</b>              | 463                |
| —— <i>v.</i> Countess of Pembroke    | 322                         | <b>Barrow and Dean and Chapter of Christ Church</b>  | 538                |
| <b>Baile v. Coleman</b>              | 527, 537, 705               | <b>Barrow v. Greenough</b>                           | 506                |
| <b>Bailey, ex parte</b>              | 662                         | <b>Barry v. Edgeworth</b>                            | 562                |
| <b>Ballis v. Gale</b>                | 562                         | <b>Barston and Birch</b>                             | 262                |
| —— <i>and</i> Stent                  | 123                         | <b>Barstow v. Kilvington</b>                         | 705                |
| <b>Baine and Willing</b>             | 378, 611                    | —— <i>v.</i> Palmes                                  | 418                |
| <b>Bainton v. Ward</b>               | 319, 465                    | <b>Bartholomew v. May</b>                            | 183                |
| <b>Baker v. Bayley</b>               | 185, 320                    | <b>Bartlett v. Hollister</b>                         | 705                |
| —— <i>v.</i> Child                   | 409                         | <b>Barton and Buckland</b>                           | 319, 468           |
| —— <i>and</i> Higham                 | 20                          | <b>Baskerville v. Baskerville</b>                    | 526                |
| —— <i>v.</i> Wall                    | 562                         | <b>Basse v. Grey</b>                                 | 584                |
| —— <i>and</i> Smith                  | 252                         | <b>Basset v. Clapham</b>                             | 755                |
| —— <i>and</i> Toplis                 | 522                         | <b>Bassett v. Bassett</b>                            | 47                 |
| <b>Baldwin and Garth</b>             | 43                          | —— (Creditors of Sir Wm.) <i>and</i> Earl of Bristol | 81                 |
| —— <i>v.</i> Karver                  | 706                         | <b>Bate v. Amhurst</b>                               | 545                |
| —— <i>and</i> Lloyd                  | 7                           | —— <i>and</i> Kenworthy                              | 80                 |
| <b>Bale v. Newton</b>                | 272                         | <b>Bates v. Bates</b>                                | 404                |
| <b>Balfe and Kine</b>                | 456                         | —— <i>v.</i> Dandy                                   | 564                |
| <b>Ball v. Burnford</b>              | 221                         | —— <i>v.</i> Heard                                   | 379                |
| —— <i>v.</i> Dunsterville            | 278                         | <b>Bath v. Montague's Case</b>                       | 70                 |
| —— <i>v.</i> Montgomery              | 47, 386, 494                | <b>Bathurst and Puck &amp; Al.</b>                   | 819                |
| —— <i>and</i> Watts                  | 537                         | <b>Batten v. Earnley</b>                             | 249                |
| <b>Ballet and Man</b>                | 415, 507                    | <b>Battersbee v. Farrington</b>                      | 44, 327            |
| <b>Ballett and Halfpenny</b>         | 35, 627                     | <b>Batteson and Clyat</b>                            | 268, 300, 667, 757 |
| <b>Bamfield v. Popham</b>            | 60, 340, 344, 366, 452, 595 | <b>Batty v. Lloyd</b>                                | 16, 27, 78, 129    |
| <b>Bampton and Dench</b>             | 538                         | <b>Baugh and Ward</b>                                | 582                |
| <b>Banbury (Earl of) and Briscoe</b> | 385                         | <b>Bavasor and Robinson</b>                          | 564                |
|                                      | 463                         | <b>Bawdes v. Amhurst</b>                             | 373                |
| <b>Banks and Freemantle</b>          | 647                         | <b>Baxter and Attorney-General</b>                   | 266                |
| <b>Banks v. Sutton</b>               | 324, 366, 681               | —— <i>v.</i> Dowdeswell                              | 226                |
| <b>Banner and Highway</b>            | 704                         | —— <i>v.</i> Manning                                 | 699                |
| <b>Barbone v. Brent</b>              | 147, 240, 379, 419          | <b>Bayley and Baker</b>                              | 185, 320           |
| <b>Barclay v. Wainwright</b>         | 299                         | —— <i>v.</i> Snelham                                 | 705                |
| —— <i>and</i> Hill                   | 104                         | <b>Baylis v. Newton</b>                              | 20                 |
| <b>Barker and Davy</b>               | 41                          | <b>Baynard and Gundry</b>                            | 342                |
| —— <i>and</i> Legriel                | 143                         | <b>Bayne and Trimmer</b>                             | 299, 647           |
| —— <i>v.</i> Wyld & Al.'             | 195, 422                    | <b>Bayntun (Diam) and Whitchurch &amp; Al.</b>       | 483                |
| —— <i>v.</i> Goodair                 | 293                         | <b>Beachcroft v. Beachcroft</b>                      | 562, 705           |
| <b>Barkham and Brown</b>             | 317, 392                    | <b>Beachinall v. Beachinall</b>                      | 13, 659, 705       |
| <b>Barley and Cruse</b>              | 20                          | <b>Beale v. Beale</b>                                | 531, 580           |
| <b>Barlow and Burt</b>               | 481                         | —— <i>and</i> Plume                                  | 9, 73, 700         |
| —— <i>v.</i> Grant                   | 138, 236, 431               | <b>Bean and Bachelor</b>                             | 195                |
| —— & Ux. <i>v.</i> Heneage           | 476                         | <b>Beardmore v. Cruttenden</b>                       | 609                |
| <b>Barnadiston and Carter</b>        | 85, 757                     | <b>Beauclerk v. Dormer</b>                           | 88, 761            |
| —— <i>and</i> Gibbs                  | 332                         | <b>Beaufort (Dutchess of) and Lady Granville</b>     | 20, 254            |
| <b>Barnard v. Large</b>              | 755                         | —— (Duke of) <i>v.</i> Lord Dundonald                | 748                |
| <b>Barnes v. Crow</b>                | 209                         | <b>Beaumont and Darbison</b>                         | 545, 711           |
| —— <i>v.</i> Patch                   | 562                         | —— <i>v.</i> Fell                                    | 732                |
| —— & Ux. <i>and</i> Att. General     | 454, 499, 625               | —— <i>v.</i> Thorp                                   | 491                |
| <b>Barnesly v. Powel</b>             | 700                         | —— <i>and</i> Villers                                | 272, 476           |
| <b>Barnett v. Weston</b>             | 727                         |  |                    |
| <b>Barret v. Blagrave</b>            | 119                         |  |                    |
| <b>Barrington (Lord) and Freke</b>   | 582                         |  |                    |



# INDEX OF CASES REFERRED TO BY

|   | Page                   |  | Page          |
|---|------------------------|--|---------------|
| <i>Beaver and Lynn</i>                          | 20                     | <i>Bettison (Sir Edward) v. Farrington</i> | 463           |
| <i>Beavor and Bishop of Winchester</i>          | 518                    | <i>&amp; Al'</i>                           | 401           |
| <i>Beazeley and Welford</i>                     | 373                    | <i>Betts and Thexton</i>                   | 706           |
| <i>Becher and Scott</i>                         | 249                    | <i>Bevan ex parte</i>                      | 139, 151      |
| <i>Bechinall v. Arnold</i>                      | 701                    | <i>Beverley v. Beverley</i>                | 153           |
| <i>Beck v. Rebow</i>                            | 508                    | <i>Bewick v. Whitfield</i>                 | 342, 724      |
| <i>Beckford v. Parnecot</i>                     | 209                    | <i>Bickerstaffe and Newburgh</i>           | 406           |
| <i>Beckwith's Case</i>                          | 472                    | <i>Bickham v. Freeman</i>                  | 727           |
| <i>and Ibbetson</i>                             | 562                    | <i>Bicknell and Evans</i>                  | 89, 761       |
| <i>Beddingfield and Delabeere</i>               | 575                    | <i>Bigge v. Bensley</i>                    | 582           |
| <i>Bedford (Earl of) and Case of Charles</i>    | 370                    | <i>Bigland v. Huddleston</i>               | 16, 79        |
| <i>Clare</i>                                    | 392                    | <i>Bill v. Price</i>                       | 323           |
| <i>Bedford v. Coke</i>                          | 519                    | <i>Billingsely and Lady Shore</i>          | 681           |
| <i>Beecher and Shepherd</i>                     | 126                    | <i>Bindon and Sweetapple</i>               | 278           |
| <i>Beeton v. Darkin</i>                         | 614                    | <i>Bingley and Williams</i>                | 564           |
| <i>Bell v. Commissary Hyde's Wife</i>           | 647                    | <i>Binkes and Spragg</i>                   | 262           |
| <i>— v. Coleman</i>                             | 389, 705               | <i>Birch v. Barston</i>                    | 638           |
| <i>— v. Phyn</i>                                | 299, 325               | <i>— and Paul</i>                          | 386, 672      |
| <i>— and Robinson</i>                           | 472                    | <i>Bird and Elnorthy</i>                   | 244, 444      |
| <i>— and Swire</i>                              | 395                    | <i>Bird v. Hardwicke</i>                   | 378           |
| <i>Bellamont (Earl of) and Connor</i>           | 82, 264, 274, 375, 725 | <i>— v. Lockey</i>                         | 162           |
| <i>Bellasis and Benson</i>                      | 20                     | <i>— v. Sedgwick</i>                       | 208, 467, 468 |
| <i>— (Lady) v. Compton</i>                      | 700                    | <i>— and Wortley</i>                       | 526           |
| <i>Bellaw v. Russell</i>                        | 741                    | <i>Biscoe v. Perkins</i>                   | 755           |
| <i>Bendlowes and Wainwright</i>                 | 115, 149               | <i>Bishop v. Church</i>                    | 481           |
| <i>Bennet and Roberts</i>                       | 700                    | <i>— v. Sharp</i>                          | 352, 478      |
| <i>— v. Vade</i>                                | 519, 724               | <i>Bissell v. Axtell</i>                   | 77, 700       |
| <i>— v. Whitehead</i>                           | 381, 580               | <i>Black and Glover</i>                    | 718           |
| <i>Bennett v. Honywood</i>                      | 606                    | <i>Blackall v. Combs</i>                   | 697           |
| <i>— and March</i>                              | 385                    | <i>Blackamore's (Arthur) Case</i>          | 435           |
| <i>— and Moor</i>                               | 88, 761                | <i>Blackborn v. Edgley</i>                 | 451           |
| <i>Bensley and Bigge,</i>                       | 82, 264, 274, 375, 725 | <i>Blackburn v. Stables</i>                | 526           |
| <i>Benson v. Bellasis</i>                       | 119                    | <i>Blackburne and Strobe</i>               | 701           |
| <i>— v. Gibson</i>                              | 45                     | <i>— v. Webster</i>                        | 262           |
| <i>— v. Scott</i>                               | 692                    | <i>Blackler v. Webb</i>                    | 706           |
| <i>— and Turton</i>                             | 334                    | <i>Blackman and Wythe</i>                  | 108, 601      |
| <i>Bergavenny (Lady) and Richards &amp; Al'</i> | 224                    | <i>Blackmore and Langston</i>              | 80            |
| <i>Berkeley &amp; Ux. and Clarke &amp; Ux.</i>  | 761                    | <i>Bladon and Countess of Plymouth</i>     | 115           |
| <i>Berkley and Brome</i>                        | 643                    | <i>Blagrove and Barret</i>                 | 119           |
| <i>Bernardiston and Watkinson</i>               | 463                    | <i>Blake v. Bunbury</i>                    | 582           |
| <i>Berney v. Eyre</i>                           | 27, 403                | <i>— and Clarke</i>                        | 580           |
| <i>Berney v. Pitt</i>                           | 545                    | <i>— v. Johnson</i>                        | 307           |
| <i>Berrier and Stead</i>                        | 393, 608               | <i>— and Vandergucht</i>                   | 388           |
| <i>Berrington and Rees</i>                      | 308                    | <i>Bland v. Wilkins</i>                    | 20            |
| <i>Berrisford v. Done</i>                       | 525                    | <i>Blandy v. Widmore</i>                   | 97, 725       |
| <i>— v. Milward</i>                             | 311                    | <i>Blatch and Rex</i>                      | 47            |
| <i>Berry v. Askham</i>                          | 572                    | <i>Blaxton v. Heath</i>                    | 63            |
| <i>— v. Usher</i>                               | 561, 619               | <i>Bletsoe and Carter</i>                  | 424           |
| <i>Bertie and Cary</i>                          | 98, 479                | <i>Bletsoe v. Sawyer</i>                   | 535, 748      |
| <i>— v. Falkland</i>                            | 268, 300               | <i>Blewitt and Good</i>                    | 422           |
| <i>Best and Brent</i>                           | 582                    | <i>— v. Thomas</i>                         | 391           |
| <i>— and Stratton</i>                           | ibid.                  | <i>Blicke and Wright</i>                   | 49            |
| <i>Bestland and Blount</i>                      | 736                    | <i>Blight and Lovence</i>                  | 562           |
| <i>Bethlehem Hospital and Newcoman</i>          |                        | <i>Blinkhorn v. Feast</i>                  | 20            |
|   |                        | <i>Blissett and Chapman</i>                | 139           |

# THE NOTES OF THE SECOND VOLUME.

|                                  | Page             |                                      | Page               |
|----------------------------------|------------------|--------------------------------------|--------------------|
| Blois v. Blois                   | 195              | Bracken and Tunstal                  | 666                |
| — & Al'. v. Lady Hereford        | 69, 402          | Brackley and Small                   | 71                 |
| Blommart v. Blommart             | 528              | Bradburn v. Kennerdale               | 320                |
| Blare v. Sutton                  | 456              | Bradbury and Weld                    | 105, 711, 745      |
| Bount v. Bestland                | 582              | Bradford and Buffar                  | 611                |
| Blundell v. Brettargh            | 415              | Bradgate v. Ridlington               | 248                |
| Bunt v. Clitherow                | 582              | Bradley v. Bradley                   | 253                |
| Bynman v. Brown                  | 379              | — and Garforth                       | 191                |
| Blythe and Postlethwaite         | 41               | — and Ward                           | 43, 196            |
| Bythway and Dashwood             | 235              | — and Porter                         | 325                |
| Boddington and Witts             | 665              | Bradshaw and Caldwell                | 111                |
| Bodicoate v. Moreton             | 354              | — and Key                            | 216                |
| Bodmin (Lady) v. Vandenbendy     | 378, 701         | Brain and Miall                      | 66                 |
| Bogkurst and Prebble             | 389              | Brander and Bosvil                   | 271, 429           |
| Boldero and Godsall              | 11               | Bransby v. Kerridge                  | 9, 700             |
| Bolton (Duke of) and Countess of |                  | Brathwaite v. Brathwaite             | 757                |
| Bridgewater                      | 562              | Braybroke (Lord) v. Inskip           | 7, 461             |
| — and Williams                   | 153              | Breary and Roundell & Ux.            | 97                 |
| — (Duchess of) and Powlett       | ibid.            | Brend v. Brend                       | 747                |
| Bonafous v. Rybot                | 317              | Brent and Barbone                    | 147, 240, 379, 419 |
| Bonbonous, ex parte              | 706              | — v. Best                            | 268, 300           |
| Bond and Hele                    | 511              | Brettargh and Blundell               | 415                |
| Bonham and Newcomb               | 84, 419          | Bretton v. Lethulier                 | 378, 706           |
| Bonney v. Ridgard                | 616              | Brewer and Hampden                   | 309                |
| Boorman and Gilbert              | 705              | Brewster v. Kidgell                  | 307                |
| Booth v. Rich                    | 518              | — v. Kitchin                         | ibid.              |
| Borlace & Al'. and Draper & Al'. | 555              | Brian and Juxon                      | 85                 |
| Boson v. Sandford                | 643              | Bricker v. Whatley                   | 120                |
| Bosvil v. Brander                | 271, 429         | Brickwood and Watson                 | 719                |
| Bosville and Lord Glenorchy      | 526, 739         | Bridge and Tilley                    | 724                |
| Bothomley v. Lord Fairfax        | 235              | Bridges and Kingdon                  | 79, 683            |
| Boughton v. Boughton             | 582              | — & Al'. v. Wood & Al'.              | 378                |
| Bourke v. Ricketts               | 395              | Bridgewater (Countess of) v. Duke of |                    |
| Bourn and Tudway                 | 433              | Bolton                               | 562                |
| Bovey's Case                     | 491              | Brightwell and Wallis                | 395                |
| Bovey v. Smith                   | 701              | Brine v. Hartpoole                   | 41                 |
| Bowden v. Bowden                 | 514              | Briscoe v. Earl of Banbury           | 385, 463           |
| — and Parrot                     | 83, 199          | Bristol (Countess of) v. Hungerford  | 20                 |
| Bowers and Fairebeard            | 277, 491         | — (Earl of) v. Hungerford            | 29, 712            |
| — v. Littlewood                  | 233, 170         | — v. Creditors of Sir                |                    |
| Bowes and Strathmore             | 209              | Wm. Bassett                          | 81                 |
| Bowey v. Lowdal                  | 325              | Bristol and Attorney General         | 397, 400           |
| Bowker v. Hunter                 | 361              |                                      |                    |
| Bowle (Sir John) case of         | 248              | Broadmead v. Wood                    | 531                |
| Bowles v. Bowles                 | 530              | Brodbelt and Raymond                 | 395                |
| — v. Stewart                     | 379              | Brome v. Berkley                     | 761                |
| Bowman and Dobbins               | 389              | Bromfield, ex parte                  | 153                |
| Bowyer v. Curre                  | 435              | Bromley v. Jeffereys                 | 339                |
| Bowyer and Newsome               | 105, 614         | — v. Fettiplace                      | 415                |
| Boycot v. Cotton                 | 424, 439         | — v. Jeffries                        | 456                |
| Boyer and Weymouth               | 117              | — and Chilcot                        | 547                |
| Boyle v. Bishop of Peterborough  | 531              | Brook (Lord) v. Lord and Lady Hert-  |                    |
| — and Graves                     | 705              | ford                                 | 553                |
| Brace v. Harrington              | 692              | Brooke v. Hewitt                     | 194                |
| — v. Marlbro'                    | 29, 81, 271, 525 | Brookeing and Crooke                 | 545, 665           |

## INDEX OF CASES REFERRED TO BY

|                                       |                                       |                                      |                    |
|---------------------------------------|---------------------------------------|--------------------------------------|--------------------|
| Brookman and Reed                     | Page 299                              | Burbage and Northey                  | Page 105, 630, 705 |
| Brooks and Starkey                    | 20                                    | Burchett and Goodfellow              | 556, 646, 710      |
| Brooman and Huxtep                    | 562                                   | Burdet and Attorney-General          | 454                |
| Broome v Monck                        | 582                                   | —— v. Hopegood                       | 580                |
| Brotherton v. Hatt                    | 610                                   | Burford (Corporation of) v. Lenthall | 747                |
| Broughton and Adams                   | 239                                   | Burgess v. Wheat                     | 537                |
| —— v. Errington                       | 66                                    | Burke and Cator                      | 692                |
| —— (Lady) and The King                | 174                                   | Burlington (Lord) and Lady Clifford  | 306                |
| Brown v. Allen                        | 111, 434, 688, 757                    | —— (Countess of) and Franklyn        | 638                |
| —— v. Barkham                         | 317, 392                              | Burn v. Burn                         | 278, 481           |
| —— v. Brown                           | 25, 101, 109, 252, 444, 486, 515, 705 | Burnell v. Martin                    | 235                |
| —— and Blynman                        | 379                                   | Burnett v. Kinnaston                 | 63, 69, 191        |
| —— v. Clarke                          | 378                                   | Burnford and Ball                    | 221                |
| —— v. Dawson                          | 300, 498, 506                         | Burron and Low                       | 185, 226           |
| —— & Ux. v. Elton                     | 494                                   | Burroughs and Morris                 | 91                 |
| —— v. Heathcote                       | 429, 564, 565, 566                    | Burrows and Walker                   | 429, 491, 566      |
| —— v. Higgs                           | 88, 108 116, 465                      | Burt v. Barlow                       | 481                |
| —— ana Keeling                        | 709                                   | —— and Clifton                       | 44                 |
| —— v. Parry                           | 366                                   | Burtenshaw v. Gilbert                | 721                |
| —— v. Raindle                         | 584                                   | Burke v. Jones                       | 142                |
| —— and Selwin                         | 585                                   | Burting v. Stonard                   | 616                |
| —— v. Taylor                          | 80                                    | Bury and Peyton                      | 91, 452, 453       |
| —— v. Vermuden                        | 46                                    | Bush and Jevon                       | 561                |
| Brownsmith v. Gilborne                | 693                                   | —— and Masters                       | 199                |
| Brownsword v. Edwards                 | 389                                   | —— v. Western                        | 391                |
| Bruce (Lord) and Grimstone            | 366                                   | Butcher v. Butcher                   | 465                |
| Bruen v. Bruen                        | 74, 424                               | —— v. Kemp                           | 66                 |
| Bruges v. Curwin & Al'.               | 103                                   | —— v. Stapely                        | 701                |
| Bruton and Jervis                     | 234                                   | Butler v. Duncomb                    | 392, 461           |
| Bryer and Shelley                     | 108                                   | —— and Lawrenson                     | 415, 456           |
| Brymer and Reeves                     | 108                                   | —— and Moore                         | 528                |
| Buckingham (Duchess of) and Sheffield | 700                                   | —— v. Pendergast                     | 481                |
| Buckinghamshire v. Drury              | 66                                    | Butterfield v. Butterfield           | 59                 |
| Buckland v. Barton                    | 319, 466                              | —— and Buckland                      | 508                |
| —— v. Butterfield                     | 508                                   | Button v. Cole                       | 131                |
| Buckland and Hawker                   | 562                                   |                                      |                    |
| Buckle and Cannel                     | 481                                   |                                      |                    |
| Buckley and Radcliffe                 | 545                                   |                                      |                    |
| Buckly and Travers                    | 614                                   |                                      |                    |
| Buckmaster v. Harrop                  | 464                                   |                                      |                    |
| Bucknall v. Royston                   | 511                                   |                                      |                    |
| Bucks (Earl of) v. Drury              | 366                                   |                                      |                    |
| —— (Duke of) and Phillips             | 633                                   |                                      |                    |
| Buden v. Dore                         | 463                                   |                                      |                    |
| Budgin & Ux. and Christ's Hospital    | 68                                    |                                      |                    |
| Buffar v. Bradford                    | 611                                   |                                      |                    |
| Bulkeley (Lord) and Dashwood          | 464, 573                              |                                      |                    |
| Bull v. Vardy                         | 154                                   |                                      |                    |
| Bullas and Watts                      | 625                                   |                                      |                    |
| Buller and Mortlock                   | 456                                   |                                      |                    |
| Bullock v. Menzies                    | 386, 753                              |                                      |                    |
| Bunbury and Blake                     | 582                                   |                                      |                    |
| Bunce v. Phillips                     | 35                                    |                                      |                    |
| Bunter v. Cook                        | 137, 209, 538                         |                                      |                    |

# THE NOTES OF THE SECOND VOLUME.

|                                     | Page               |   | Page          |
|-------------------------------------|--------------------|---|---------------|
| Canterbury (Archbishop of) v. House | 643                | Chapman v. Derby                              | 234           |
| Cadle & Al'. v. Morris & Al'.       | 498                | ———— and Doe                                  | 503           |
| Cavan and Dethicke                  | 106                | ———— v. Duncombe                              | 41            |
| Carbonell and Wiseman               | 41                 | ———— and Hill                                 | 705           |
| Cardonnel and Hedges                | 464                | ———— v. Tanner                                | 280           |
| Careless and Rackfield              | 20, 254            | ———— and Forth                                | 60, 325       |
| Carey v. Askew                      | 499, 592, 598      | Chappel and Hawkins                           | 20            |
| Carlisle (Earl of) and Lechmere     | 228, 296, 299, 392 | Charles v. Andrews                            | 366           |
| Carpenter v. Carpenter              | 757                | Charleton and Frewin                          | 755           |
| Carr v. Singer                      | 585                | Chase and Lewis                               | 71, 603       |
| ———— v. Taylor                      | 503                | Chauvel and Mutter                            | 401           |
| Carrington and Cresly               | 25, 109, 230       | Cheek and Watkins                             | 7, 616        |
| (Lord) v. Payne                     | 209                | Cheney's Case                                 | 593           |
| Carroll and Savage                  | 456, 530           | Chester v. Chester                            | 461           |
| Carruthers and Sparrow              | 106                | ———— v. Painter                               | 199           |
| Carte v. Carte                      | 309                | ———— v. Willes                                | 91, 308, 354  |
| Carter v. Barnadiston               | 85, 757            | Chesterfield v. Janssen                       | 179           |
| ———— v. Bletsoe                     | 424                | Cheyney and Hunsden                           | 133, 370, 466 |
| ———— v. Carter                      | 109                | Chilcot v. Bromley                            | 547           |
| ———— v. Crawley                     | 233                | Child and Baker                               | 400           |
| ———— and Hall                       | 761                | ———— v. Danbridge                             | 603           |
| Carteret (Lord) v. Paschal          | 402, 503           | ———— and Edwards                              | 212           |
| Cartwright and Hebblethwaite        | 761                | ———— v. Pitt                                  | 566           |
| ———— v. Vawdry                      | 705                | ———— v. Stephens                              | 510           |
| Cary v. Bertie                      | 561, 619           | Childrens v. Saxby                            | 123           |
| ———— and Greatorox                  | 66                 | Chiswell and Gray                             | 481, 706      |
| ———— v. White                       | 643                | Chitters and Hartwell                         | 763, 764      |
| Carborne v. Scarfe                  | 537, 550, 625      | Cholmondeley v. Clinton                       | 600, 625, 736 |
| Case v. Acton                       | 481                | Christ Church (Dean and Chapter of) v. Barrow | 538           |
| Casson v. Tucker                    | 614                | Christ's Hospital v. Budgin & Ux.             | 68            |
| Castleton (Lord) and Sheffield      | 608                | Christian v. Corren                           | 368           |
| Caswell, ex parte                   | 662                | Church and Bishop                             | 481           |
| Cater and Middleton                 | 20                 | Churchill v. Lady Speake                      | 738           |
| Cator v. Burke                      | 692                | ———— and Worlidge                             | 388           |
| ———— and Sparkes                    | 299                | Churchman v. Harvey                           | 761           |
| Cavan (Lady) v. Pakeney             | 582                | Chute and Darcy                               | 491           |
| Cave v. Cave                        | 424                | Civil v. Rich                                 | 632, 754      |
| Cecil v. Plaistow                   | 71                 | Clapham and Basset                            | 755           |
| Chadwell and Godfrey                | 663                | Clare (case of Charles) v. Earl of Bedford    | 370           |
| Chadwick and Love                   | 666                | ———— v. Clare                                 | 601           |
| Chalie and Garthshore               | 366, 710           | ———— and Crosley                              | 108           |
| Chaloner and Horsley                | 705                | Clarendon (Lord) and Danvers                  | 325           |
| Chalmers v. Storil                  | 66                 | Clarges v. Duke of Albemarle                  | 59, 332       |
| Chambers and Lord Rodney            | 672                | Clark v. Day                                  | 325           |
| Chancey's Case                      | 299, 479           | ———— and Mackel                               | 306           |
| Chancey v. May                      | 423                | ———— v. Ward                                  | 61, 307       |
| Chandler, ex parte                  | 706                | Clarke and Armiger                            | 416           |
| ———— v. Thompson                    | 646                | ———— v. Blake                                 | 580           |
| Chandos (Duke of) and Lyon          | 761                | ———— and Brown                                | 378           |
| ———— v. Talbot                      | 354, 508           | ———— & Ux'. v. Berkeley & Ux'.                | 224           |
| Chaplin v. Chaplin                  | 537, 757           | ———— & Al'. and Hadley                        | 243           |
| ———— v. Horner                      | 350                | ———— and Kinaston                             | 134           |
| ———— and Gray                       | 422                | ———— and Poore                                | 103           |
| Chapman v. Blissett                 | 139                | Clavell v. Littleton                          | 476           |

# INDEX OF CASES REFERRED TO BY

|                                    | Page               |                                 | Page               |
|------------------------------------|--------------------|---------------------------------|--------------------|
| Claverden and Webb                 | 700                | Collins and White               | 325                |
| Clavering v. Clavering             | 380, 557, 561      | — v. Plummer                    | 234                |
| Claxton v. Claxton                 | 211                | — and Strange                   | 494                |
| — and Smith                        | 20                 | Colman v. Croker                | 491                |
| Clay, <i>ex parte</i>              | 706                | — v. Duke of St. Alban's        | 41                 |
| — and Pring                        | 611                | Colt v. Woollaston              | 193                |
| — v. Willis                        | 764                | Colville and Creed              | 713                |
| Cleaver v. Spurling                | 91                 | Colville and Stapleton          | 302, 569           |
| Cleland v. Cleland                 | 191, 503           | Colyer and Smith                | 153                |
| Clements v. Scudamore              | 226                | Combe and Young                 | 562                |
| Clennell v. Lewthwaite             | 20, 149            | Comber v. Hill                  | 546                |
| Clerk v. Clerk                     | 678                | Combs and Blackall              | 697                |
| — and Cowper                       | 368                | — v. Dowell                     | 472                |
| Clerke and Raggett                 | 720                | Compton and Farmer              | 386                |
| Clever and Smith                   | 246                | — and Lady Bellasis             | 20                 |
| Cliffe v. Gibbons                  | 562                | — and Lillcott                  | 512                |
| Clifford (Lady) v. Lord Burlington | 306                | — (Lord) v. Oxenden             | 354                |
| Clifton v. Burt                    | 44                 | — and Paul                      | 705                |
| Clinton v. Hooper                  | 689                | Congreve v. Congreve            | 705                |
| — (Lady) v. Lord Robert Seymour    | 761                | Coringham v. Mellish            | 20                 |
| Clinton and Cholmondeley           | 600, 625, 736      | Connor v. Earl of Bellamont     | 395                |
| Clitherow and Blunt                | 582                | Constable v. Constable          | 82                 |
| Clowdsley v. Pelham                | 144, 709, 719, 757 | Conway v. Conway                | 761                |
| Clyat v. Batteson                  | 268, 300, 667, 757 | — and Stapleton                 | 295                |
| Coads and Williams                 | 20                 | Cony and Hawes                  | 461                |
| Coatsworth and Dalston             | 380                | Cook v. Arnham                  | 377, 391           |
| Cobb and Fines                     | 356                | — and Doe                       | 325                |
| Cock and Vanbrugh                  | 47                 | — and Williams                  | 219                |
| — v. Richards                      | 102, 216           | — and Bunter                    | 137, 209, 538      |
| Cockburn v. Thomson                | 422                | — v. Cook                       | 105, 108, 557, 705 |
| Cocks v. Foley                     | 383, 517           | — v. Duckenfield                | 20                 |
| Coddington and All Soul's Coll.    | 137, 538           | — and Foster                    | 66                 |
| Codrington v. Lord Foley           | 461, 761           | — v. Gerrard                    | 461                |
| Coghill and Holmes                 | 319, 465           | — v. Parsons                    | 474                |
| Coke and Bedford                   | 392                | — and Sibley                    | 378                |
| — v. Fountain                      | 449                | Cooke v. Cooke                  | 391                |
| Colchester v. Arnott               | 103                | — and Flight                    | 636                |
| Cole and Adams                     | 69                 | — and Markham                   | 562                |
| — and Button                       | 131                | Cookes v. Hellier               | 380, 557, 561      |
| — v. Gibson                        | 380, 446, 561      | Cookson and Ellison             | 647                |
| — and Lady Stowell                 | 219                | Coomes v. Elling & Ux'          | 277                |
| — v. Warten                        | 59, 61, 764        | Cooper v. Forbes                | 580                |
| Coleby v. Smith                    | 307                | — and Procter                   | 43, 392            |
| Colegrave v. Manby                 | 209                | Cooth and Hyde                  | 80                 |
| Coleman and Baile                  | 527, 537, 705      | Cope v. Sir Robert Wilmot & Al' | 560                |
| — and Bell                         | 647                | — v. Parry                      | 36, 472            |
| — v. Cruwys                        | 381, 465           | Corbet's Case                   | 635                |
| — v. Duck                          | 466                | Corbet and Ewer                 | 445, 616           |
| — v. Seymour                       | 705                | Corbett v. Maydwell             | 761                |
| — v. Seymour                       | 661                | — and Snelson                   | 512                |
| Coles v. Trecothick                | 456                | Corbyn v. French                | 378                |
| Collier and Thirveton              | 103                | Cordal's Case                   | 404                |
|                                    |                    | Corie and Howman                | 56, 69, 502        |
|                                    |                    | Cornwallis (Lord) and Lassells  | 319                |
|                                    |                    | Corren and Christian            | 368                |
|                                    |                    | Cotten (Dr.) and Forrester      | 592                |

**THE NOTES OF THE SECOND VOLUME.**

|                                      |               |                                     |                |
|--------------------------------------|---------------|-------------------------------------|----------------|
|                                      | Page          |                                     | Page           |
| Cotter v. Layer                      | 5             | Crow and Barnes                     | 209            |
| Cotterel v. Hampson                  | 445           | Crowder v. Oldfield                 | 250            |
| Cotton and Boycot                    | 424, 439      | Cruse v. Barley                     | 20             |
| ——— and Garth                        | 123, 153      | Cruttenden and Beardmore            | 609            |
| ——— and Scarth                       | 713           | Cruwys v. Coleman                   | 381, 465       |
| Couch v. Stratton                    | 66            | Cud v. Rutter                       | 394            |
| Cousmaker and Kidney                 | 327           | Culpepper (Sir Thomas) and The King | 604            |
| Coventry v. Coventry                 | 465           | Cunliffe and Edwards                | 41             |
| Coward and Birkhead                  | 208, 467, 468 | ——— v. Sefton                       | 472            |
| ——— and Lyford                       | 4, 164, 391   | Cunningham v. Mellish               | 425, 644       |
| Cowne and Legastick                  | 142           | ——— v. Moody                        | 537            |
| Cowper v. Clerk                      | 368           | Curre v. Bowyer                     | 435            |
| ——— v. Earl Cowper                   | 380           | Currie, ex parte                    | 706            |
| ——— v. Marten                        | 562           | Curson v. African Company           | 396,           |
| ——— v. Williams                      | 246           |                                     | 429, 699       |
| Cox (Sir Charles) Case of the Credi- |               | Curtis v. Curtis                    | 519            |
| tors of                              | 436, 763      | Curwin & Al'. and Bruges            | 103            |
| ——— and Edmundson                    | 277           | Cuthbert v. Peacock                 | 647            |
| ——— v. Higford                       | 538           | Cuthbertson and Pilkington          | 454            |
| ——— and Jory                         | 317, 401      | Cutler v. Coxeter                   | 569            |
| Cox the Lady's Case                  | 202           |                                     |                |
| Coxeter and Cutler                   | 569           | D.                                  |                |
| Coysegame ex parte                   | 97            | Dafforne v. Goodman                 | 196            |
| Cracroft and Palmer                  | 705           | Daintry v. Daintry                  | 325            |
| Crane v. Drake                       | 76            | Dalrymple and Woodhouselee          | 705            |
| ——— and Fox                          | 5, 182, 380   | Dalston v. Coatsworth               | 380            |
| Cranmer's Case                       | 363           | Dalt and Waller                     | 78             |
| Crawley and Carter                   | 233           | Dalzeel and Lynch                   | 11             |
| ——— and Sealing                      | 47            | Damon and White                     | 456            |
| Cray v. Rooke                        | 202           | Danbridge and Child                 | 603            |
| ——— v. Willis                        | 545           | Danby v. Lawson                     | 91             |
| Creagh v. Wilson                     | 581, 720      | ——— and Palmes                      | 193, 378       |
| Creed v. Colville                    | 713           | Dancer v. Evett                     | 250            |
| Cresly v. Carrington                 | 25, 109, 230  | Dandy and Bates                     | 564            |
| Creuze v. Hunter                     | 392           | Daniel v. Adams                     | 61             |
| Crew and Furnival                    | 389           | Danvers v. Lord Clarendon           | 325            |
| ——— v. Jolliff                       | 99            | ——— and Nicholls                    | 386, 753       |
| Crewes and Kempe                     | 131           | ——— and Doe                         | 598            |
| Crickett v. Dolby                    | 199           | D'Aquila v. Lambert                 | 203            |
| Crisp and Lant                       | 41            | D'Aranda and Lee                    | 299            |
| Crispe and Countess of Arran         | 307           | Darbison v. Beaumont                | 545, 711       |
| Crispin and Attorney-General         | 705           | Darcy v. Chute                      | 481            |
| Croft v. Powell                      | 401           | ——— v. Hall                         | 66             |
| Croker and Coleman                   | 491           | Darkin and Becton                   | 126            |
| Cromwell v. Grunsden                 | 435           | Darlington (Lord) and Pultney       | 296            |
| Crooke v. Brookeing                  | 545, 665      | Darrel v. Molesworth                | 653            |
| ——— v. De Vandes                     | 325           | Dashwood v. Lord Bulkeley           | 464, 573       |
| Cross v. Lewes                       | 646           | ——— v. Blythway                     | 235            |
| Crosbie v. Murray                    | 582           | ——— and Musgrave                    | 584            |
| Crosby v. Macdoul                    | 209           | ——— v. Peyton                       | 528            |
| ——— v. Middleton                     | 481           | Davenport and Elliott               | 116, 378, 611, |
| Crosley v. Clare                     | 108           |                                     | 722            |
| Crosseing v. Honor                   | 483           | ——— v. Hanbury                      | 108            |
| Crossling v. Crossling               | 465           |                                     |                |
| Crouch v. Martin                     | 391           |                                     |                |
| ——— and Sanderson                    | 61, 195       |                                     |                |

# INDEX OF CASES REFERRED TO BY .

|   | Page          |                                    | Page          |
|---|---------------|------------------------------------|---------------|
| <i>Davenport v. Oldis</i>                     | 546           | <i>Denn v. Gaskin</i>              | 562           |
| — and Tanfield                                | 271           | — and <i>Ireson</i>                | 41            |
| <i>Davers v. Dewes</i>                        | 395, 653      | — v. <i>Kemeys</i>                 | 389           |
| <i>Davidson and Eddie</i>                     | 111           | <i>Denne and Walker</i>            | 116, 284, 310 |
| — v. <i>Foley</i>                             | 30, 248       | <i>Denny and Thrustout</i>         | 88            |
| <i>Davies &amp; Al' v. Stephens &amp; Al'</i> | 545           | <i>Depaiba v. Ludlow</i>           | 269           |
| — and <i>French</i>                           | 66            | <i>Derby and Chapman</i>           | 254           |
| — v. <i>Weld</i>                              | 304           | (Lord) and <i>Nash</i>             | 147, 665      |
| <i>Davis and Farmer</i>                       | 643           | <i>De Roven and Dupleix</i>        | 695           |
| — v. <i>Gardiner</i>                          | 229           | <i>Desbrough and Vandenanker</i>   | 196           |
| — v. <i>Gibbs</i>                             | 43, 196       | <i>Dethick and Stevens</i>         | 761           |
| — and <i>Godfrey</i>                          | 705           | <i>Dethicke v. Caravan</i>         | 106           |
| — and <i>Whitworth</i>                        | 380           | <i>Detillin v. Gale</i>            | 536           |
| <i>Davison &amp; Al' and Robinson</i>         | 81, 536       | <i>De Vandes and Crooke</i>        | 335           |
| <i>Daubeny and Harris</i>                     | 434           | <i>Devaynes and Land</i>           | 748           |
| <i>Daubuz and Pye</i>                         | 429, 566      | <i>Devese v. Pontet</i>            | 300, 498      |
| <i>Davy v. Barker</i>                         | 41            | <i>Devisme v. Mellish</i>          | 381           |
| — and <i>Doe</i>                              | 209           | — v. <i>Mello</i>                  | 706           |
| <i>Dawding and Rippon</i>                     | 481           | <i>Devon (Duke of) v. Atkins</i>   | 185, 790      |
| <i>Dawling and Amburst</i>                    | 550           | — v. <i>Kinton</i>                 | 330           |
| <i>Dawson and Brown</i>                       | 300, 498, 506 | — and <i>Metham</i>                | 706           |
| — v. <i>Killet</i>                            | 666           | <i>Devonshire and Leslie</i>       | 20            |
| — and <i>Row</i>                              | 429           | <i>Dewes and Davers</i>            | 395, 653      |
| — and <i>Dixon</i>                            | 20            | <i>Dickenson v. Lockyer</i>        | 441           |
| <i>Day and Clark</i>                          | 325           | <i>Dickinson v. Molineux</i>       | 426           |
| <i>Deacon v. Smith</i>                        | 97, 483       | <i>Dicks v. Lambert</i>            | 20            |
| <i>Dean v. Lord Delaware</i>                  | 234, 754      | <i>Dickson v. Robinson</i>         | 66            |
| — and <i>James</i>                            | 909           | <i>Dighton and Tomlinson</i>       | 182           |
| <i>Dear and French</i>                        | 263           | <i>Dillon and Mulvany</i>          | 700           |
| <i>Debar and Taylor</i>                       | 447           | — v. <i>Parker</i>                 | 528           |
| <i>De Bathe v. Fingal</i>                     | 209           | <i>Dixon and Adderley</i>          | 394           |
| <i>Debeze v. Mann</i>                         | 647           | — v. <i>Dawson</i>                 | 20            |
| <i>De Costa v. Scandret</i>                   | 206           | — v. <i>Parker</i>                 | 638           |
| <i>Dedire and Freemoult</i>                   | 452           | <i>Dixwell and Roberts</i>         | 90, 526, 537  |
| <i>Deerkurst v. St. Albans</i>                | 526           | <i>Dobbins v. Bowman</i>           | 389           |
| <i>Deering v. Hanbury</i>                     | 59, 686       | <i>Dodd and Aylet</i>              | 119           |
| — (Sir Edward) v. <i>Lord Winchel-</i>        |               | — and <i>Nightingale</i>           | 100           |
| — sea   | 757           | <i>Dodson v. Hay</i>               | 557           |
| <i>Deerly v. Mazarine</i>                     | 105           | <i>Dodswell and Middleton</i>      | 249           |
| <i>Deeze, ex parte</i>                        | 117           | <i>Doe v. Chapman</i>              | 562           |
| <i>Deflis v. Goldschmidt</i>                  | 705           | — v. <i>Davy</i>                   | 209           |
| <i>Deg v. Deg</i>                             | 76, 248       | — v. <i>Fonnereau</i>              | 119, 501      |
| <i>Dehew and Saunders</i>                     | 121           | — v. <i>Laming</i>                 | 325           |
| <i>Delabeere v. Beddingfield</i>              | 575           | — v. <i>Richards</i>               | 562           |
| <i>Delany v. Tenison</i>                      | 561           | — v. <i>Cooke</i>                  | 325           |
| <i>Delaval and Pawlet</i>                     | 689           | — v. <i>Danvers</i>                | 598           |
| <i>Delaware (Lord) and Dean</i>               | 234, 754      | — v. <i>Holmes</i>                 | 105           |
| <i>Delawne and Sprignall</i>                  | 111           | — v. <i>Jessepp</i>                | 389           |
| <i>Delbor and Martin</i>                      | 695           | — v. <i>Manning</i>                | 44            |
| <i>Delight and Wakerell</i>                   | 41            | — v. <i>Ossingbrooke</i>           | 565           |
| <i>Delmare v. Robello</i>                     | 593           | — v. <i>Over</i>                   | 381           |
| <i>De Manneville v. De Manneville</i>         | 386           | — v. <i>Richards</i>               | 105           |
| <i>Dench v. Bampton</i>                       | 538           | — v. <i>Snelling</i>               | 105           |
| — and <i>Hall</i>                             | 496, 721, 722 | — v. <i>Treby</i>                  | 585           |
| <i>Denison and Druce</i>                      | 63, 582, 647  | <i>Dogget and Pawlet &amp; Ux'</i> | 152, 686, 767 |
| — and <i>King</i>                             | 20            | <i>Dolby and Crickett</i>          | 140           |

**THE NOTES OF THE SECOND VOLUME.**

|   |               |  |                |
|---|---------------|--|----------------|
|   | Page          |  | Page           |
| <b>Dolder v. The Bank of England</b>          | 434           | <b>Dungannon (Lord) v. Hackett</b>           | 395            |
| <b>Doloret v. Rothschild</b>                  | 394           | <b>Dunn v. Allen</b>                         | 549            |
| <b>Done's Case</b>                            | 219           | <b>Dunsterville and Ball</b>                 | 278            |
| <b>Done and Berrisford</b>                    | 308           | <b>Dupleix v. De Roven</b>                   | 695            |
| <b>Donegall's Will (Case on the Earl of)</b>  | 395           | <b>Dupine and King</b>                       | 491            |
| <b>Donisthorpe v. Porter</b>                  | 354           | <b>Dupont and Gugleman</b>                   | 85             |
| <b>Dor and Pyne</b>                           | 739           | <b>Durant v. Titley</b>                      | 386            |
| <b>Dore and Buden</b>                         | 463           | <b>Durham (Bishop of) and Morice</b>         | 454            |
| <b>Dormer and Beauclerk</b>                   | 88, 761       | <b>Dutens and Dundass</b>                    | 491            |
| —— v. Fortescue                               | 724           | <b>Dutton v. Dutton</b>                      | 386            |
| —— and Sheldon                                | 2             | <b>Dux' Ebor. and Welden</b>                 | 190            |
| <b>Dorney and Goslin</b>                      | 248, 302, 406 | <b>Dwyer v. Lysaght</b>                      | 647            |
| <b>Dorrington v. Jackson</b>                  | 123           | <b>Dyer v. Dyer</b>                          | 252, 620, 724  |
| <b>Dorson v. Hunter</b>                       | 250           | —— and Savery                                | 36             |
| <b>Douglas v. Vincent</b>                     | 322           |  |                |
| <b>Dowdeswell and Baxter</b>                  | 236           |  |                |
| <b>Dowell and Combs</b>                       | 472           |  |                |
| <b>Dowler and Higgins</b>                     | 613           |  |                |
| <b>Downing and Attorney General</b>           | 209           |  |                |
| <b>Dowset v. Sweet</b>                        | 611           |  |                |
| <b>Drake and Crane</b>                        | 76            |  |                |
| —— v. Mayor of Exeter                         | 429           |  |                |
| —— and Saunders                               | 395           |  |                |
| <b>Draper &amp; Al'. v. Borlace &amp; Al'</b> | 555           |  |                |
| <b>Drew v. Merry</b>                          | 307           |  |                |
| <b>Driver v. Frank</b>                        | 530           |  |                |
| —— v. Span                                    | 395           |  |                |
| <b>Drohan v. Drohan</b>                       | 445, 616      |  |                |
| <b>Druce v. Denison</b>                       | 63, 582, 647  |  |                |
| <b>Drummond and Macleod</b>                   | 445, 616      |  |                |
| <b>Drury's (Dr.) Case</b>                     | 315           |  |                |
| <b>Drury and Earl of Bucks.</b>               | 66, 366       |  |                |
| —— v. Hooke                                   | 392, 446, 588 |  |                |
| —— v. Drury                                   | 66            |  |                |
| <b>Dryden and Hopton</b>                      | 62            |  |                |
| <b>Dubber v. Trollope</b>                     | 325           |  |                |
| <b>Dubois v. Hole &amp; Ux'</b>               | 105           |  |                |
| <b>Duchaire and Jackson</b>                   | 71            |  |                |
| <b>Duck and Coleman</b>                       | 456           |  |                |
| —— and Read                                   | 202           |  |                |
| <b>Duckenfield and Cook</b>                   | 20            |  |                |
| <b>Ducket and Wilson</b>                      | 206           |  |                |
| <b>Duffay and Theobald</b>                    | 564           |  |                |
| <b>Duke and Jarvis &amp; Ux'</b>              | 223, 294, 573 |  |                |
| —— and Jervois                                | 358, 453      |  |                |
| <b>Dulwich College v. Johnson</b>             | 47            |  |                |
| —— Hospital and Taylor                        | 412           |  |                |
| <b>Dumas, ex parte</b>                        | 117, 566, 638 |  |                |
| <b>Dunbar and Ferguson</b>                    | 388           |  |                |
| <b>Dunch v. Kent</b>                          | 663           |  |                |
| <b>Duncombe and Butler</b>                    | 392, 461      |  |                |
| —— and Chapman                                | 41            |  |                |
| <b>Dundass v. Dutens</b>                      | 491           |  |                |
| <b>Dundonald (Lord) and Duke of Beau-</b>     | 748           |  |                |
| <b>fort</b>                                   |               |  |                |
|   |               | <b>E.</b>                                    |                |
|   |               | <b>Eacles v. England</b>                     | 116            |
|   |               | <b>Earl v. Earl</b>                          | 376            |
|   |               | <b>Earle and Alford</b>                      | 538, 722       |
|   |               | —— and Senhouse                              | 385            |
|   |               | <b>Earnley and Batten</b>                    | 249            |
|   |               | <b>Eastabrooke v. Scott</b>                  | 71             |
|   |               | <b>Eastham (Case of the Poor in) v. Lady</b> |                |
|   |               | <b>Kemp &amp; Al'.</b>                       | 747            |
|   |               | <b>East India Company and Ekins</b>          | 395            |
|   |               | —— and Hotham & Al'.                         | 212            |
|   |               | —— and Lewin & Al'.                          | ibid.          |
|   |               | —— v. Neave                                  | 422            |
|   |               | —— and Wych                                  | 369            |
|   |               | <b>Eastwicke and Merreitt</b>                | 441            |
|   |               | <b>Eastwood v. Vinke</b>                     | 498            |
|   |               | <b>Eaton v. Jacques</b>                      | 276            |
|   |               | <b>Ebrall and Waters</b>                     | 713            |
|   |               | <b>Eddie v. Davidson</b>                     | 293            |
|   |               | <b>Edes and Mitchell</b>                     | 595            |
|   |               | <b>Edge and Harding</b>                      | 37, 57, 62, 89 |
|   |               | —— and Scattergood                           | 711            |
|   |               | <b>Edgeworth and Barry</b>                   | 562            |
|   |               | <b>Edgley and Blackburn</b>                  | 451            |
|   |               | <b>Edmunds v. Povey &amp; Al'.</b>           | 29, 81, 271    |
|   |               | <b>Edmundson v. Cox</b>                      | 277            |
|   |               | <b>Edwards and Brownsword</b>                | 389            |
|   |               | —— v. Child                                  | 212            |
|   |               | —— v. Countess of Warwick                    | 350            |
|   |               | —— v. Cunliffe                               | 41             |
|   |               | —— v. Freeman                                | 205            |
|   |               | —— and Hollis                                | 456            |
|   |               | —— v. M'Leay                                 | 434            |
|   |               | <b>Edwin v. Thomas</b>                       | 232            |
|   |               | <b>Eeles v. Lambert</b>                      | 273            |
|   |               | <b>Egremont (Lord) and Duke of Nor-</b>      |                |
|   |               | <b>thumberland</b>                           | 91             |



# INDEX OF CASES REFERRED TO BY.

|                                     | Page               |  | Page                                       |
|-------------------------------------|--------------------|--|--|
| <b>Ekins v. East India Company</b>  | 395                | <b>Fairechild and Lancy</b>                      | 273  |
| <b>Elkin and Pinbury</b>            | 564                | <b>Fairfax (Lord) and Bothomley</b>              | 235  |
| <b>Elling &amp; Ux'. and Coomes</b> | 277                | <b>Fairfield v. Morgan</b>                       | 389  |
| <b>Elliot v. Hancock</b>            | 229, 506           | <b>Falkland and Bertie</b>                       | 98, 479                                    |
| —— v. Jekyl                         | 545                | —— (Lady) and Lytton                             | 209  |
| —— and <i>Shephard</i>              | 41                 | <b>Fane v. Fane</b>                              | 98, 100, 254, 339, 517, 593, 594, 624, 647 |
| <b>Elliott v. Davenport</b>         | 116, 378, 611, 722 | <b>Fanshaw and Rotherham</b>                     | 47   |
| <b>Ellis v. Hunt</b>                | 203                | <b>Farmer v. Compton</b>                         | 386  |
| —— v. Smith                         | 80, 742            | —— v. Davis                                      | 643  |
| <b>Ellison v. Airey</b>             | 580, 705           | —— and Green                                     | 699  |
| —— v. Cookson                       | 647                | <b>Farr v. Newman</b>                            | 616  |
| —— v. Ellison                       | 209                | <b>Farrand and Jackson</b>                       | 439, 508, 617, 673                         |
| <b>Elton ex parte</b>               | 706                | <b>Farrington &amp; Al'. and Sir Edward Bet-</b> | 463  |
| —— and <i>Brown &amp; Ux'</i>       | 494                | tison  | 9  |
| <b>Elwes and Forrest</b>            | 394                | <b>Farrington v. Knightley</b>                   | 44, 327                                    |
| —— v. <i>Maw</i>                    | 508                | —— and <i>Battersbee</i>                         | 727  |
| <b>Elworthy v. Bird</b>             | 386, 672           | <b>Faulder and Harper</b>                        | 116  |
| <b>Emery, ex parte</b>              | 117                | <b>Faure and Miller</b>                          | 380, 561                                   |
| <b>Emery v. England</b>             | 530                | <b>Fausset and Whitfield</b>                     | 301  |
| —— v. <i>Wase</i>                   | 415, 456           | <b>Fawkes and Arthington</b>                     | 572, 723                                   |
| <b>Emes v. Hancock</b>              | 481                | <b>Fawlkner v. Fawlkner</b>                      | 229  |
| <b>England and Eacles</b>           | 116                | <b>Fearnley and Parker</b>                       | 20   |
| <b>England (Bank of) and Dolder</b> | 434                | <b>Feast and Blinkhorn</b>                       | 765  |
| —— and <i>Glynn</i>                 | 472, 700           | <b>Feen v. Harrison</b>                          | 203  |
| —— and <i>Morrice</i>               | 37                 | <b>Feise v. Wray</b>                             | 732  |
| <b>England and Emery</b>            | 530                | <b>Fell and Beaumont</b>                         | 277  |
| <b>English v. Orde</b>              | 454                | <b>Fellowes and Smith</b>                        | 531  |
| <b>Errington and Broughton</b>      | 66                 | <b>Fellows and Jermyn</b>                        | 52   |
| <b>Errissey and West</b>            | 701                | <b>Fenhoulet and Scott</b>                       | 336  |
| <b>Essington and Jesson</b>         | 512                | <b>Fenner's Case</b>                             | 692  |
| <b>Etheringham v. Etheringham</b>   | 441                | <b>Fenwick and Ray</b>                           | 388  |
| <b>Eustace and Earl of Kildare</b>  | 192                | <b>Ferguson v. Dunbar</b>                        | 415  |
| <b>Evans v. Bicknell</b>            | 727                | <b>Fettiplace and Bromley</b>                    | 293  |
| —— and <i>Smith</i>                 | 761                | <b>Fields and Taylor</b>                         | 300, 582                                   |
| —— and <i>Thornhill</i>             | 41                 | <b>Finch v. Finch</b>                            | 20, 647                                    |
| <b>Evelyn v. Evelyn</b>             | 535                | —— and <i>Hornsby</i>                            | 20, 647                                    |
| <b>Everall v. Smalley</b>           | 585                | —— and <i>Nourse</i>                             | 59, 215, 566                               |
| <b>Everett v. Backhouse</b>         | 706                | —— v. (Lord) <i>Winchelsea</i>                   | 219  |
| <b>Evett and Dancer</b>             | 250                | <b>Fines v. Cobb</b>                             | 356  |
| <b>Ewart and Milbourne</b>          | 481                | <b>Fineux and Willis</b>                         | 538  |
| <b>Ewer and Corbet</b>              | 445, 616           | <b>Fingal and De Bathe</b>                       | 209  |
| —— and <i>White</i>                 | 419                | <b>Finney v. Finney</b>                          | 66   |
| <b>Exeter (Lord) and Aston</b>      | 463                | <b>Fish v. Jesson</b>                            | 33, 137                                    |
| —— (Mayor of) and <i>Drake</i>      | 429                | <b>Fitton and Earl of Macclesfield</b>           | 41, 135                                    |
| <b>Eyles and Hooper</b>             | 193                | <b>Fitzer v. Fitzer</b>                          | 47, 491                                    |
| <b>Eyre and Berney</b>              | 463                | <b>Fitzgerald and Smith</b>                      | 149  |
| —— v. <i>Countess of Shaftsbury</i> | 514                | <b>Flanagan v. Flanagan</b>                      | 310  |
| —— and <i>Gower</i>                 | 465                | <b>Fleetwood's (Sir Gerard) Case</b>             | 390  |
| <b>Eyton v. Eyton</b>               | 249, 561           | <b>Fleming and St. John's College</b>            | 720  |
| —— and <i>Rowley</i>                | 209                | <b>Fletcher's Case</b>                           | 88, 545                                    |
| —— and <i>Weld</i>                  | ibid.              | <b>Fletcher v. Ashburner</b>                     | 537  |
|                                     |                    | —— and <i>Robinson</i>                           | 681  |
|                                     |                    | —— v. <i>Sedley</i>                              | 511, 684                                   |
| F.                                  |                    |  |  |
| <b>Fagg's (Sir John) Case</b>       | 701                |  |  |
| <b>Fairebeard v. Bowers</b>         | 277, 491           |  |  |

**THE NOTES OF THE SECOND VOLUME.**

|  |                                     |                                 |                           |
|--|-------------------------------------|---------------------------------|---------------------------|
| <b>Fletcher v. Smiton</b>                  | <b>Page</b><br><b>562</b>           | <b>Freeman v. Parsley</b>       | <b>Page</b><br><b>108</b> |
| <b>—— v. Stone</b>                         | <b>183</b>                          | <b>—— and Stacie's Case</b>     | <b>236</b>                |
| <b>—— v. Fletcher</b>                      | <b>386</b>                          | <b>—— and Thomas</b>            | <b>557, 595</b>           |
| <b>Flight v. Cooke</b>                     | <b>636</b>                          | <b>Freemantle v. Bankes</b>     | <b>647</b>                |
| <b>Floyer and Williams</b>                 | <b>47</b>                           | <b>Freemoult v. Dedire</b>      | <b>483</b>                |
| <b>Fluitt and Plumb</b>                    | <b>727</b>                          | <b>Freke v. Lord Barrington</b> | <b>582</b>                |
| <b>Foley and Cocks</b>                     | <b>383, 517</b>                     | <b>French and Corbyn</b>        | <b>378</b>                |
| <b>—— (Lord) and Codrington</b>            | <b>461, 761</b>                     | <b>—— v. Davies</b>             | <b>66</b>                 |
| <b>—— and Davidson</b>                     | <b>20, 248</b>                      | <b>—— v. Dear</b>               | <b>262</b>                |
| <b>—— and Winnington</b>                   | <b>755</b>                          | <b>—— v. Hobson</b>             | <b>516</b>                |
| <b>Fonnereau and Doe</b>                   | <b>489, 601</b>                     | <b>—— v. Myles</b>              | <b>434</b>                |
| <b>Forbes and Cooper</b>                   | <b>580</b>                          | <b>Frewen v. Relfe</b>          | <b>611</b>                |
| <b>—— v. Moffatt</b>                       | <b>354</b>                          | <b>Frewin v. Charleton</b>      | <b>755</b>                |
| <b>Ford v. Peering</b>                     | <b>463</b>                          | <b>Frogmorton v. Holyday</b>    | <b>562</b>                |
| <b>Forder v. Wade</b>                      | <b>584</b>                          | <b>—— v. Wright</b>             | <b>ibid.</b>              |
| <b>Forrest v. Elwes</b>                    | <b>394</b>                          | <b>Frome and Moth</b>           | <b>564</b>                |
| <b>Forrester v. Dr. Cotten</b>             | <b>582</b>                          | <b>Frost and Jones</b>          | <b>700</b>                |
| <b>—— v. Lord Leigh</b>                    | <b>310</b>                          | <b>Fry v. Porter</b>            | <b>561</b>                |
| <b>Fortescue and Dormer</b>                | <b>724</b>                          | <b>Fullarton and Watts</b>      | <b>680</b>                |
| <b>Forth v. Chapman</b>                    | <b>60, 325</b>                      | <b>Fulwood's Case</b>           | <b>564</b>                |
| <b>Foster v. Cook</b>                      | <b>66</b>                           | <b>Furnesse and St. John</b>    | <b>52</b>                 |
| <b>—— v. Marchant</b>                      | <b>194</b>                          | <b>Furnival v. Crew</b>         | <b>389</b>                |
| <b>—— v. Munt</b>                          | <b>20, 100, 104, 150, 247,</b>      | <b>Fursaker v. Robinson</b>     | <b>625</b>                |
|  | <b>254, 295, 361, 517, 650, 737</b> | <b>Fursor v. Penton</b>         | <b>290, 481</b>           |
| <b>—— v. Frampton</b>                      | <b>203</b>                          | <b>Furzo and Godfrey</b>        | <b>117</b>                |
| <b>Fotherby v. Hartridge</b>               | <b>517</b>                          | <b>Fussell and White</b>        | <b>464</b>                |
| <b>Fothergill v. Kendrick</b>              | <b>751</b>                          |                                 |                           |
| <b>Fotherly and Seymour</b>                | <b>13</b>                           |                                 |                           |
| <b>—— and Wankford</b>                     | <b>202</b>                          |                                 |                           |
| <b>Fouke v. Lewen</b>                      | <b>234, 559, 615, 632,</b>          |                                 |                           |
|  | <b>754</b>                          |                                 |                           |
| <b>Foundling Hospital and Attorney-Ge-</b> |                                     |                                 |                           |
| <b>neral</b>                               | <b>400</b>                          |                                 |                           |
| <b>Fountain and Coke</b>                   | <b>448</b>                          |                                 |                           |
| <b>Fowle v. Freeman</b>                    | <b>456</b>                          |                                 |                           |
| <b>Fowler ex parte</b>                     | <b>262</b>                          |                                 |                           |
| <b>Fox v. Crane</b>                        | <b>5, 182, 380</b>                  |                                 |                           |
| <b>—— v. Hanbury</b>                       | <b>293</b>                          |                                 |                           |
| <b>—— v. Mackreth</b>                      | <b>385</b>                          |                                 |                           |
| <b>Frampton and Foster</b>                 | <b>203</b>                          |                                 |                           |
| <b>Francis and Viner</b>                   | <b>705</b>                          |                                 |                           |
| <b>Franco v. Franco</b>                    | <b>422</b>                          |                                 |                           |
| <b>Frank and Driver</b>                    | <b>530</b>                          |                                 |                           |
| <b>Franklin and Murless</b>                | <b>20</b>                           |                                 |                           |
| <b>—— v. Thornebury</b>                    | <b>225, 343</b>                     |                                 |                           |
| <b>Franklyn v. Countess of Burlington</b>  | <b>638</b>                          |                                 |                           |
| <b>Frazer &amp; Al'. v. Moor</b>           | <b>377, 419</b>                     |                                 |                           |
| <b>—— and Thomas</b>                       | <b>481</b>                          |                                 |                           |
| <b>Freake v. Lee</b>                       | <b>106</b>                          |                                 |                           |
| <b>Frecker and Norton</b>                  | <b>226</b>                          |                                 |                           |
| <b>Frederick v. Aynscomb</b>               | <b>47</b>                           |                                 |                           |
| <b>—— v. Frederick</b>                     | <b>5, 98</b>                        |                                 |                           |
| <b>Freeman and Bickham</b>                 | <b>406</b>                          |                                 |                           |
| <b>—— and Edwards</b>                      | <b>205</b>                          |                                 |                           |
| <b>—— and Fowle</b>                        | <b>456</b>                          |                                 |                           |
| <b>—— v. Freeman</b>                       | <b>251</b>                          |                                 |                           |

# INDEX OF CASES REFERRED TO BY

|  | Page                    |   | Page               |
|--|-------------------------|---|--------------------|
| <i>Geering and Weatherall</i>              | 194                     | <i>Goodair and Barker</i>                   | 293                |
| <i>Germain v. Orchard</i>                  | 684                     | <i>Goodfellow v. Burchett</i>               | 556, 646, 710      |
| <i>Gerrard and Cook</i>                    | 461                     | <i>Goodman and Dallorne</i>                 | 196                |
| — <i>v. Gerrard</i>                        | 641, 761                | <i>Goodrich and Sheddon</i>                 | 582                |
| — <i>and Soule</i>                         | 389                     | <i>Goodright v. Allen</i>                   | 562                |
| <i>Gibbons and Cliffe</i>                  | 562                     | — <i>v. Opey</i>                            | 522                |
| <i>Gibbs v. Barnardiston</i>               | 332                     | — <i>v. Stocker</i>                         | 105, 562           |
| — <i>and Davis</i>                         | 43, 196                 | — <i>v. Wright</i>                          | 722, 733           |
| <i>Gibson and Benson</i>                   | 119                     | <i>Goodwin and Grise</i>                    | 319                |
| — <i>and Cole</i>                          | 380, 446, 561           | <i>Goodwyn v. Goodwyn</i>                   | 562, 705           |
| — <i>v. Kinven</i>                         | 513, 665                | <i>Gorge and Pye</i>                        | 755                |
| — <i>v. Lord Mountford</i>                 | 20, 209                 | <i>Gosling v. Dorney</i>                    | 248, 302, 406      |
| — <i>v. Rogers</i>                         | 209                     | <i>Goss v. Tracy</i>                        | 9, 472             |
| — <i>v. Whitacre</i>                       | 37                      | <i>Gould and Thayer</i>                     | 61                 |
| — <i>and Price</i>                         | 354                     | <i>Gourlay v. Somerset</i>                  | 415                |
| <i>Gifford ex parte</i>                    | 393                     | <i>Gower v. Eyre</i>                        | 465                |
| — <i>v. Goldsey</i>                        | 667                     | <i>Gower v. Grosvenor</i>                   | 601                |
| <i>Gifford and Norfolk</i>                 | 91                      | — <i>v. Mead</i>                            | 190                |
| <i>Gilbert v. Boorman</i>                  | 705                     | — <i>and Reeves</i>                         | 562                |
| — <i>and Burtenshaw</i>                    | 721                     | <i>Graham and Windham</i>                   | 530                |
| <i>Gilborne and Brownsmith</i>             | 693                     | <i>Grandison v. Pitt</i>                    | 740                |
| <i>Giles v. Hooper</i>                     | 307                     | <i>Grant and Barlow</i>                     | 138, 236, 431      |
| <i>Ginger v. White</i>                     | 451                     | — <i>and Inglis</i>                         | 162                |
| <i>Girling v. Lee</i>                      | 106, 134, 249, 406, 764 | <i>Granville (Lady) v. Duchess of Beau-</i> |                    |
| <i>Gladding v. Yapp</i>                    | 20                      | — <i>fort</i>                               | 20, 254            |
| <i>Glaister v. Hewer</i>                   | 491                     | <i>Graves v. Boyle</i>                      | 705                |
| <i>Glasbrook and Woodward</i>              | 620                     | — <i>&amp; Al. and Ratcliffe</i>            | 548                |
| <i>Glass and Jerningham</i>                | 614                     | <i>Gray v. Chiswell</i>                     | 481, 706           |
| <i>Glenorchy (Lord) v. Bosville</i>        | 526, 739                | — <i>v. Chaplin</i>                         | 422                |
| <i>Glover v. Black</i>                     | 718                     | <i>Greatorex v. Cary</i>                    | 66                 |
| <i>Glyn and Harding</i>                    | 116, 381, 421, 465, 705 | <i>Greaves and James</i>                    | 700                |
| <i>Glynn v. Bank of England</i>            | 472, 700                | <i>Green v. Farmer</i>                      | 699                |
| <i>Godbolt and White</i>                   | 434                     | — <i>on dem. of Crew v. King</i>            | 120                |
| <i>Goddard v. Keate</i>                    | 276                     | — <i>and Pamplin</i>                        | 47                 |
| <i>Goddart v. Garrett</i>                  | 11, 716, 718            | — <i>v. Stephens</i>                        | 526                |
| <i>Godfrey v. Chadwell</i>                 | 663                     | <i>Greenbank and Hearle</i>                 | 465, 535, 537, 582 |
| — <i>v. Davis</i>                          | 705                     | <i>Greenfield v. Reynail</i>                | 262                |
| — <i>v. Furzo</i>                          | 117                     | <i>Greenough and Barrow</i>                 | 506                |
| — <i>and Moore</i>                         | 388                     | <i>Greenville and Lord Huntington</i>       | 271, 701           |
| — <i>and Neuman</i>                        | 380                     | <i>Gresham and Woodyer</i>                  | 195                |
| <i>Godin &amp; Al. v. London Assurance</i> | 117                     | <i>Gresley v. Addersley</i>                 | 41                 |
| <i>Godolphin (Lord) and Duke of Marl-</i>  |                         | <i>Gretton v. Hayward</i>                   | 528                |
| — <i>borough</i>                           | 465, 511                | <i>Grey and Basse</i>                       | 584                |
| <i>Godwin v. Kilsha</i>                    | 499                     | <i>Grey's Case</i>                          | 336                |
| — <i>v. Munday</i>                         | 75                      | <i>Griffin v. Archer</i>                    | 380                |
| — <i>v. Winsmore</i>                       | 584, 585                | <i>Griffith and Wood</i>                    | 25                 |
| <i>Godsall v. Boldero</i>                  | 11                      | — <i>and Gardiner</i>                       | 401                |
| <i>Golding and Sanky</i>                   | 386                     | <i>Griffiths v. Vere</i>                    | 88                 |
| <i>Goldschmidt and Deffis</i>              | 705                     | <i>Grills and Hussey</i>                    | 499, 598           |
| <i>Goldsey and Gifford</i>                 | 667                     | <i>Grimmett v. Grimmett</i>                 | 454                |
| <i>Goldsmid v. Goldsmid</i>                | 97, 257, 261, 710       | <i>Grimstone v. Lord Bruce</i>              | 366                |
| <i>Goldwire and Legg</i>                   | 705                     | <i>Grise v. Goodwin</i>                     | 319                |
| <i>Good v. Blewitt</i>                     | 422                     | <i>Groome ex parte</i>                      | 662                |
|  |                         | <i>Grosvenor and Gower</i>                  | 601                |

# THE NOTES OF THE SECOND VOLUME.

|                                   | Page                 |                                | Page                    |
|-----------------------------------|----------------------|--------------------------------|-------------------------|
| Grosvenor v. Hallum               | 20                   | Harborough (Lord) and Sherrard | 20                      |
| Grove and Pearce                  | 434                  | Hardcastle and Robinson        | 80                      |
| Grubham and Stone                 | 727                  | ——— and Sparrow                | 241, 680                |
| Grunsden and Cromwell             | 435                  | Hardham v. Roberts             | 165, 265, 625           |
| Grute v. Locroft                  | 63                   | Harding v. Edge                | 37, 57, 62, 89          |
| Gudgeon and Ramsden               | 375                  | ——— v. Glyn                    | 116, 381, 421, 465, 705 |
| Gugleman v. Dupont                | 85                   | ——— and Maw                    | 170                     |
| Gulliver v. Wickett               | 580                  | ——— v. Salkill                 | 147                     |
| Gundry v. Baynard                 | 342                  | ——— and Wynne                  | 154                     |
| Guth v. Guth                      | 47, 386              | Hardwicke and Bird             | 244, 444                |
| H.                                |                      | Hardy and Hall                 | 25                      |
| Habergham and Stansfield          | 572                  | Hare and Ruscombe              | 689                     |
| ——— v. Vincent                    | 9, 80, 243, 499, 598 | Harman v. Van Hatton           | 269                     |
| Hackett and Lord Dungannon        | 395                  | Harmood v. Oglander            | 680                     |
| Hadley v. Clarke & Al'.           | 243                  | Harper and Jenner              | 598                     |
| Hale v. Hale                      | 105, 580, 711        | Harper and Faulder             | 727                     |
| Hales and James                   | 567                  | Harrington and Brace           | 692                     |
| ——— and Syngé                     | 526                  | ——— v. Harte                   | 465                     |
| Halfpenny v. Ballett              | 35, 627              | Harris v. Daubeny              | 434                     |
| ——— and Macdowell                 | 753                  | ——— v. Harris                  | 392                     |
| Halifax's (Lord) Case             | 290                  | ——— and Howard                 | ibid.                   |
| Hall v. Carter                    | 761                  | ——— v. Howell                  | 41                      |
| ——— and Darcy                     | 66                   | Harrison v. Cage               | 181                     |
| ——— v. Dench                      | 496, 721, 722        | ——— and Feen                   | 765                     |
| ——— a Hall                        | 98, 635              | ——— and Haughton               | 705                     |
| ——— v. Hardy                      | 25                   | ——— v. Jackson                 | 278                     |
| ——— and Pinkney                   | 278                  | ——— v. Ridley                  | 549                     |
| ——— v. Potter                     | 446                  | ——— v. Southcote               | 463                     |
| ——— v. Thomas                     | 509                  | ——— v. Style                   | 85                      |
| ——— v. Winckfeild                 | 751                  | Harrop and Buckmaster          | 464                     |
| Hallett and Tolson                | 643                  | Hart and Moore                 | 35, 202, 322            |
| Hallum and Grosvenor              | 20                   | Harte and Harrington           | 465                     |
| Halsam ex parte                   | 614                  | Hartopp v. Hartopp             | 647                     |
| Hamilton and Royle                | 108                  | Hartpoole and Brine            | 41                      |
| Hamilton (Duke of) and Lord Mohun | 91, 405              | Hartridge and Fotherby         | 517                     |
| ——— v. Mordaunt                   | 535                  | Hartwell v. Chitters           | 763, 764                |
| Hammond and Roach                 | 381                  | Harvey v. Ashley               | 366, 449, 605           |
| ——— and Russell                   | 491                  | ——— and Churchman              | 761                     |
| Hamond and Hutchinson             | 20                   | ——— v. Mountague               | 113, 184, 217           |
| Hampden v. Brewer                 | 309                  | Harwood and Jacomb             | 616                     |
| Hampson and Cotterel              | 445                  | ——— and Skipp                  | 293                     |
| Hanbury and Davenport             | 108                  | Haslewood v. Pope              | 302                     |
| ——— and Deering                   | 59, 686              | Hastings & Al' and Tooke       | 483                     |
| ——— and Fox                       | 293                  | Hatt and Brotherton            | 610                     |
| ——— and Neal                      | 36                   | Haughton v. Harrison           | 705                     |
| Hancock and Elliot                | 229, 506             | Hawes v. Cony                  | 461                     |
| ——— and Emes                      | 481                  | ——— v. Warner                  | 91, 142                 |
| ——— and Galton                    | 66                   | Hawke and Langley              | 249                     |
| Hancox v. Abbey                   | 719                  | Hawker v. Buckland             | 562                     |
| Hand and Haws                     | 472, 700             | Hawkins v. Chappel             | 20                      |
| Hanmer's Case and Leigh           | 336                  | ——— v. Leigh                   | 81                      |
| Hanson v. Gardiner                | 301                  | ——— v. Taylor                  | 30, 445, 526, 616       |
|                                   |                      | Haws v. Hand                   | 472, 700                |
|                                   |                      | Hay and Dodson                 | 537                     |
|                                   |                      | Hayes and Warner               | 757                     |
|                                   |                      | Haymer v. Haymer               | 481                     |

# INDEX OF CASES REFERRED TO BY

|   | Page               |                               | Page                  |
|---|--------------------|-------------------------------|-----------------------|
| Haynes v. Mico                          | 498                | Higham v. Baker               | 20                    |
| Hayter v. Rod                           | 196, 350           | Highway v. Banner             | 704                   |
| Hayward v. Angell                       | 473                | Higman and Roberts            | 705                   |
| — and Stephenson                        | 511                | Hill v. Atkins                | 205                   |
| — and Gretton                           | 528                | — v. Barclay                  | 104                   |
| H—t's (Mr.) Case                        | 471                | — v. Caillovel                | 692                   |
| Head v. Head                            | 47, 386            | — and Caldcott                | 447                   |
| — and March                             | 191                | — v. Chapman                  | 705                   |
| — v. Teynham                            | 36                 | — and Comber                  | 546                   |
| Heard and Bates                         | 379                | — v. Bishop of London         | 20                    |
| Hearle v. Greenbank                     | 465, 535, 537, 582 | — v. Simpson                  | 76, 445, 616          |
| Heath and Blaxton                       | 63                 | — v. Smith                    | 425                   |
| — and Oke                               | 378, 522           | — v. Spencer                  | 188                   |
| Heathcote and Brown                     | 429, 564, 565, 566 | — & Ux'. v. Wiggett           | 98                    |
| Heathe v. Heathe                        | 705                | — and Atkins                  | 905                   |
| Hebblethwaite v. Cartwright             | 761                | — v. Simpson                  | 445                   |
| Hedges v. Cardonnel                     | 464                | Hills and Jenkins             | 7                     |
| Hedworth v. Primate                     | 43, 145            | Hilton and Windsor            | 747                   |
| Heelis and Attorney-General             | 422                | Hinchcliffe v. Hinchcliffe    | 299                   |
| Hele v. Bond                            | 511                | Hincks v. Nelthorpe           | 47, 386               |
| Hellier and Cookes                      | 380, 557, 561      | Hindmarsh and Addison         | 747                   |
| Heming and Orde                         | 377, 419           | Hinsworth Hospital and Watson | 747                   |
| Hemsworth Hospital and Watson           | 597                | Hinton v. Hinton              | 45, 63, 429, 566, 582 |
| Heneage and Barlow & Ux'.               | 476                | — v. Toye & Al'.              | 319                   |
| — v. Hunlocke                           | 526                | Hitchcock v. Sedgwick         | 30, 81, 97, 271       |
| Henley (Sir Robert) and Lee             | 623                | Hitchin v. Hitchin            | 66, 366               |
| Hennell v. Kelland                      | 437                | Hoare v. Parker               | 701                   |
| Herbert v. Lowas                        | 700                | Hobart v. Lady Suffolk        | 20, 247               |
| — and Lord Tenham                       | 301                | Hobbs v. Norton               | 151, 240, 283         |
| — c. Dean and Chapter of Westminster    | 386                | Hobson and French             | 516                   |
| Hereford (Lady) and Blois & Al'.        | 69, 402            | Hudges v. Isaac               | 705                   |
| Herne v. Herne                          | 557                | — and Legard                  | 636                   |
| Heron v. Heron                          | 277, 434           | — v. Middleton                | 545                   |
| Hertford (Lord and Lady) and Lord Brook | 553                | Hodgkinson v. Star            | 562                   |
| Hervey v. Hervey                        | 80                 | Hodgson v. Hodgson            | 647                   |
| Haseltine v. Heseltine                  | 748                | — v. Loy                      | 903                   |
| Hewer and Glaister                      | 491                | — and Pringle                 | 491                   |
| Hewitt and Brooke                       | 194                | — v. Rawson                   | 95                    |
| Hewitt v. Ireland                       | 545                | Hodge and Walter              | 535                   |
| Heycock v. Heycock                      | 421                | Hodson and Wallis             | 580                   |
| Heygate and Hulme                       | 209                | Hogan v. Jackson              | 562                   |
| Heyward v. Lomax                        | 607                | Holcroft (Lady) v. Smith      | 561                   |
| Hickman and Attorney General            | 378, 454           | Hole and Thomas               | 706                   |
| — and Ledsome                           | 378                | — & Ux'. and Dubois           | 105                   |
| Hide and Lomax                          | 536, 601, 663      | Halford v. Platt              | 343                   |
| — and Mead                              | 112, 183, 569      | Holles v. Wyse                | 317                   |
| — v. Parrot                             | 59                 | Hollins and Soresby           | 454                   |
| Hiern v. Mill                           | 385                | Hollis v. Edwards             | 456                   |
| Higden v. Williamson                    | 564                | Hollister and Bartlett        | 705                   |
| Higford and Cox                         | 532                | Holmeden and Lomax            | 36, 546, 661          |
| Higgins v. Dowler                       | 698                | Hollaway and Marshall         | 325                   |
| Higgs and Brown                         | 88, 108, 116, 465  | — v. Millard                  | 327                   |
|   |                    | Holmes v. Coghill             | 319, 465              |
|   |                    | — and Doe                     | 105                   |

# THE NOTES OF THE SECOND VOLUME.

|                                    | Page          |                                    | Page                        |
|------------------------------------|---------------|------------------------------------|-----------------------------|
| Holt v. Holt                       | 5, 215        | Hughes v. Hughes                   | 705                         |
| Holt (Ch. Just.) v. Mill           | 29            | —— and Lord Penrhyn                | 41                          |
| Holtham v. Ryland                  | 481           | Hull and Rich                      | 582                         |
| Holyday and Frogmorton             | 562           | Hulme v. Heygate                   | 209                         |
| Honeywood and Annand               | 556           | Hume v. Rundell                    | 528                         |
| Honor and Crosseing                | 483           | Humberston v. Humberston           | 451                         |
| —— v. Honor                        | 705           | Humphrey v. Tayleur                | 611                         |
| Honywood and Bennett               | 381, 580      | Hungerford and Countess of Bristol | 20                          |
| Hook and May                       | 45            | —— and Earl of Bristol             | 29, 712                     |
| —— v. Taylor                       | 564, 687, 691 | Hunlocke and Heneage               | 526                         |
| Hooke and Drury                    | 392, 446, 588 | Hunsden v. Cheyney                 | 133, 370, 466               |
| Hooper and Clinton                 | 689           | Hunt and Ellis                     | 203                         |
| —— v. Eyles                        | 193           | —— and Pitt                        | 18, 191                     |
| —— and Giles                       | 307           | —— and Price                       | 389                         |
| —— and Nichols                     | 88            | Hunter and Bowker                  | 361                         |
| Hope and Tyrrell                   | 429           | —— and Creuze                      | 392                         |
| Hopegood and Burdet                | 580           | —— and Dorson                      | 250                         |
| Hopewell v. Ackland                | 562           | —— and Pulsford                    | 705                         |
| Hopton v. Dryden                   | 62            | —— and Wright                      | 757                         |
| Horn and Wright                    | 522           | Huntington (Lord) v. Greenville    | 271, 701                    |
| Horner and Chaplin                 | 350           | Hurlock and Jackson                | 209                         |
| Hornsby v. Finch                   | 20, 647       | Husbands v. Husbands               | 115, 257, 299, 646, 681     |
| —— and Sympson                     | 20, 209       | Hussey v. Grills                   | 499, 598                    |
| Horrell v. Waldron                 | 47            | —— & Al. and White                 | 262                         |
| Horseman and Newland               | 541           | Hutchinson and Atkinson            | 88                          |
| Horsepool v. Watson                | 108           | —— v. Hamond                       | 20                          |
| Horsley v. Chaloner                | 705           | —— v. Massareene                   | 85                          |
| Horton v. Horton                   | 20            | Hutton v. Simpson                  | 20, 139, 209, 519           |
| Herwood v. Schmedes                | 219           | Huxtep v. Brooman                  | 562                         |
| —— and Underhill                   | 481           | Hyde v. Cooth                      | 80                          |
| Hosier v. Read                     | 561           | —— v. Hyde                         | 469                         |
| Hoskins v. Hoskins                 | 257           | —— v. Parrott                      | 245                         |
| —— and Pagett                      | 118           | —— and Sagittary                   | 36, 183, 261, 273, 709, 764 |
| —— and Woodhouse                   | 755           | Hyde's (Commissary) Wife and Bell  | 614                         |
| Hoste v. Pratt                     | 705           | Hyley v. Hyley                     | 461, 562                    |
| Hotham & Al. v. East India Company | 212           | Hylton v. Morgan                   | 463                         |
| Hovenden v. Annesley               | 369           |                                    |                             |
| Houlditch and Stephenson           | 64, 292       |                                    |                             |
| House and Archbishop of Canterbury | 642           |                                    |                             |
| Howard v. Harris                   | 392           |                                    |                             |
| —— and Duke of Norfolk             | 557, 669, 694 |                                    |                             |
| —— v. Papera                       | 249           |                                    |                             |
| —— and Earl of Suffolk             | 463           |                                    |                             |
| Howe v. Howe                       | 20            |                                    |                             |
| Howel v. Price                     | 757           |                                    |                             |
| Howell and Harris                  | 41            |                                    |                             |
| —— v. Price                        | 112, 183, 302 |                                    |                             |
| —— v. Waldron                      | 47            |                                    |                             |
| Howman v. Corie                    | 56, 69, 502   |                                    |                             |
| Huddleston and Bigland             | 582           |                                    |                             |
| Hudson v. Hudson                   | 514           |                                    |                             |
| —— and Otway                       | 324, 537, 704 |                                    |                             |

# INDEX OF CASES REFERRED TO BY

|   | Page               |                              | Page          |
|---|--------------------|------------------------------|---------------|
| <i>Isaac and Hodges</i>                   | 705                | <i>Jesson v. Jesson</i>      | 261           |
| — <i>v. Isaac</i>                         | <i>ibid.</i>       | <i>Jessop v. King</i>        | 41            |
| <i>Ive v. Ashe</i>                        | 308                | <i>Jevon v. Bush</i>         | 561           |
| <i>Ivie v. Ivie</i>                       | 463                | — <i>and Noel</i>            | 366           |
| <b>J.</b>                                 |                    |                              |               |
| <i>Jackman v. Mitchell</i>                | 71                 | <i>Jewson v. Moulson</i>     | 271, 429, 564 |
| <i>Jackson and Dorrington</i>             | 123                | <i>Johnes and Lloyd</i>      | 757           |
| — <i>v. Duehaire</i>                      | 71                 | <i>Johnson and Blake</i>     | 307           |
| — <i>v. Farrand</i>                       | 439, 508, 617, 673 | — <i>and Dulwich College</i> | 47            |
| — <i>and Harrison</i>                     | 278                | — <i>v. Kirman</i>           | 562           |
| — <i>and Hogan</i>                        | 562                | — <i>and Legard</i>          | 386           |
| — <i>v. Hurlock</i>                       | 209                | — <i>v. Milksopp</i>         | 121           |
| — <i>and Innes</i>                        | 689                | — <i>and Nott</i>            | 348           |
| — <i>v. Kelly</i>                         | 522                | — <i>v. Ogilby</i>           | 129, 638      |
| — <i>v. Lomas</i>                         | 71                 | <i>Jolliff and Crew</i>      | 99            |
| — <i>and Madox</i>                        | 195                | <i>Jolliffe and Mertins</i>  | 385           |
| — <i>and Purdew</i>                       | 402                | <i>Jones and Burke</i>       | 142           |
| <i>Jacob and Worrall</i>                  | 386, 672           | — <i>v. Frost</i>            | 700           |
| <i>Jacobson v. Williamson</i>             | 566                | — <i>v. Jones</i>            | 700           |
| <i>Jacomb v. Harwood</i>                  | 616                | — <i>and Lee</i>             | 562           |
| <i>Jacques and Eaton</i>                  | 276                | — <i>&amp; Ux' v. Marsh</i>  | 44            |
| <i>James v. Dean</i>                      | 209                | — <i>&amp; Ux' v. Martin</i> | 202, 277      |
| — <i>v. Greaves</i>                       | 700                | — <i>v. Mitchell</i>         | 20            |
| — <i>v. Hales</i>                         | 567                | — <i>and Morphet</i>         | 456           |
| — <i>v. Rich</i>                          | 262                | — <i>&amp; Al' v. Perry</i>  | 564           |
| <i>Jane and Paradyne</i>                  | 243                | — <i>v. Pope</i>             | 236           |
| <i>Janssen and Earl of Chesterfield</i>   | 172                | — <i>and Reynolds</i>        | 519           |
| <i>Jarvis &amp; Ux' v. Duke</i>           | 223, 294, 573      | — <i>v. Simpson</i>          | 323           |
| <i>Jee v. Thurlow</i>                     | 386                | — <i>v. Smith</i>            | 699           |
| <i>Jeffery and Roe</i>                    | 325                | — <i>v. Strafford</i>        | 142           |
| <i>Jeffereys and Bromley</i>              | 339                | — <i>and Taylor</i>          | 471, 491      |
| <i>Jeffries and Bromley</i>               | 456                | — <i>v. Westcomb</i>         | 31, 139       |
| <i>Jekyl and Elliot</i>                   | 545                | <i>Jordan v. Savage</i>      | 63            |
| — <i>and Wind</i>                         | 137, 209, 538, 564 | <i>Jory v. Cox</i>           | 317, 401      |
| <i>Jenkins v. Hills</i>                   | 7                  | <i>Joyner and Medlicot</i>   | 604           |
| — <i>v. Kemish</i>                        | 364                | <i>Judson and Nicholls</i>   | 299           |
| — <i>v. Keymes</i>                        | 306                | <i>Juxon v. Brian</i>        | 85            |
| <i>Jenner v. Harper</i>                   | 598                | <i>Judd v. Pratt</i>         | 528           |
| <i>Jennings v. Merton College</i>         | 434                | <b>K.</b>                    |               |
| — <i>v. Selleck</i>                       | 20                 | <i>Kaines v. Nightley</i>    | 619           |
| — <i>and Turner</i>                       | 98, 277            | <i>Karver and Baldwin</i>    | 705           |
| <i>Jermyn v. Fellows</i>                  | 531                | <i>Kay v. Townsend</i>       | 709           |
| <i>Jerningham v. Glass</i>                | 614                | <i>Keane v. Roberts</i>      | 445, 616      |
| <i>Jerrard v. Saunders</i>                | 701                | <i>Keate and Goddard</i>     | 276           |
| <i>Jersey (Countess of) and St. Amand</i> | 327, 511           | <i>Keeley and Winch</i>      | 429           |
| <i>Jervis v. Bruton</i>                   | 234                | <i>Keeling v. Brown</i>      | 709           |
| <i>Jervois v. Duke</i>                    | 358, 453           | <i>Keighley and Malim</i>    | 116           |
| <i>Jervoise v. Northumberland</i>         | 526                | <i>Kelland and Hennell</i>   | 437           |
| <i>Jessep and Doe</i>                     | 389                | <i>Kelly and Jackson</i>     | 522           |
| <i>Jesson v. Essington</i>                | 512                | — <i>v. Pawlett</i>          | 512           |
| — <i>and Fish</i>                         | 33, 137            | <i>Kemeys and Denn</i>       | 389           |
|   |                    | <i>Kemish and Jenkins</i>    | 364           |

**THE NOTES OF THE SECOND VOLUME.**

|   |              |                                     |                    |
|---|--------------|-------------------------------------|--------------------|
| <b>Kemp &amp; Al.' (Lady) and case of the poor in Eastham</b> | 747          | <b>Knight v. Knight</b>             | 508, 673           |
| <b>Kemp and Butcher</b>                                       | 66           | <b>Knightly and Farrington</b>      | 9                  |
| <b>— v. Crewes</b>  | 131          | <b>Knipe and Aveling</b>            | 456                |
| <b>Kempstead and Arnold</b>                                   | 66           | <b>Knollys v. Alcock</b>            | 209                |
| <b>Kemys and Thomas</b>                                       | 91           | <b>Kruger v. Wilcox</b>             | 117                |
| <b>Kendrick and Fothergill</b>                                | 751          | <b>Kuffin and Roberts</b>           | 276                |
| <b>Kennegal and Reeck</b>                                     | 506          |                                     |                    |
| <b>Kennerdale and Bradburn</b>                                | 320          |                                     |                    |
| <b>Kennerley and Swaine</b>                                   | 703          |                                     |                    |
| <b>Kent and Dunch</b>   | 663          |                                     |                    |
| <b>— v. Kent</b>  | 219          |                                     |                    |
| <b>Kenworthy v. Bate</b>                                      | 80           |                                     |                    |
| <b>— and Woollam</b>  | 562          |                                     |                    |
| <b>Kerridge and Bransby</b>                                   | 9, 700       |                                     |                    |
| <b>Kett and Back</b>  | 528          |                                     |                    |
| <b>— and Monger</b>   | 71           |                                     |                    |
| <b>Kettleby v. Atwood</b>                                     | 55, 537, 562 |                                     |                    |
| <b>Kew v. Rouse &amp; Ux'.</b>                                | 47, 323, 430 |                                     |                    |
| <b>Key v. Bradshaw</b>  | 216          |                                     |                    |
| <b>Keynes and Jenkins</b>                                     | 306          |                                     |                    |
| <b>Kidder and Rider</b>                                       | 491          |                                     |                    |
| <b>Kidgell and Brewster</b>                                   | 307          |                                     |                    |
| <b>Kidney v. Coussmaker</b>                                   | 327          |                                     |                    |
| <b>Kilburne and Theebridge</b>                                | 43           |                                     |                    |
| <b>Kildare (Earl of) v. Eustace</b>                           | 192          |                                     |                    |
| <b>Killet and Dawson</b>                                      | 666          |                                     |                    |
| <b>Kilsha and Godwin</b>                                      | 499          |                                     |                    |
| <b>Kilvington and Barstow</b>                                 | 705          |                                     |                    |
| <b>Kime and Luddington</b>                                    | 545          |                                     |                    |
| <b>Kinaston v. Clarke</b>                                     | 134          |                                     |                    |
| <b>Kine v. Balfe</b>  | 456          |                                     |                    |
| <b>King ex parte</b>  | 286, 293     |                                     |                    |
| <b>— v. Denison</b>   | 20           |                                     |                    |
| <b>— v. Dupine</b>  | 491          |                                     |                    |
| <b>— and Green on dem. of Crew</b>                            | 120          |                                     |                    |
| <b>— and Jessop</b>   | 41           |                                     |                    |
| <b>— v. King</b>  | 680          |                                     |                    |
| <b>— v. Lacy</b>  | 429          |                                     |                    |
| <b>— v. Melling</b>   | 325          |                                     |                    |
| <b>The King v. Lady Broughton</b>                             | 174          |                                     |                    |
| <b>— v. Sir Tho. Culpepper</b>                                | 604          |                                     |                    |
| <b>— and Lord Hunsdon v. Arundel</b>                          | 380          |                                     |                    |
| <b>Kingdon v. Bridges</b>                                     | 79, 683      |                                     |                    |
| <b>Kingsly and Roberts</b>                                    | 705          |                                     |                    |
| <b>Kingsman v. Kingsman</b>                                   | 461          |                                     |                    |
| <b>Kingston (Dutchess of) and Meadows</b>                     | 700          |                                     |                    |
| <b>Kinnaston and Burnett</b>                                  | 63, 69, 191  |                                     |                    |
| <b>Kinton and Duke of Devon</b>                               | 320          |                                     |                    |
| <b>Kinven and Gibson</b>                                      | 513, 665     |                                     |                    |
| <b>Kirkham v. Smith</b>                                       | 757          |                                     |                    |
| <b>Kirman and Johnson</b>                                     | 562          |                                     |                    |
| <b>Kitchin and Brewster</b>                                   | 307          |                                     |                    |
|   |              | <b>L.</b>                           |                    |
|   |              | <b>Lacy and King</b>                | 429                |
|   |              | <b>Lad and Norton's Case</b>        | 562                |
|   |              | <b>Ladbroke and Tompkyns</b>        | 277                |
|   |              | <b>Lake v. Cansfield</b>            | 47                 |
|   |              | <b>Lambert and D'Aquila</b>         | 203                |
|   |              | <b>— and Dicks</b>                  | 20                 |
|   |              | <b>— and Eeles</b>                  | 273                |
|   |              | <b>Laming and Doe</b>               | 325                |
|   |              | <b>Lampett's Case</b>               | 564                |
|   |              | <b>Lamplugh v. Lamplugh</b>         | 20                 |
|   |              | <b>— v. Smith</b>                   | 16                 |
|   |              | <b>Lancaster and Lovel</b>          | 121                |
|   |              | <b>Lancy v. Fairechild</b>          | 273                |
|   |              | <b>Land v. Devaynes</b>             | 748                |
|   |              | <b>Lander and Lloyd</b>             | 380                |
|   |              | <b>Landsdown's (Lord) Case</b>      | 209                |
|   |              | <b>Lane v. Nicholls</b>             | 395                |
|   |              | <b>Langford v. Pitt</b>             | 209, 679           |
|   |              | <b>Langham v. Nenny</b>             | 562                |
|   |              | <b>— v. Sandford</b>                | 20                 |
|   |              | <b>Langley v. Hawks</b>             | 249                |
|   |              | <b>Langston v. Blackmore</b>        | 80                 |
|   |              | <b>Lansdowne v. Lansdowne</b>       | 153                |
|   |              | <b>Lant v. Crisp</b>                | 41                 |
|   |              | <b>Large and Barnard</b>            | 755                |
|   |              | <b>Lassells v. Lord Cornwallis</b>  | 319                |
|   |              | <b>Laundy v. Williams</b>           | 199                |
|   |              | <b>Lawrence v. Lawrence</b>         | 405                |
|   |              | <b>Lawrenson v. Butler</b>          | 415, 456           |
|   |              | <b>Lawson and Danby</b>             | 91                 |
|   |              | <b>— and Nightingale</b>            | 667                |
|   |              | <b>Lawton v. Lawton</b>             | 508                |
|   |              | <b>— and Townsend</b>               | 755                |
|   |              | <b>Laycock and Shuttleworth</b>     | 177, 207, 286, 699 |
|   |              | <b>Layer and Cotter</b>             | 5                  |
|   |              | <b>Leake v. Leake</b>               | 710                |
|   |              | <b>— v. Robinson</b>                | 705                |
|   |              | <b>Lechmere v. Earl of Carlisle</b> | 228, 296, 299, 322 |
|   |              | <b>— v. Lechmere</b>                | 296                |
|   |              | <b>Ledsome v. Hickman</b>           | 378                |
|   |              | <b>Lee ex parte</b>                 | 692                |
|   |              | <b>— and Abbott</b>                 | 228                |
|   |              | <b>— v. D'Aranda</b>                | 299                |



# INDEX OF CASES REFERRED TO BY

|                                   | Page                            |                                   | Page            |
|-----------------------------------|---------------------------------|-----------------------------------|-----------------|
| 'Lee and Freake                   | 106                             | Lloyd and Attorney General        | 743             |
| — and Girling                     | 106, 134, 249, 406, 764         | — v. Baldwin                      | 7               |
| — v. Sir Robert Henley            | 623                             | — and Batty                       | 16, 27, 73, 122 |
| — v. Jones                        | 562                             | — v. Johnes                       | 757             |
| — and Wallwyn                     | 701                             | — v. Lander                       | 380             |
| Legard v. Hodges                  | 636                             | — v. Spillet                      | 20, 91, 480     |
| — v. Johnson                      | 386                             | Lock v. Lock                      | 36, 667         |
| Legastick v. Cowne                | 142                             | Lockey and Bird                   | 378             |
| Legate v. Sewell                  | 307                             | — v. Lockey                       | 456             |
| Legg v. Goldwire                  | 705                             | Lockyer and Dickenson             | 445             |
| Legriel v. Barker                 | 143                             | Locroft and Grute                 | 63              |
| Le Hooke and Mergrave             | 286                             | Logan and Mac Adam                | 465             |
| Leigh and Aspinwall               | 153                             | Lomas and Jackson                 | 71              |
| — (Lord) and Forrester            | 310                             | Lomax and Heyward                 | 607             |
| — and Hanmer's Case               | 336                             | — v. Hide                         | 536, 601, 663   |
| — and Hawkins                     | 81                              | — v. Holmeden                     | 36, 546, 661    |
| — and Lutkins                     | 44, 310, 350                    | London Assurance Company and God- |                 |
| — and Stanley                     | 601                             | in & Al'.                         | 117             |
| Leman v. Alie                     | 463                             | London (Bishop of) and Hill       | 20              |
| Lemon v. Lemon                    | 366                             | — v. Web                          | 739             |
| Le Neve v. Le Neve                | 575                             | London (City of) v. Garway        | 340             |
| Lenthall and Burford Corporation  | 747                             | Long v. Long                      | 582             |
| Leonard and Atkinson              | 299                             | — and Martin                      | 88              |
| Leppingwell and Baddeley          | 562                             | — and Prescott                    | 705             |
| Leslie v. Devonshire              | 20                              | — and Reeve                       | 579             |
| Lethulier and Bretton             | 378, 706                        | Lord Keeper v. Wyld               | 701             |
| Levet v. Needham                  | 66, 468                         | Love v. Chadwick                  | 666             |
| Lewen and Fouke                   | 234, 559, 615, 632, 754         | Loveacre v. Blight                | 562             |
| Lewin & Al' v. East India Company | 212                             | Lovel v. Lancaster                | 121             |
| Lewis v. Chase                    | 71, 603                         | Lovell v. Lovell                  | 243             |
| — and Cross                       | 646                             | Low v. Burron                     | 185, 226        |
| — and Spink                       | 20                              | Lowdal and Bowey                  | 325             |
| Lewthwaite and Clennell           | 20, 149                         | Lower and Weale                   | 5               |
| Ley and Reake                     | 562                             | Lowns and Herbert                 | 700             |
| Lidderdale and Stone              | 595                             | Lowson and Supple                 | 381             |
| Lillicott v. Compton              | 512                             | Loy and Hodgson                   | 203             |
| Lilly v. Osborn                   | 491                             | Lucas v. Vicarage                 | 151             |
| Limbery v. Mason & Al'.           | 499                             | — and Williams                    | 483             |
| Lincoln (Lady) v. Pelham          | 653                             | — and Willis                      | 20              |
| Lincoln v. Newcastle              | 526                             | Luddington v. Kime                | 545             |
| — v. Pelham                       | 530                             | Ludlow and Depaba                 | 269             |
| Lindo and Gale                    | 652                             | Lugg and Willie                   | 207             |
| Lister v. Lister                  | 56, 191, 502                    | Lush v. Wilkinson                 | 327, 491        |
| Litchford and Oldham              | 144                             | Lutkins v. Leigh                  | 44, 310, 350    |
| Little and Moyses                 | 97                              | Lutterel's Case                   | 711             |
| — and Strode                      | 484                             | Lutwyche v. Lutwyche              | 639             |
| Littleton and Clavell             | 476                             | Lydcott v. Willows                | 461             |
| — and Winn                        | 44, 67, 112, 193, 367, 583, 625 | Lyddon v. Lyddon                  | 761             |
| Littlewood and Bowers             | 233, 170                        | Lyford v. Coward                  | 4, 164, 391     |
| Litton v. Litton                  | 392                             | Lynch v. Dulzeel                  | 11              |
| Livesy v. Wilson                  | 434                             | Lynn and Beaver                   | 20              |
|                                   |                                 | Lynn and Spearing & Ux'.          | 435             |
|                                   |                                 | Lyon v. Duke of Chandos           | 761             |
|                                   |                                 | Lysaght and Dwyer                 | 647             |
|                                   |                                 | Lytton v. Lady Falkland           | 209             |

# THE NOTES OF THE SECOND VOLUME.

| M.   | Page             |   | Page               |
|--|------------------|---|--------------------|
|  |                  | <i>Marshall v. Holloway</i>                       | 325                |
|  |                  | <i>Marten and Cowper</i>                          | 562                |
| <i>Mabank v. Metcalfe</i>                      | 700              | <i>Martin and Burnell</i>                         | 235                |
| <i>Mabberley v. Strode</i>                     | 389              | ——— <i>and Crouch</i>                             | 391                |
| <i>Mac Adam v. Logan</i>                       | 465              | ——— <i>v. Delboe</i>                              | 695                |
| <i>Macaree v. Tall</i>                         | 562              | ——— <i>and Jones &amp; Ux'.</i>                   | 202, 277           |
| <i>Macclesfield (Earl of) v. Fitton</i>        | 41, 135          | ——— <i>v. Long</i>                                | 88                 |
|  |                  | ——— <i>v. Martin</i>                              | 89                 |
| <i>Macdonal and Crosby</i>                     | 209              | ——— <i>on dem. of Weston v. Mowlin</i>            | 704                |
| <i>Macdowell v. Halfpenny</i>                  | 753              |   |                    |
| <i>Mackel v. Clark</i>                         | 306              | ——— <i>and Reynish</i>                            | 47, 453            |
| <i>Mackell v. Winter</i>                       | 199              | ——— <i>v. Savage</i>                              | 209                |
| <i>Mackensie v. Robinson</i>                   | 401              | ——— <i>v. Woodgate</i>                            | 66                 |
| <i>Mackenzie and Rogers</i>                    | 757              | <i>Mary's (Robert) Case</i>                       | 116                |
| <i>Mackworth's (Sir Humphrey) Case</i>         | 225              | <i>Mascal and Norton</i>                          | 109                |
| <i>Maclean and Rutter</i>                      | 582              | <i>Maskeline v. Maskeline</i>                     | 182                |
| <i>M'Leay and Edwards</i>                      | 434              | <i>Mason &amp; Al'. and Limbery</i>               | 499                |
| <i>M'Leod v. Drummond</i>                      | 445, 616         | <i>Massareene and Hutchinson</i>                  | 85                 |
| <i>Macnamara and Earl Verney</i>               | 434              | <i>Massey and Meynel</i>                          | 27, 421            |
| <i>Macnath and Ryan</i>                        | 206              | <i>Master v. Willoughby</i>                       | 222                |
| <i>Macreth and Fox</i>                         | 385              | <i>Masterman and Sayer</i>                        | 562                |
| <i>Maddison v. Andrew</i>                      | 705              | <i>Masters v. Bush</i>                            | 199                |
| <i>Maddox v. Staines</i>                       | 59, 60, 601      | ——— <i>v. Masters</i>                             | 137, 512, 538      |
| <i>Madox v. Jackson</i>                        | 195              | ——— <i>and Nicholson</i>                          | 262                |
| <i>Maitland v. Adair</i>                       | 381, 522         | <i>Mathers and Pember</i>                         | 506                |
| <i>Major and Wilson</i>                        | 562, 572         | <i>Matthews v. Paul</i>                           | 530                |
| <i>Malim v. Keighley</i>                       | 116              | <i>Matthews &amp; Al'. and Roberts &amp; Al'.</i> | 129, 198, 265, 540 |
| <i>Mallabar v. Mallabar</i>                    | 20               |   |                    |
| <i>Mallet v. Trigg</i>                         | 118, 415, 507    | <i>Maundrell v. Maundrell</i>                     | 324, 721           |
| <i>Maltby and Anderson</i>                     | 429              | <i>Maundy v. Maundy</i>                           | 700                |
| ——— <i>and Meur</i>                            | 422              | <i>Maw and Elwes</i>                              | 508                |
| <i>Mauby and Colegrave</i>                     | 209              | ——— <i>v. Harding</i>                             | 170                |
| <i>Man v. Ballet</i>                           | 415, 507         | <i>Mawood v. Turner</i>                           | 209                |
| <i>Man's (Sir Thomas) Case</i>                 | 167              | <i>Mawson v. Stock</i>                            | 71                 |
| <i>Manlove and Rex</i>                         | 174              | <i>May and Bartholomew</i>                        | 183                |
| <i>Mann and Debeze</i>                         | 647              | ——— <i>and Chancey</i>                            | 422                |
| <i>Manning and Baxter</i>                      | 699              | ——— <i>v. Hook</i>                                | 45                 |
| <i>Manning's (Matthew) Case</i>                | 404              | <i>Maydwell and Corbett</i>                       | 761                |
| ——— <i>and Doe</i>                             | 44               | <i>Mayer and Duke of Ancaster</i>                 | 719                |
| <i>Mansell v. Mansell</i>                      | 304, 755         | <i>Maynard and Nicholls</i>                       | 317                |
| <i>Mappletoft v. Mappletoft</i>                | 17               | <i>Mazarine (Duchess of) and Deerley</i>          | 105                |
| <i>March v. Bennett</i>                        | 606              |   |                    |
| ——— <i>v. Head</i>                             | 191              | <i>Mead and Gower</i>                             | 120                |
| <i>Marchant and Foster</i>                     | 194              | ——— <i>v. Hide</i>                                | 112, 183, 569      |
| <i>Markham v. Cooke</i>                        | 562              | ——— <i>v. Lord Orrery</i>                         | 616                |
| <i>Marlar and Worrall</i>                      | 429              | <i>Meadows v. Duchess of Kingston</i>             | 700                |
| <i>Marlborough (Duke of) v. Lord Godolphin</i> | 465              | <i>Meager and Walker</i>                          | 248                |
| <i>Marlboro' and Brace</i>                     | 29, 81, 271, 525 | <i>Meal and Wych</i>                              | 32, 380            |
|  |                  | <i>Medlicot v. Joyner</i>                         | 604                |
| <i>Marlow and Middlecome</i>                   | 491              | <i>Medlicott's Case</i>                           | 692                |
| ——— <i>v. Smith</i>                            | 755              | <i>Medlicott and Toole</i>                        | 456                |
| <i>Marriot v. Marriot</i>                      | 700              | <i>Melhuish and Saltern</i>                       | 561                |
| <i>Marsh and Jones</i>                         | 44               | <i>Melling and King</i>                           | 325                |
| ——— <i>and Porey</i>                           | 36, 273, 306     | <i>Mellish and Coningham</i>                      | 20                 |
|  |                  | ——— <i>and Cunningham</i>                         | 425, 644           |

# INDEX OF CASES REFERRED TO BY

|   | Page               |  | Page   |
|---|--------------------|--|--|
| <b>Mellish and Devisme</b>              | 381                | <b>Monger v. Kett</b>                      | 71   |
| <b>Mello and Devisme</b>                | 706                | <b>Monk and Peacock</b>                    | 330, 491   |
| <b>Meilor and Moor</b>                  | 562                | <b>Montague v. Lord Sandwich</b>           | 491  |
| <b>Menzies and Bullock</b>              | 386, 753           | — (Dutchess of) and Rawlin-                |  |
| <b>Meredith v. Wynn</b>                 | 402, 479           | son  | 36, 667  |
| <b>Mergrave v. Le Hooke</b>             | 286                | <b>Montgomery and Ball</b>                 | 47, 386, 494   |
| <b>Merrett v. Eastwicke</b>             | 441                | <b>Moody and Cunningham</b>                | 537  |
| <b>Merry and Drew</b>                   | 307                | — v. Walters                               | 755  |
| <b>Mertins v. Jolliffe</b>              | 385                | <b>Moor v. Bennett</b>                     | 385  |
| <b>Merton College and Jennings</b>      | 434                | — and Frazer & Al.                         | 377, 419   |
| <b>Metcalf and Mabank</b>               | 700                | — v. Mellor                                | 562  |
| <b>Metcalf v. Pulvertoft</b>            | 44, 693            | — and Towers                               | 339, 547   |
| <b>Metham v. Duke of Devon</b>          | 705                | — and Turner                               | 389  |
| <b>Mex v. Maltby</b>                    | 422                | <b>Moore v. Butler</b>                     | 528  |
| <b>Meynel v. Massey</b>                 | 27, 421            | — v. Godfrey                               | 520  |
| <b>Meynell and Moore</b>                | 614                | — v. Hart                                  | 35, 202, 322   |
| <b>Miall v. Brais</b>                   | 68                 | — v. Meynell                               | 614  |
| <b>Micklethwaite and Perkins</b>        | 208, 378, 388, 620 | — v. Moore                                 | 585  |
|   |                    | — and Papworth                             | 199  |
| <b>Mico and Haynes</b>                  | 498                | <b>Mordaunt and Hamilton</b>               | 535  |
| <b>Micoe v. Powell</b>                  | 494, 671           | <b>Moreton and Bodicoats</b>               | 354  |
| <b>Middlecome v. Marlow</b>             | 491                | <b>Morgan and Fairfield</b>                | 389  |
| <b>Middlesex's (Sheriff of) Case</b>    | 697                | — and Hylton                               | 463  |
| <b>Middleton v. Cater</b>               | 20                 | — and Powell                               | 354  |
| — and Crosby                            | 481                | <b>Morice v. Bishop of Durham</b>          | 454  |
| — v. Dodswell                           | 249                | <b>Morony v. O'Dea</b>                     | 536  |
| — and Hodges                            | 545                | <b>Morphett v. Jones</b>                   | 456  |
| — v. Lord Onslow                        | 71                 | <b>Morret v. Westerne</b>                  | 601  |
| <b>Milbourne v. Ewart</b>               | 481                | <b>Morrice v. Bank of England</b>          | 37   |
| <b>Mildmay's (Sir Anthony) Case</b>     | 635                | — and Twining                              | 456  |
| — v. Mildmay                            | 494                | <b>Morris v. Burroughs</b>                 | 21   |
| <b>Milksopp and Johnson</b>             | 121                | — & Al. and Cantle & Al.                   | 498  |
| <b>Mill and Hiern</b>                   | 385                | <b>Morse v. Roach</b>                      | 47   |
| <b>Mill and Holt, Ch. Just.</b>         | 29                 | <b>Mortlock v. Buller</b>                  | 456  |
| <b>Millar v. Turner</b>                 | 580                | <b>Moseley and Yate</b>                    | 592  |
| <b>Millard and Holloway</b>             | 327                | <b>Mosse and Archer</b>                    | 47, 73   |
| <b>Miller and Abney</b>                 | 209                | <b>Moth v. Frome</b>                       | 564  |
| — v. Faure                              | 116                | <b>Moulson and Jewson</b>                  | 271, 429, 564  |
| — v. Warren                             | 116, 378           | <b>Mount and Wilson</b>                    | 582  |
| <b>Mills v. Norris</b>                  | 705                | <b>Mountague's Case and Bath</b>           | 70   |
| <b>Milward and Berrisford</b>           | 525                | <b>Mountague and Harvey</b>                | 113, 184, 217  |
| <b>Minshull v. Lord Mohun</b>           | 549                | <b>Mountford (Lord) and Gibson</b>         | 20, 209  |
| <b>Mitchell v. Edes</b>                 | 595                | <b>Mountjoy's (Lord) Case</b>              | 714  |
| — and Jackman                           | 71                 | <b>Mowlin and Martin on dem. of Weston</b> | 704  |
| — and Jones                             | 55                 | <b>Moxom and Sibthorp</b>                  | 378  |
| <b>Mitford v. Mitford</b>               | 429, 503, 566      | <b>Moyes v. Little</b>                     | 97   |
| <b>Mocatta v. Murgatroyd</b>            | 151, 536, 555      | <b>Mullens and Lord Tenham</b>             | 491  |
| <b>Moffatt and Forbes</b>               | 354                | <b>Mulwany and Dillen</b>                  | 700  |
| <b>Mohun (Lord) v. Duke of Hamilton</b> | 91, 405            | <b>Mumma v. Mumma</b>                      | 29, 139, 252, 295, 619                               |
| — and Minshull                          | 54                 | <b>Munday and Godwin</b>                   | 75   |
| <b>Molesworth and Darrel</b>            | 653                | <b>Mundy and Weddell</b>                   | 389  |
| <b>Molineux and Dickinson</b>           | 426                | <b>Munt and Foster</b>                     | 20, 100, 104, 150, 247, 254, 295, 361, 517, 650, 737 |
| — and Tatton                            | 234                | <b>Murgatroyd and Mocatta</b>              | 151, 536, 555  |
| <b>Monck and Broome</b>                 | 562                |  |  |
| — v. Monck                              | 647                |  |  |

# THE NOTES OF THE SECOND VOLUME.

|                                       | Page     |  | Page                         |
|---------------------------------------|----------|--|------------------------------|
| <i>Murray and Crosbie</i>             | 582      | <i>Noel v. Jevon</i>                               | 366                          |
| ——— <i>and Nisbett</i>                | 435      | ——— <i>v. Robinson</i>                             | 57, 76, 205                  |
| ——— <i>v. Wyse</i>                    | 562      | <i>Norcliffe &amp; Al'. and Earl of Winchelsea</i> | 127, 193, 233, 275, 346, 606 |
| <i>Murless v. Franklin</i>            | 20       | <i>Norfolk v. Gifford</i>                          | 91                           |
| <i>Muschamp and Arglasse</i>          | 495      | ——— <i>(Duke of) v. Howard</i>                     | 557, 669, 694                |
| <i>Musgrave v. Dashwood</i>           | 584      | <i>Norris and Mills</i>                            | 705                          |
| ——— <i>v. Parry</i>                   | 105      | <i>North v. Way</i>                                | 133, 345, 704                |
| <i>Mutter v. Chauvel</i>              | 401      | <i>Northcote v. Northcote</i>                      | 376                          |
| <i>Nyles and French</i>               | 434      | ——— <i>and Incledon</i>                            | 366                          |
| N.                                    |          |  |                              |
| <i>Nab v. Nab</i>                     | 560      | <i>Northey v. Burbage</i>                          | 105, 630, 705                |
| <i>Nash v. Lord Derby</i>             | 147, 665 | ——— <i>v. Strange</i>                              | 105, 580, 705                |
| ——— <i>v. Preston</i>                 | 366      | <i>Northumberland (Earl of) v. Lord Egremont</i>   | 91                           |
| <i>Neal v. Hanbury</i>                | 36       | <i>Northumberland and Jervoise</i>                 | 526                          |
| <i>Neave and East India Company</i>   | 422      | <i>Norton v. Frecker</i>                           | 226                          |
| <i>Nedham's (Sir John) Case</i>       | 290      | ——— <i>and Hobbs</i>                               | 151, 240, 283                |
| <i>Needham and Levet</i>              | 66, 468  | ——— <i>and Lady's Case</i>                         | 562                          |
| ——— <i>v. Smith</i>                   | 472      | ——— <i>v. Mascall</i>                              | 109                          |
| <i>Neele ex parte</i>                 | 278      | ——— <i>v. Sprigg</i>                               | 118                          |
| <i>Nelson v. Oldfield</i>             | 700      | ——— <i>and Whaley</i>                              | 188, 242                     |
| ——— <i>and Thompson</i>               | 66       | <i>Noton and Slatter</i>                           | 209                          |
| <i>Nethorpe and Hincks</i>            | 47, 386  | <i>Nott v. Johnson</i>                             | 348                          |
| <i>Nenny and Langham</i>              | 562      | <i>Nourse v. Finch</i>                             | 20, 647                      |
| <i>Nesbit and Scott</i>               | 395      | <i>Novosielski v. Wakefield</i>                    | 41                           |
| <i>Nesbitt and Totty</i>              | 299      | <i>Noysomhead (Case of the Ship)</i>               | 47                           |
| <i>Neville v. Robinson</i>            | 240      | <i>Nunn and Williams</i>                           | 162                          |
| <i>Newman v. Godfrey</i>              | 380      | <i>Nutbrown v. Thornton</i>                        | 394                          |
| <i>Newburgh v. Bickerstaffe</i>       | 342, 724 | <i>Nutt and White</i>                              | 280                          |
| <i>Newcastle and Lincoln</i>          | 526      | O.   |                              |
| <i>Newcoman v. Bethlehem Hospital</i> | 736      | <i>Obee and Taylor</i>                             | 434                          |
| <i>Newcomb v. Bonham</i>              | 84, 419  | <i>Obrian v. Ram</i>                               | 195                          |
| <i>New River Company and Adair</i>    | 422      | <i>O'Dea and Morony</i>                            | 536                          |
| <i>Newland v. Horseman</i>            | 541      | <i>Odes v. Woodward</i>                            | 151                          |
| ——— <i>and Reresby</i>                | 761      | <i>Offley v. Offley</i>                            | 334                          |
| <i>Newman and Farr</i>                | 616      | <i>Ogilby and Johnson</i>                          | 129, 638                     |
| ——— <i>v. Newman</i>                  | 582      | <i>Oglander and Harmood</i>                        | 680                          |
| <i>Newsome v. Bowyer</i>              | 105, 614 | <i>Ognell's Case</i>                               | 315                          |
| <i>Newton and Bale</i>                | 272      | <i>Oke v. Heath</i>                                | 378, 522                     |
| ——— <i>and Baylis</i>                 | 20       | <i>Oldfield and Crowder</i>                        | 250                          |
| ——— <i>v. Rouse</i>                   | 64, 492  | ——— <i>and Nelson</i>                              | 700                          |
| <i>Nicholas v. Nicholas</i>           | 47       | ——— <i>v. Oldfield</i>                             | 90                           |
| <i>Nicholls v. Danvers</i>            | 386, 753 | <i>Oldham v. Litchford</i>                         | 144                          |
| ——— <i>v. Judson</i>                  | 299      | ——— <i>v. Pickering</i>                            | 320                          |
| ——— <i>and Lane</i>                   | 395      | <i>Oldis and Davenport</i>                         | 546                          |
| ——— <i>v. Maynard</i>                 | 317      | <i>Oliphant and West</i>                           | 388                          |
| ——— <i>v. Osborn</i>                  | 512      | <i>Olive and Stephens</i>                          | 491                          |
| ——— <i>v. Skinner</i>                 | 388      | <i>Onions v. Tyrer</i>                             | 499                          |
| <i>Nichols v. Hooper</i>              | 88       | <i>Onslow (Lord) and Middleton</i>                 | 71                           |
| <i>Nicholson v. Masters</i>           | 262      | ——— <i>and Pope</i>                                | 97, 429                      |
| <i>Nightingale v. Dodd</i>            | 100      | <i>Opey and Goodright</i>                          | 522                          |
| ——— <i>v. Lawson</i>                  | 667      | <i>Orchard and Germain</i>                         | 684                          |
| <i>Nightley and Kaines</i>            | 619      |  |                              |
| <i>Nisbett v. Murray</i>              | 435      |  |                              |

# INDEX OF CASES REFERRED TO BY

|                                   | Page          |  | Page                   |
|-----------------------------------|---------------|--|------------------------|
| <i>Orde and English</i>           | 454           | <i>Partington and Andrews</i>                  | 705                    |
| — <i>v. Heming</i>                | 377, 419      | <i>Paschal and Lord Carteret</i>               | 403, 503               |
| <i>Orrery (Lord) and Mead</i>     | 616           | <i>Patch and Barnes</i>                        | 562                    |
| — <i>and Sheffield</i>            | 88, 601       | <i>Patterson v. Slaughter</i>                  | 434                    |
| <i>Osborn and Lilly</i>           | 491           | <i>Paul v. Birch</i>                           | 638                    |
| — <i>and Nicholls</i>             | 512           | — <i>v. Compton</i>                            | 706                    |
| <i>Osgood v. Stode</i>            | 322, 364, 483 | — <i>and Matthews</i>                          | 530                    |
| <i>Ossingbrooke and Doe</i>       | 585           | <i>Pawlet v. Delaval</i>                       | 689                    |
| <i>Otway v. Hudson</i>            | 324, 537, 704 | — <i>&amp; Ux. v. Dogget</i>                   | 152, 566, 767          |
| <i>Over and Doe</i>               | 381           | — <i>(Lord) v. Parry</i>                       | 144                    |
| <i>Owen and Williams</i>          | 209           | — <i>v. Pawlett</i>                            | 75, 199, 417, 424, 673 |
| <i>Oxenden and Lord Compton</i>   | 354           | <i>Pawlett v. Attorney General</i>             | 313                    |
| — <i>v. Oxendon</i>               | 386, 626      | — <i>and Kelly</i>                             | 512                    |
| P.                                |               |  |                        |
| <i>Pack &amp; Al. v. Bathurst</i> | 319           | <i>Pawlin and Whitacre</i>                     | 429, 566               |
| — <i>and Willson</i>              | 535           | <i>Payne and Lord Carrington</i>               | 309                    |
| <i>Packer v. Windham</i>          | 503           | <i>Peachey (Sir Harry) v. Duke of Somerset</i> | 368, 538               |
| <i>Packington's Case</i>          | 739           | <i>Peacock and Cuthbert</i>                    | 647                    |
| <i>Page v. Page</i>               | 611           | — <i>v. Monk</i>                               | 330, 491               |
| — <i>and Tuffnell</i>             | 499, 557, 598 | — <i>v. Spooner</i>                            | 363                    |
| <i>Pagett v. Hoskins</i>          | 118           | <i>Pearce v. Grove</i>                         | 434                    |
| <i>Pain and Ridout</i>            | 461, 562      | <i>Peele ex parte</i>                          | 176                    |
| <i>Paine and Winchester</i>       | 518           | <i>Peering and Ford</i>                        | 463                    |
| <i>Painter and Chester</i>        | 199           | <i>Pelham and Clowdesley</i>                   | 144, 709, 719, 757     |
| <i>Palmer v. Cracroft</i>         | 705           | — <i>and Lady Lincoln</i>                      | 653                    |
| — <i>v. Richards</i>              | 502           | — <i>and Lincoln</i>                           | 530                    |
| — <i>v. Trevor</i>                | 191           | <i>Pember v. Mathers</i>                       | 500                    |
| <i>Palmer and Barstow</i>         | 440           | <i>Pembroke (Earl of) and Baden</i>            | 61, 366                |
| — <i>v. Danby</i>                 | 193, 378      | — <i>(Countess of) and Baden</i>               | 322                    |
| <i>Pamplin v. Green</i>           | 47            | <i>Pendergast and Butler</i>                   | 481                    |
| <i>Pannell v. Tayler</i>          | 614           | <i>Penrhyn (Lord) v. Hughes</i>                | 41                     |
| <i>Papera and Howard</i>          | 249           | <i>Penrice and Piggot</i>                      | 454, 465, 562          |
| <i>Papillon v. Voice</i>          | 526, 527, 669 | <i>Penry and Walker</i>                        | 377                    |
| <i>Papworth v. Moore</i>          | 192           | <i>Penson and Plunket</i>                      | 764                    |
| <i>Paradyne v. Jane</i>           | 543           | <i>Pentland v. Stokes</i>                      | 569                    |
| <i>Parker v. Ash</i>              | 23, 517       | <i>Penton and Fursor</i>                       | 290, 481               |
| — <i>and Dillon</i>               | 523           | — <i>v. Robart</i>                             | 508                    |
| — <i>and Dixon</i>                | 638           | — <i>&amp; Al. v. Walker &amp; Al.</i>         | 209, 241, 496, 721     |
| — <i>v. Fearley</i>               | 229           | <i>Perkins and Biscoe</i>                      | 755                    |
| — <i>and Hoare</i>                | 701           | — <i>v. Micklethwaite</i>                      | 208, 378, 388, 620     |
| — <i>and Stode</i>                | 290           | <i>Perry and Jones &amp; Al.</i>               | 564                    |
| <i>Parkhurst v. Smith</i>         | 755           | — <i>v. Perry</i>                              | 201                    |
| <i>Parnacot and Beckford</i>      | 209           | — <i>v. Phillips</i>                           | 209, 564               |
| <i>Parrot v. Bowden</i>           | 83, 199       | — <i>and Sibley</i>                            | 545                    |
| — <i>and Hide</i>                 | 59            | — <i>v. Silvester</i>                          | 435                    |
| <i>Parrott and Hyde</i>           | 245           | <i>Pesey and Wood</i>                          | 17                     |
| <i>Parry and Brown</i>            | 500           | <i>Peterborough (Bishop of) and Boyle</i>      | 531                    |
| — <i>and Cope</i>                 | 36, 472       | <i>Peters v. Soames</i>                        | 195, 566               |
| — <i>and Musgrave</i>             | 105           |  |                        |
| — <i>and Lord Pawlet</i>          | 144           |  |                        |
| <i>Parley and Freeman</i>         | 108           |  |                        |
| <i>Parsons and Cook</i>           | 479           |  |                        |
| — <i>v. Thompson</i>              | 308           |  |                        |

# THE NOTES OF THE SECOND VOLUME.

|  | Page                        |                               | Page                        |
|--|-----------------------------|-------------------------------|-----------------------------|
| Peterson and Rolfe                           | 119                         | Poore v. Clarke               | 103                         |
| —— and Walsh                                 | 389                         | Pope and Archer               | 481                         |
| Pett's Case                                  | 170, 233                    | —— and Haslewood              | 302                         |
| Pett v. Pett                                 | 233                         | —— and Jones                  | 236                         |
| Pettiward v. Prescott                        | 562, 582                    | —— v. Onslow                  | 97, 429                     |
| Peyton v. Bury                               | 91, 452, 453                | Popham v. Lady Aylesbury      | 20                          |
| —— and Dashwood                              | 528                         | —— and Bamfield               | 60, 340, 344, 366, 452, 595 |
| Pheasant's (Ann) Case                        | 559                         | —— v. Taylor                  | 91                          |
| Phelps and Whithill                          | 274                         | Porey v. Marsh                | 36, 273, 306                |
| Philips v. Philips                           | 20                          | Porter v. Bradley             | 325                         |
| Phillips v. Duke of Bucks                    | 633                         | —— and Donisthorpe            | 354                         |
| —— and Bunce                                 | 35                          | —— and Fry                    | 561                         |
| —— and Perry                                 | 209, 564                    | —— and Thomas                 | 538                         |
| —— v. Philips                                | 138, 428                    | —— v. Tournay                 | 512                         |
| —— v. Vaughan                                | 66                          | Portman v. Seymour            | 17                          |
| Phillpot and Arundell                        | 379, 465                    | Postlethwaite and Blythe      | 41                          |
| Phipps v. Earl of Anglesea                   | 395                         | Potter and Hall               | 446                         |
| —— v. Steward                                | 49                          | —— v. Potter                  | 209, 463                    |
| Phrazier and Prodgers                        | 194                         | Poulet v. Poulet              | 95, 458, 508                |
| Phyn and Bell                                | 389, 705                    | Povey and Edmunds             | 29, 81, 271                 |
| Pickering v. Lord Stamford                   | 82, 517, 561                | Powel and Barnesly            | 700                         |
| —— and Oldham                                | 320                         | —— and Rawlins                | 464                         |
| Piers v. Piers                               | 739                         | Powell and Croft              | 401                         |
| Pierson v. Garnet                            | 395, 580                    | —— and Micoe                  | 494, 671                    |
| Piggot v. Penrice                            | 454, 465, 562               | —— v. Morgan                  | 354                         |
| Piggott v. Waller                            | 209                         | —— v. Price                   | 701                         |
| Pilkington v. Cuthbertson                    | 454                         | —— v. Powell                  | 5, 306                      |
| —— v. Shaller & Al.                          | 276                         | —— v. Robins                  | 709                         |
| Pilling and Wright                           | 464                         | —— and Stratford              | 526                         |
| Pinbury v. Elkin                             | 564                         | Powlett v. Dutchess of Bolton | 153                         |
| Pinkey v. Hall                               | 278                         | Praed v. Gardiner             | 757                         |
| Pitt and Berny                               | 27, 403                     | Prankerd v. Prankerd          | 20                          |
| —— and Child                                 | 566                         | Prat v. Taylor                | 37, 199                     |
| —— and the Creditors of the Duke of Richmond | 219                         | Pratt and Hoste               | 705                         |
| —— and Grandison                             | 740                         | —— and Judd                   | 528                         |
| —— v. Hunt                                   | 18, 191                     | —— v. Pratt                   | 639                         |
| —— and Longford                              | 209, 679                    | Prebble v. Boghurst           | 389                         |
| Plaistow and Cecil                           | 71                          | —— and Snee                   | 203                         |
| Platt and Holford                            | 343                         | —— v. Long                    | 705                         |
| —— v. Sprigg                                 | 755                         | —— and Pettiward              | 562, 582                    |
| —— and Stanton                               | 234                         | Preston and Nash              | 366                         |
| Plymouth (Countess of) v. Bladon             | 115                         | —— v. Tubbin                  | 575                         |
| Plumb v. Fluitt                              | 727                         | Price and Bill                | 16, 78                      |
| Plume v. Beale                               | 9, 73, 700                  | —— v. Gibson                  | 354                         |
| Plummer and Collins                          | 234                         | —— and Howel                  | 757                         |
| Plunket v. Penson                            | 764                         | —— and Howell                 | 112, 183, 302               |
| Pockley v. Pockley                           | 44, 112, 193, 302, 469, 470 | —— v. Hunt                    | 389                         |
| Pole and Raw & Ux'.                          | 151                         | —— and Powell                 | 701                         |
| —— v. Lord Somers                            | 20, 582                     | —— v. Price                   | 167                         |
| —— v. Somers                                 | 647                         | —— and Whitley                | 16                          |
| Pomfret and Wallace                          | 299                         | Priddy v. Rose                | 692                         |
| Pontet and Devese                            | 300, 498                    | Pridgeon v. Pridgeon          | 481                         |
|  |                             | Primate and Hedworth          | 43, 145                     |
|  |                             | Pring v. Clay                 | 611                         |

# INDEX OF CASES REFERRED TO BY

|                                   | Page          |                                     | Page               |
|-----------------------------------|---------------|-------------------------------------|--------------------|
| Pringle v. Hodgson                | 491           | Rees v. Berrington                  | 393, 608           |
| Pritty & Al'. and Garret & Ux'.   | 573           | Reeve v. Long                       | 579                |
| Procter v. Cooper                 | 43, 392       | Reeves v. Brymer                    | 108                |
| Prodgers v. Phrazier              | 194           | —— v. Gower                         | 562                |
| Prowse v. Abingdon                | 424           | —— v. Reeves                        | 463                |
| Puck & Al'. v. Bathurst           | 319           | Reid ex parte                       | 293                |
| Pulsford v. Hunter                | 705           | —— v. Shergold                      | 465                |
| Pulteney and Lady Cavan           | 582           | Relfe and Frewen                    | 611                |
| Pultney v. Lord Darlington        | 296           | Reresby v. Newland                  | 761                |
| Pulvertoft and Metcalfe           | 44, 693       | Rex v. Blatch                       | 47                 |
| —— v. Pulvertoft                  | 44            | —— v. Manlove                       | 174                |
| Purdew v. Jackson                 | 402           | —— and Yate                         | 481                |
| Purdey v. Stacey                  | 308           | Reynall and Greenfield              | 262                |
| Purefoy v. Purefoy                | 286           | Reynish v. Martin                   | 47, 453            |
| —— v. Rogers                      | 562           | Reynolds v. Jones                   | 519                |
| Putt v. Rawsterne & Al'.          | 239           | Rhodes and Ibbottson                | 370                |
| Pye v. Daubuz                     | 429, 566      | Rich and Booth                      | 518                |
| —— v. Gorge                       | 755           | —— and Civil                        | 632, 754           |
| Pyne v. Dor                       | 739           | —— v. Hull                          | 582                |
|                                   |               | —— and James                        | 262                |
|                                   |               | Richards & Al'. v. Lady Bergavenny  | 334                |
| Q.                                |               | —— and Cock                         | 102, 216           |
| Qualey v. Qualey                  | 47            | —— and Doe                          | 105, 562           |
| Quincy ex parte                   | 508           | —— and Palmer                       | 562                |
|                                   |               | Richardson v. Spraag                | 389                |
|                                   |               | Richmond (Creditors of the Duke of) |                    |
| R.                                |               | v. Pitt                             | 219                |
| Rachfield v. Careless             | 20, 254       | —— and Turner                       | 30, 525, 526       |
| Radcliffe v. Buckley              | 545           | Ricketts and Bourke                 | 395                |
| Radley and Sir Thomas Standish    | 429           | Riddell v. White                    | 712                |
| Radnor (Lady) v. Rotheram         | 324           | Rider v. Kidder                     | 491                |
| Raggett v. Clerke                 | 720           | —— v. Wager                         | 241                |
| Raindle and Brown                 | 584           | Ridgard and Bonney                  | 616                |
| Ram and Obrian                    | 195           | Ridley and Harrison                 | 549                |
| Ramsden v. Gudgeon                | 375           | —— and Rowley                       | 376                |
| Ratcliffe v. Graves & Al'.        | 548           | Ridlington and Bradgate             | 248                |
| Raw & Ux'. v. Pole                | 151           | Ridout v. Pain                      | 461, 562           |
| Rawlins v. Powel                  | 464           | Right v. Sidebotham                 | 562                |
| Rawlinson v. Dutchess of Montague | 36, 667       | Ripley v. Waterworth                | 185, 320, 720      |
|                                   |               | Rippon v. Dawding                   | 481                |
| Rawson and Hodgson                | 95            | Roach v. Hammond                    | 381                |
| Rawsterne & Al'. and Putt         | 239           | —— and Morse                        | 47                 |
| Ray v. Fenwick                    | 692           | Robart and Penton                   | 508                |
| —— v. Ray                         | 445, 616      | Robarts and Keane                   | 445, 616           |
| Raymond v. Brodbelt               | 395           | Robello and Delmare                 | 593                |
| Rayson v. Sacheverel              | 689           | Roberts's Lunacy                    | 678                |
| Read v. Duck                      | 202           | Roberts v. Bennet                   | 115, 149           |
| —— and Hosier                     | 561           | —— v. Dixwell                       | 80, 526, 537       |
| —— v. Snell                       | 196           | —— and Hardham                      | 165, 265, 625      |
| Reake v. Ley                      | 562           | —— v. Higman                        | 705                |
| Rebow and Beck                    | 508           | —— v. Kingsly                       | ibid.              |
| Redman v. Redman                  | 151, 652, 765 | —— v. Kuffin                        | 276                |
| Reech v. Kennegal                 | 506           | —— & Al'. v. Matthews & Al'.        | 129, 198, 265, 540 |
| Reed v. Brookman                  | 299           | —— v. Roberts                       | 151                |

**THE NOTES OF THE SECOND VOLUME.**

|                                     | Page         |  | Page                        |
|-------------------------------------|--------------|--|-----------------------------|
| <i>Roberts v. Smith</i>             | 66           | <i>Russell and Whitting</i>                              | 506                         |
| <i>Robertson v. St. John</i>        | 447          | — and <i>Bellev</i>                                      | 700                         |
| <i>Robins and Attorney General</i>  | 434          | <i>Rutland's (Countess of) Case</i>                      | 619                         |
| — and <i>Powell</i>                 | 709          | <i>Rutter and Cud</i>                                    | 394                         |
| <i>Robinson v. Bavasor</i>          | 564          | — v. <i>Maclean</i>                                      | 592                         |
| — v. <i>Bell</i>                    | 399, 395     | — v. <i>Rutter</i>                                       | 92                          |
| — v. <i>Davison &amp; Al'</i>       | 81, 526      | — and <i>Symons</i>                                      | 285, 296                    |
| — and <i>Dickson</i>                | 66           | <i>Ryal v. Ryal</i>                                      | 441                         |
| — v. <i>Fletcher</i>                | 681          | <i>Ryall v. Rolle</i>                                    | 565                         |
| — and <i>Fursaker</i>               | 625          | <i>Ryan and Macnath</i>                                  | 206                         |
| — v. <i>Hardcastle</i>              | 80           | <i>Rybot and Bonafous</i>                                | 317                         |
| — and <i>Leake</i>                  | 705          | <i>Rye &amp; Warwick &amp; Al'. and Attorney General</i> | 755                         |
| — and <i>Mackenzie</i>              | 401          | <i>Ryland and Hoitham</i>                                | 481                         |
| — and <i>Neville</i>                | 240          |  |                             |
| — and <i>Noel</i>                   | 57, 76, 205  |  |                             |
| — v. <i>Stevens</i>                 | 307          |  |                             |
| — v. <i>Taylor</i>                  | 90           |  |                             |
| — and <i>Westland</i>               | 738          |  |                             |
| — v. <i>Whitley</i>                 | 647          |  |                             |
| — and <i>Wilson</i>                 | 562          |  |                             |
| <i>Rod and Hayter</i>               | 196, 350     | <i>Sabbarton v. Sabbarton</i>                            | 601                         |
| <i>Roden v. Smith</i>               | 199          | <i>Sacheverel and Rayson</i>                             | 689                         |
| <i>Rodney (Lord) v. Chambers</i>    | 672          | <i>Sackvill v. Ayleworth</i>                             | 414, 678                    |
| <i>Roe and Acherley</i>             | 391          | <i>Sadler and Stanton</i>                                | 81, 159                     |
| — v. <i>Jeffery</i>                 | 345          | — <i>ex parte</i>  | 71                          |
| <i>Rogers and Gibson</i>            | 209          | <i>Sadler's Company v. Badcock</i>                       | 11, 269                     |
| — v. <i>Mackenzie</i>               | 757          | <i>Sagitary v. Hyde</i>                                  | 36, 183, 261, 273, 709, 764 |
| — and <i>Purfoy</i>                 | 562          | <i>Sainsbury and Lady Whetstone</i>                      | 538                         |
| — v. <i>Rogers</i>                  | 50, 562, 645 | <i>St. Alban's (Duke of) and Colman</i>                  | 41                          |
| <i>Rolle v. Peterson</i>            | 119          | <i>St. Alban's and Deerpur</i>                           | 526                         |
| <i>Rolle and Ryall</i>              | 565          | <i>St. Amand v. Countess of Jersey</i>                   | 327, 511                    |
| <i>Rook v. Warth</i>                | 322          |  |                             |
| <i>Rooke and Cray</i>               | 202          | <i>St. John v. Furness</i>                               | 52                          |
| — v. <i>Rooke</i>                   | 560, 623     | <i>St. John v. St. John</i>                              | 386                         |
| <i>Roome v. Roome</i>               | 479          | — and <i>Robertson</i>                                   | 447                         |
| <i>Rose and Priddy</i>              | 692          | — v. <i>Turner</i>                                       | 369, 377                    |
| <i>Ross v. Ross</i>                 | 306          | <i>St. John (Lord) and Whitbread</i>                     | 705                         |
| <i>Rotherham and Lady Radnor</i>    | 324          | <i>St. John's College v. Fleming</i>                     | 720                         |
| <i>Rotherham v. Fanshaw</i>         | 47           | <i>Salkill and Harding</i>                               | 147                         |
| <i>Rothschild and Doloret</i>       | 394          | <i>Saltern v. Melhulsh</i>                               | 561                         |
| <i>Roundell &amp; Ux' v. Breary</i> | 97           | <i>Sampson v. Sweetenham</i>                             | 463                         |
| <i>Rouse &amp; Ux' and Kew</i>      | 47, 323, 430 | <i>Sanderson v. Crouch</i>                               | 61, 195                     |
| — and <i>Newton</i>                 | 64, 492      | <i>Sandford and Bosen</i>                                | 643                         |
| <i>Row v. Dawson</i>                | 429          | — and <i>Langham</i>                                     | 20                          |
| — and <i>Townsend</i>               | 318          | <i>Sandwich (Lord) and Montague</i>                      | 491                         |
| — and <i>Wright</i>                 | 20           | <i>Sandys v. Sandys</i>                                  | 761                         |
| <i>Rowe and Atkins</i>              | 627          | <i>Sanky v. Golding</i>                                  | 386                         |
| <i>Rowley v. Eyton</i>              | 209          | <i>Sanson v. Rumsey</i>                                  | 380                         |
| — v. <i>Ridley</i>                  | 376          | <i>Sarman and Scott</i>                                  | 638                         |
| <i>Boyle v. Hamilton</i>            | 108          | <i>Saul v. Wilson</i>                                    | 747                         |
| <i>Royston and Bucknall</i>         | 511          | <i>Saunders v. Dehew</i>                                 | 159                         |
| <i>Rumsey and Sanson</i>            | 380          | — v. <i>Drake</i>  | 395                         |
| <i>Rundell and Hume</i>             | 528          | — and <i>Jerrard</i>                                     | 701                         |
| <i>Ruscombe v. Hare</i>             | 689          | <i>Savage v. Carroll</i>                                 | 456, 531                    |
| <i>Russel v. Hammond</i>            | 491          | — and <i>Jordan</i>                                      | 63                          |
| — and <i>Strode</i>                 | 209, 593     | — and <i>Martin</i>                                      | 209                         |
|                                     |              | <i>Savery v. Dyer</i>                                    | 36                          |



# INDEX OF CASES REFERRED TO BY

|   | Page            |   | Page               |
|---|-----------------|---|--------------------|
| <i>Sawtell and Attorney General</i>               | 454, 499        | <i>Sheffield v. Dutchess of Bucks</i>   | 700                |
|   | 598             | ——— <i>v. Lord Castleton</i>            | 608                |
| <i>Sawyer and Bletsow</i>                         | 535, 748        | ——— <i>v. Lord Orrery</i>               | 88, 601            |
| <i>Saxby and Childrens</i>                        | 123             | <i>Sheldon v. Dormer</i>                | 2                  |
| <i>Sayer and Allen</i>                            | 419             | ——— <i>and Gardner</i>                  | 20                 |
| —— <i>v. Masterman</i>                            | 562             | <i>Shelly's Case</i>                    | 722                |
| —— <i>and Taylor</i>                              | 545             | <i>Shelley v. Bryer</i>                 | 108                |
| <i>Sayers ex parte</i>                            | 117             | <i>Shephard v. Elliot</i>               | 41                 |
| <i>Scandret and De Costa</i>                      | 206             | <i>Shepherd v. Beecher</i>              | 519                |
| <i>Scarborough (Earl of) and Sharpe</i>           | 764             | <i>Shergold and Reid</i>                | 465                |
| <i>Scarfe and Casborne</i>                        | 537, 550, 625   | <i>Sheriff v. Wilks</i>                 | 278                |
| <i>Scarisbrick and Attorney General</i>           | 401             | <i>Sherrard v. Lord Harborough</i>      | 20                 |
| <i>Scarth v. Cotton</i>                           | 713             | ——— <i>and Stapleton</i>                | 125                |
| <i>Scattergood v. Edge</i>                        | 711             | <i>Shore (Lady) v Billingsly</i>        | 323                |
| <i>Schmedes and Horwood</i>                       | 219             | <i>Short and Tickel</i>                 | 276                |
| <i>Scholefield v. Whitehead</i>                   | 391             | <i>Shouldham v. Shouldham &amp; Al'</i> | 356                |
| <i>Scott v. Becher</i>                            | 249             | <i>Shrewsbury (Duke of) and Talbot</i>  | 299, 312           |
| —— <i>and Benson</i>                              | 45              | <i>Shuttleworth v. Laycock</i>          | 177, 207, 286, 699 |
| —— <i>and Eastabrook</i>                          | 71              | <i>Sibley v. Cook</i>                   | 378                |
| —— <i>v. Fenhoulet</i>                            | 52              | ——— <i>v. Perry</i>                     | 545                |
| —— <i>v. Nesbit</i>                               | 395             | <i>Sibthorp v. Moxom</i>                | 378                |
| —— <i>v. Sarman</i>                               | 638             | <i>Sidebotham and Right</i>             | 562                |
| —— <i>v. Tyler</i>                                | 294             | <i>Sidney v. Sidney</i>                 | 47                 |
| <i>Scudamore and Clements</i>                     | 226             | <i>Silvester and Perry</i>              | 435                |
| ——— <i>v. Scudamore</i>                           | 350             | <i>Simpson and Hill</i>                 | 76, 445, 616       |
| <i>Scudemore v. White</i>                         | 695             | ——— <i>and Hutton</i>                   | 20, 139, 209, 519  |
| <i>Seale v. Seale</i>                             | 526             | ——— <i>and Jones</i>                    | 323                |
| <i>Sealing v. Crawley</i>                         | 47              | ——— <i>v. Vaughan</i>                   | 481                |
| <i>Sedgwick and Bird</i>                          | 162             | ——— <i>and Wright</i>                   | 393                |
| ——— <i>and Hitchcock</i>                          | 30, 81, 97, 271 | <i>Sims v. Urry</i>                     | 481                |
| <i>Sedley and Fletcher</i>                        | 511, 684        | <i>Singer and Carr</i>                  | 585                |
| <i>Sefton and Cunliffe</i>                        | 472             | <i>Singleton v. Singleton</i>           | 705                |
| <i>Selby (Serjeant) and Galby</i>                 | 401             | <i>Skinner and Nicholls</i>             | 388                |
| <i>Selleck and Jennings</i>                       | 20              | <i>Skip and West</i>                    | 993, 409           |
| <i>Selwin v. Brown</i>                            | 587             | <i>Skipp v. Harwood</i>                 | 293                |
| <i>Senhouse v. Earle</i>                          | 385             | <i>Slade and Seton</i>                  | 317                |
| <i>Seton v. Slade</i>                             | 317             | —— <i>v. Tompson</i>                    | 343                |
| <i>Sewell and Legate</i>                          | 307             | <i>Slanning v. Style</i>                | 249                |
| <i>Seymour (Lord Robert) and Lady Clinton</i>     | 761             | <i>Slatter v. Noton</i>                 | 209                |
| ——— <i>and Coleman</i>                            | 661, 705        | <i>Slaughter and Patterson</i>          | 434                |
| ——— <i>v. Fotherby</i>                            | 13              | ——— <i>and Tay</i>                      | 454, 755           |
| ——— <i>and Portman</i>                            | 17              | <i>Small v. Brackley</i>                | 71                 |
| <i>Shaftoe v. Shaftoe</i>                         | 47              | <i>Smalley and Surrey</i>               | 62, 300            |
| <i>Shaftsbury (Lady) v. Arrowsmith</i>            | 463             | ——— <i>and Everall</i>                  | 585                |
| ——— (Countess of) <i>and Eyre</i>                 | 514             | <i>Smallman and Aston</i>               | 545                |
| ——— <i>v. Shaftsbury</i>                          | 740             | <i>Smarthe v. Williams</i>              | 472, 591           |
| <i>Shales v. Sir John Barrington</i>              | 463             | <i>Smith v. Attersoll</i>               | 108                |
| <i>Shaller &amp; Al'. and Pilkington</i>          | 276             | —— <i>v. Baker</i>                      | 252                |
| <i>Shalmer &amp; Al'. and Spalding</i>            | 7, 516          | ——— <i>and Bovey</i>                    | 701                |
| <i>Sharp and Bishop</i>                           | 352, 478        | ——— <i>v. Campbell</i>                  | 381                |
| <i>Sharpe v. Earl of Scarborough</i>              | 764             | ——— <i>v. Claxton</i>                   | 20                 |
| <i>Shaw &amp; Al'. v. Lady Standish &amp; Al'</i> | 491             | ——— <i>v. Clever</i>                    | 246                |
| <i>Sheddon v. Goodrich</i>                        | 562             | ——— <i>and Coleby</i>                   | 307                |

# THE NOTES OF THE SECOND VOLUME.

|                                  | Page              |                                 | Page          |
|----------------------------------|-------------------|---------------------------------|---------------|
| Smith v. Colyer                  | 153               | Spearman and Wilkinson          | 545           |
| — and Deacon                     | 97, 483           | Spencer and Hill                | 188           |
| — and Ellis                      | 80, 742           | Spicer v. Spicer                | 562           |
| — v. Evans                       | 761               | Spillet and Lloyd               | 20, 91, 480   |
| — v. Fellowes                    | 277               | Spink v. Lewis                  | 20            |
| — v. Fitzgerald                  | 149               | Spooner and Peacock             | 363           |
| — and Hill                       | 425               | Spraag and Richardson           | 389           |
| — and Lady Holcroft              | 561               | Spragg v. Binkes                | 564           |
| — and Jones                      | 699               | Sprigg and Norton               | 118           |
| — and Kirkham                    | 757               | — and Platt                     | 755           |
| — and Lamplugh                   | 16                | Sprignall v. Delawne            | 183           |
| — and Marlow                     | 755               | Spurling and Cleaver            | 91            |
| — and Needham                    | 472               | Squib and Snelling              | 701           |
| — and Parkhurst                  | 755               | — v. Wyn                        | 302           |
| — and Roberts                    | 66                | Stables and Blackburn           | 526           |
| — and Roden                      | 199               | Stacey and Purdey               | 308           |
| — v. Smith                       | 66, 74, 85, 639   | Stacie v. Freeman               | 236           |
| — v. Snow                        | 380               | Staines and Maddox              | 59, 60, 601   |
| — and Sparkes                    | 374               | Staker & Al'. and Weeks         | 356           |
| — v. Tyndall                     | 562               | Stamford (Lord) and Pickering   | 82, 517, 561  |
| Smithson and Ackroyd             | 20, 139, 248, 645 | — Case                          | 491           |
| Smiton and Fletcher              | 562               | Standish (Sir Thomas) v. Radley | 429           |
| Snee v. Prescott                 | 203               | — (Lady) & Al'. and Shaw & Al'. | 491           |
| Snell and Read                   | 196               | — v. Standish                   | 582           |
| Snelling and Doe                 | 105               | Stanger v. Tryon                | 709           |
| — v. Squib                       | 701               | Stanhope v. Thacker             | 2             |
| Snelham and Bayley               | 705               | Staniforth v. Staniforth        | 459, 641, 761 |
| Snelson v. Corbett               | 512               | Stanley v. Leigh                | 601           |
| Snow and Smith                   | 380               | Stansbury v. Watkins            | 614           |
| — and Wilbraham                  | 239               | Stansfield v. Habergham         | 572           |
| Soames and Peters                | 195, 566          | Stanton v. Platt                | 234           |
| Somers (Lord) and Pole           | 20, 582           | — v. Sadler                     | 81, 159       |
| Somers and Pole                  | 647               | Stapley and Butcher             | 701           |
| Somerset (Duke of) and Sir Harry | 368, 538          | Stapilton v. Stapilton          | 5             |
| — Peachy                         | 415               | Stapleton v. Colville           | 302, 569      |
| Somerset and Gourlay             | 82                | — v. Conway                     | 395           |
| Somerville v. Lord Somerville    | 635               | — v. Sherrard                   | 125           |
| Sonday's Case                    | 454               | Star and Hodgkinson             | 562           |
| Soresby v. Hollins               | 389               | Starkey v. Brooks               | 20            |
| Soule v. Gerrard                 | 60                | Stead v. Berrier                | 545           |
| South v. Alleine                 | 463               | Stent v. Bailis                 | 123           |
| Southcote and Harrison           | 562               | Stephens ex parte               | 429           |
| Southouse and Andrews            | 429, 566          | — and Child                     | 510           |
| South Sea Company v. Wymondsell  | 123               | — & Al'. and Davie & Al'.       | 545           |
| Sowerby v. Warder                | 7, 516            | — and Green                     | 526           |
| Spalding v. Shalmer & Al'.       | 395               | — v. Olive                      | 491           |
| Span and Driver                  | 506               | — v. Stephens                   | 601           |
| Sparhawk and Alcock              | 299               | Stephenson v. Hayward           | 511           |
| Sparkes v. Cator                 | 374               | — v. Houlditch                  | 64, 292       |
| — v. Smith                       | 105               | — v. Wilson                     | 147           |
| Sparrow v. Carruthers            | 241, 680          | Stephenton v. Gardiner          | 9, 700        |
| — v. Hardcastle                  | 733               | Sterne ex parte                 | 185           |
| Speake (Lady) and Churchill      | 97                | Stevens v. Dethick              | 761           |
| — v. Speake                      | 435               | — and Robinson                  | 307           |
| Spearing & Ux'. v. Lynn          |                   |                                 |               |

# INDEX OF CASES REFERRED TO BY

|   | Page          | T. | Page                                       |
|---|---------------|----|--|
| <i>Steward and Phipps</i>                     | 49            |    |  |
| <i>Stewart and Bowles</i>                     | 379           |    |  |
| <i>Stileman v. Ashdown</i>                    | 491, 684      |    | <i>Talbot and Duke of Chandos</i> 354, 508 |
| <i>Stiles v. Watford</i>                      | 562           |    | <i>Talbott v. Duke of Shrewsbury</i> 299,  |
| <i>Stock and Mawson</i>                       | 71            |    | 312  |
| <i>Stocker and Goodright</i>                  | 105, 562      |    | <i>Tall and Macaree</i> 562                |
| <i>Stokes and Pentland</i>                    | 369           |    | <i>Tancred and Attorney General</i> 454    |
| <i>Stonard and Burting</i>                    | 616           |    | <i>Tanfield v. Davenport</i> 271           |
| <i>Stone and Fletcher</i>                     | 183           |    | <i>Tanner and Chapman</i> 280              |
| — <i>v. Grubham</i>                           | 727           |    | — <i>v. Wise</i> 463, 562, 687             |
| — <i>v. Lidderdale</i>                        | 595           |    | — <i>and Wollen</i> 582                    |
| — <i>and York</i>                             | 557           |    | <i>Target v. Gaunt</i> 60, 88              |
| <i>Storil and Chambers</i>                    | 66            |    | <i>Tate v. Austin</i> 438, 604             |
| <i>Stowell (Lady) v. Cole</i>                 | 219           |    | <i>Tattam and Symance</i> 755              |
| <i>Strafford and Jones</i>                    | 142           |    | <i>Tatton v. Molineux</i> 234              |
| <i>Strahan v. Sutton</i>                      | 66            |    | <i>Tay v. Slaughter</i> 454, 755           |
| <i>Strange v. Collins</i>                     | 434           |    | <i>Tayler and Pannell</i> 614              |
| — <i>and Northey</i>                          | 105, 580, 705 |    | <i>Tayleur and Humphrey</i> 611            |
| <i>Stratford v. Powell</i>                    | 526           |    | <i>Taylor and Browne</i> 80                |
| <i>Strathmore v. Bowes</i>                    | 209           |    | — <i>and Carr</i> 503                      |
| <i>Stratton v. Best</i>                       | 582           |    | — <i>v. Debar</i> 447                      |
| — <i>and Couch</i>                            | 66            |    | — <i>v. Dulwich Hospital</i> 412           |
| <i>Streatfield v. Streatfield</i>             | 556, 582      |    | — <i>v. Fields</i> 293                     |
| <i>Strode v. Blackburne</i>                   | 701           |    | — <i>and Hawkins</i> 30, 526, 616          |
| — <i>v. Little</i>                            | 484           |    | — <i>v. Hawkins</i> 445                    |
| — <i>and Mabblerley</i>                       | 389           |    | — <i>and Hook</i> 564, 687, 691            |
| — <i>and Osgood</i>                           | 322, 364, 483 |    | — <i>v. Jones</i> 471, 491                 |
| — <i>v. Parker</i>                            | 290           |    | — <i>v. Obee</i> 434                       |
| — <i>v. Russel</i>                            | 209, 593      |    | — <i>and Popham</i> 91                     |
| <i>Style and Harrison</i>                     | 85            |    | — <i>and Prat</i> 37, 199                  |
| — <i>and Slanning</i>                         | 249           |    | — <i>and Robinson</i> 20                   |
| <i>Sudell &amp; Al'. and Attorney General</i> | 313           |    | — <i>v. Sayer</i> 545                      |
| <i>Suffolk (Lady) and Hobart</i>              | 20, 247       |    | — <i>v. Wheeler</i> 429                    |
| — <i>(Earl of) v. Howard</i>                  | 463           |    | — <i>and White</i> 376                     |
| <i>Sunday's Case</i>                          | 451           |    | <i>Teather and Tunbridge</i> 479, 498, 556 |
| <i>Supple v. Lawson</i>                       | 381           |    | <i>Tenham (Lord) v. Herbert</i> 301        |
| <i>Surrey v. Smalley</i>                      | 62, 300       |    | — <i>v. Mullens</i> 491                    |
| <i>Sutton and Banks</i>                       | 324, 366, 681 |    | <i>Tenison and Delany</i> 561              |
| — <i>and Blore</i>                            | 456           |    | <i>Tennant v. Wilsmore</i> 434             |
| — <i>and Strahan</i>                          | 66            |    | <i>Teynham (Lord) v. Webb</i> 511, 531     |
| <i>Sutton Coldfield Corporation v. Wilson</i> | 318           |    | <i>Teynham and Head</i> 36                 |
| <i>Swaine v. Kennerley</i>                    | 705           |    | <i>Thacker and Stanhope</i> 2              |
| <i>Sweet and Dowset</i>                       | 611           |    | <i>Thayer v. Gould</i> 61                  |
| <i>Sweetapple v. Bindon</i>                   | 681           |    | <i>Theebridge v. Kilburne</i> 43           |
| <i>Swettenham and Sampson</i>                 | 463           |    | <i>Thellusson and Woodford</i> 88, 580,    |
| <i>Swire v. Bell</i>                          | 472           |    | 601, 738                                   |
| <i>Syderfin and Attorney General</i>          | 266           |    | <i>Thellusson v. Woodford</i> 528, 647     |
| <i>Sym's Case</i>                             | 63            |    | <i>Theobald v. Duffay</i> 564              |
| <i>Symance v. Tattam</i>                      | 755           |    | <i>Thexton v. Betts</i> 401                |
| <i>Symonds and Walker</i>                     | 464           |    | <i>Thirveton v. Collier</i> 103            |
| <i>Symons v. Rutter</i>                       | 285, 296      |    | <i>Thomas v. Kemys</i> 91                  |
| <i>Sympson v. Hornsby</i>                     | 20, 209       |    | <i>Thomas and Blewitt</i> 391              |
| <i>Synge v. Hales</i>                         | 526           |    | — <i>and Edwin</i> 232                     |
|   |               |    | — <i>v. Frazer</i> 481                     |
|   |               |    | — <i>v. Freeman</i> 557, 595               |
|   |               |    | — <i>and Hall</i> 509                      |

L

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## INDEX OF CASES REFERRED TO BY

|                            |                      |  |                          |
|----------------------------|----------------------|--|--------------------------|
|                            | Page                 |  | Page                     |
| Vernon and Acherley        | 209                  | Ward and Clark                             | 61, 307                  |
| —— and Attorney-General    | 307                  | —— v. Turner                               | 299                      |
| —— and Trott               | 741                  | Warder and Sowerby                         | 123                      |
| —— v. Vernon               | 322                  | Warden and Cole                            | 59, 61, 764              |
| Vernon's Case              | 247                  | Waring (Richard) and Attorney-Ge-<br>neral | 751                      |
| Vicarage and Lucas         | 151                  | Warner and Hawes                           | 91, 142                  |
| Vigor and Attorney-General | 721                  | —— v. Hayes                                | 757                      |
| Villers v. Beaumont        | 272, 476             | Warren and Miller                          | 116, 378                 |
| —— v. Villers              | 196                  | —— and Attorney-General                    | 597                      |
| Vincent and Douglas        | 322                  | Warth and Rook                             | 322                      |
| —— and Habergham           | 9, 80, 243, 499, 598 | Warwick v. Warwick                         | 701                      |
| Viner v. Francis           | 705                  | —— (Countess of) and Edwards               | 350                      |
| Vinke and Eastwood         | 498                  | Wase v. Emery                              | 415, 456                 |
| Voice and Papillon         | 526, 527, 669        | Waters v. Ebrall                           | 713                      |
|                            |                      | Waterworth and Ripley                      | 185, 320, 720            |
|                            |                      | Watford and Stiles                         | 562                      |
|                            |                      | Watkins v. Cheek                           | 7, 616                   |
|                            |                      | —— and Stansbury                           | 614                      |
|                            |                      | Watkinson v. Bernadiston                   | 643                      |
|                            |                      | Watkins v. Watkins                         | 481                      |
|                            |                      | Watson v. Brickwood                        | 719                      |
|                            |                      | —— v. Hemsworth Hospital                   | 597                      |
|                            |                      | —— v. Hinsworth Hospital                   | 747                      |
|                            |                      | —— and Horsepool                           | 108                      |
|                            |                      | —— and Wheeler                             | 461                      |
|                            |                      | Watts v. Ball                              | 537                      |
|                            |                      | —— v. Bullas                               | 625                      |
|                            |                      | —— v. Fullarton                            | 680                      |
|                            |                      | —— v. Thomas                               | 68                       |
|                            |                      | Way and North                              | 133, 345, 704            |
|                            |                      | Weale v. Lower                             | 5                        |
|                            |                      | Weatherall v. Geering                      | 194                      |
|                            |                      | Web and Bishop of London                   | 739                      |
|                            |                      | Webb and Atkinson                          | 261, 485, 498            |
|                            |                      | —— and Blackler                            | 706                      |
|                            |                      | —— v. Claverden                            | 700                      |
|                            |                      | —— and Lord Teynham                        | 511, 531                 |
|                            |                      | —— v. Webb                                 | 23, 43, 82, 91, 557, 668 |
|                            |                      | Webber v. Tivill                           | 695                      |
|                            |                      | Webster and Blackburne                     | 262                      |
|                            |                      | —— and Whistler                            | 582                      |
|                            |                      | Weddell v. Mundy                           | 389                      |
|                            |                      | Weeks v. Staker & Al'                      | 356                      |
|                            |                      | Welby v. Thornagh & Ux'                    | 99, 700                  |
|                            |                      | Weld's Case                                | 108                      |
|                            |                      | Weld v. Bradbury                           | 105, 711, 745            |
|                            |                      | —— and Davies                              | 304                      |
|                            |                      | —— v. Eyton                                | 209                      |
|                            |                      | —— and Whitmore                            | 185                      |
|                            |                      | Welden v. Dux' Ebor'.                      | 190                      |
|                            |                      | Welford v. Beazeley                        | 373                      |
|                            |                      | Wells v. Wood                              | 434                      |
|                            |                      | West v. Errissey                           | 701                      |
|                            |                      | —— v. Primate of Ireland                   | 530                      |
|                            |                      | —— v. Oliphant                             | 388                      |

# THE NOTES OF THE SECOND VOLUME.

|  | Page               |  | Page         |
|--|--------------------|--|--------------|
| <i>West v. Skip</i>                            | 293, 409           | <i>Widmore and Blandy</i>                      | 97, 735      |
| <i>Westby's Case</i>                           | 435                | <i>Wiggett and Hill &amp; Ux'</i>              | 98           |
| <i>Westcomb and Jones</i>                      | 31, 139            | <i>Wilbraham v. Snow</i>                       | 939          |
| <i>Western and Bush</i>                        | 391                | <i>Wilcocks v. Wilcocks</i>                    | 97           |
| <i>Westerne and Marret</i>                     | 601                | <i>Wilcox and Kruger</i>                       | 117          |
| <i>Westfaling v. Westfaling</i>                | 790                | <i>Wild's Case</i>                             | 845          |
| <i>Westland v. Robinson</i>                    | 798                | <i>Wilkes v. Wilkes</i>                        | 386          |
| <i>Westmeath v. Westmeath</i>                  | 356, 672           | <i>Wilkins and Bland</i>                       | 20           |
| <i>Westminster (Dean and Chapter of)</i>       |                    | <i>Wilkinson v. Adam</i>                       | 706          |
| <i>and Herbert</i>                             | 587                | <i>and Lush</i>                                | 337, 491     |
| <i>Wiston and Barnet</i>                       | 797                | <i>v. Spearman</i>                             | 545          |
| <i>Weyland v. Weyland</i>                      | 639                | <i>v. Wilkinson</i>                            | 302          |
| <i>Weymouth v. Boyer</i>                       | 117                | <i>Wilks and Sheriff</i>                       | 278          |
| <i>Whaley v. Norton</i>                        | 168, 242           | <i>Willes and Chester</i>                      | 91, 308, 354 |
| <i>Wharton v. Wharton</i>                      | 306, 380           | <i>Willet v. Winnell</i>                       | 541          |
| <i>Whitely and Bricker</i>                     | 190                | <i>Williams ex parte</i>                       | 545          |
| <i>Whete and Burgess</i>                       | 537                | <i>and Abery</i>                               | 162, 600     |
| <i>Wheler and Taylor</i>                       | 499                | <i>v. Bingley</i>                              | 278          |
| <i>v. Watson</i>                               | 461                | <i>v. Duke of Bolton</i>                       | 153          |
| <i>Whetstone (Lady) v. Sainsbury</i>           | 538                | <i>v. Callow</i>                               | 386          |
| <i>Whichey v. Whichey</i>                      | 176                | <i>v. Coade</i>                                | 90           |
| <i>Whialer v. Webster</i>                      | 569                | <i>v. Cooke</i>                                | 219          |
| <i>Whitacre and Gibson</i>                     | 37                 | <i>and Cowper</i>                              | 246          |
| <i>v. Pawlin</i>                               | 429, 566           | <i>v. Floyer</i>                               | 47           |
| <i>Whitbread v. Lord St. John</i>              | 705                | <i>and Landy</i>                               | 199          |
| <i>Whitchurch &amp; Al'. v. D'nara Baynton</i> |                    | <i>v. Lucas</i>                                | 483          |
|  | 483                | <i>v. Nunn</i>                                 | 162          |
| <i>Whitcombe v. Whitcombe</i>                  | 165                | <i>v. Owen</i>                                 | 909          |
| <i>White and Cary</i>                          | 643                | <i>and Smarthe</i>                             | 472, 591     |
| <i>v. Collins</i>                              | 325                | <i>v. Wray</i>                                 | 537, 681     |
| <i>v. Damon</i>                                | 456                | <i>v. Williams</i>                             | 59           |
| <i>v. Ewer</i>                                 | 419                | <i>and Wood</i>                                | 36           |
| <i>v. Fussell</i>                              | 464                | <i>Williamson and Higden</i>                   | 564          |
| <i>and Ginger</i>                              | 451                | <i>and Jacobson</i>                            | 566          |
| <i>v. Godbolt</i>                              | 434                | <i>Willie v. Lugg</i>                          | 1307         |
| <i>v. Hussey &amp; Al'.</i>                    | 262                | <i>Willing v. Baine</i>                        | 378, 611     |
| <i>v. Nutt</i>                                 | 280                | <i>Willis and Ayres</i>                        | 66           |
| <i>and Riddell</i>                             | 712                | <i>and Clay</i>                                | 764          |
| <i>and Scudamore</i>                           | 695                | <i>and Cray</i>                                | 545          |
| <i>v. Taylor</i>                               | 376                | <i>v. Fineux</i>                               | 538          |
| <i>v. Thornburgh</i>                           | 659                | <i>v. Lucas</i>                                | 90           |
| <i>v. White</i>                                | 454, 469, 477, 569 | <i>and Vandervee</i>                           | 177          |
| <i>Whitehead and Bennet</i>                    | 519, 724           | <i>Willoughby and Master</i>                   | 222          |
| <i>and Scholefield</i>                         | 391                | <i>v. Willoughby</i>                           | 600          |
| <i>Whitfield and Bewick</i>                    | 153                | <i>Willows and Lydcott</i>                     | 461          |
| <i>v. Fausset</i>                              | 380, 561           | <i>Willson v. Pack &amp; Al'</i>               | 535          |
| <i>Whithill v. Phelps</i>                      | 274                | <i>Wilmore and Tennant</i>                     | 434          |
| <i>Whitley v. Price</i>                        | 16                 | <i>Wilmot (Sir Robert) &amp; Al'. and Cope</i> | 560          |
| <i>and Robinson</i>                            | 647                | <i>Wilson ex parte</i>                         | 41           |
| <i>Whitmore v. Weld</i>                        | 185                | <i>and Creagh</i>                              | 581, 720     |
| <i>Whitting v. Russell</i>                     | 506                | <i>v. Duckett</i>                              | 206          |
| <i>Whittingham's Case</i>                      | 343                | <i>and Livesy</i>                              | 434          |
| <i>Whitworth v. Davis</i>                      | 380                | <i>v. Major</i>                                | 562, 572     |
| <i>Whorewood v. Whorewood</i>                  | 47, 386            | <i>v. Mount</i>                                | 582          |
| <i>Whorwood and Attorney-General</i>           | 97                 | <i>v. Robinson</i>                             | 562          |
| <i>Wickett and Gulliver</i>                    | 580                |  |              |

## INDEX OF CASES REFERRED TO, &c.

|  | Page                               |   | Page     |
|--|------------------------------------|---|----------|
| Wilson <i>and</i> Saul                           | 747                                | Wollam v. Kenworthy                     | 562      |
| ——— <i>and</i> Stephenson                        | 147                                | Woollaston <i>and</i> Colt              | 123      |
| ——— <i>and</i> Sutton Coldfield Corpora-<br>tion | 318                                | Wollen v. Tanner                        | 582      |
| ——— v. Lord Townshend                            | 582                                | Woolston <i>and</i> Zouch               | 511      |
| Winch v. Keeley                                  | 429                                | Wordsworth <i>and</i> Aynsley           | 205      |
| Winchelsea (Earl of) <i>and</i> Finch            | 59,<br>215, 219, 566               | Worldidge v. Churchill                  | 388      |
| ——— (Lord) <i>and</i> Sir Edward<br>Deering      | 757                                | Worrall v. Jacob                        | 386, 672 |
| ——— v. Norcliff & Al'.                           | 127, 193, 233, 275, 346, 606       | ——— v. Marlar                           | 429      |
| Winchester (Bishop of) v. Beavor                 | 518                                | Wortley v. Birkhead                     | 526      |
| Winchester v. Paine                              | 518                                | Wray <i>and</i> Feise                   | 203      |
| Winckfeild <i>and</i> Hall                       | 751                                | ——— <i>and</i> Williams                 | 537, 681 |
| Wind v. Jekyl                                    | 137, 209, 538, 564                 | Wright (Sir Benjamin) <i>ex parte</i>   | 414      |
| Windham <i>and</i> Packer                        | 503                                | ——— <i>and</i> Atkins                   | 463      |
| ——— <i>and</i> Lord Townshend                    | 319,<br>327, 491                   | ——— v. Blicke                           | 49       |
| ——— v. Graham                                    | 530                                | ——— <i>and</i> Frogmorton               | 562      |
| Windsor v. Hilton                                | 747                                | ——— <i>and</i> Goodright                | 722, 733 |
| Winn v. Littleton                                | 44, 67, 112, 193,<br>367, 583, 625 | ——— v. Horn                             | 522      |
| Winnell <i>and</i> Willett                       | 521                                | ——— v. Hunter                           | 757      |
| Winnington v. Foley                              | 755                                | ——— v. Pilling                          | 464      |
| Winsmore <i>and</i> Godwin                       | 584, 585                           | ——— v. Row                              | 90       |
| Winter <i>and</i> Mackell                        | 199                                | ——— v. Simpson                          | 393      |
| Wise <i>and</i> Murray                           | 562                                | ——— v. Wright                           | 564      |
| ——— <i>and</i> Tanner                            | 463, 562, 687                      | Wrigley v. Andrew                       | 616      |
| Wiseman v. Carbonell                             | 41                                 | Wyburgh <i>and</i> Attorney-General     | 318      |
| Withers v. Withers                               | 252                                | Wych v. East India Company              | 369      |
| Witter v. Witter                                 | 320                                | ——— v. Meal                             | 32, 380  |
| Witts v. Boddington                              | 665                                | Wyld & Al'. <i>and</i> Barker           | 195, 422 |
| Wood & Al'. <i>and</i> Bridges & Al'.            | 378                                | ——— <i>and</i> Lord Keeper              | 701      |
| ——— <i>and</i> Broadmead                         | 531                                | Wymondsell <i>and</i> South Sea Company | 429, 566 |
| ——— v. Pesey                                     | 17                                 | Wyn <i>and</i> Squib                    | 302      |
| ——— <i>and</i> Wells                             | 434                                | Wynn <i>and</i> Meredith                | 402, 479 |
| Wood v. Griffith                                 | 25                                 | Wynne v. Harding                        | 154      |
| ——— v. Williams                                  | 36                                 | Wyse <i>and</i> Holles                  | 317      |
| Woodford <i>and</i> Thellusson                   | 528, 647                           | Wyth v. Blackman                        | 108, 601 |
| Woodford v. Thellusson                           | 88, 580, 601                       |   |          |
| Woodgate <i>and</i> Martin                       | 66                                 |   |          |
|  | 738                                |   |          |
| Woodhouse v. Hoskins                             | 755                                |   |          |
| Woodhouselee v. Dalrymple                        | 705                                |   |          |
| Woodward v. Aston                                | 471                                |   |          |
| ——— v. Glasbrook                                 | 620                                |   |          |
| ——— <i>and</i> Odes                              | 151                                |   |          |
| Woodyer v. Gresham                               | 195                                |   |          |



# TABLE OF STATUTES CITED.

## VOL. II.

### HENRY VIII.

|   | Page |  | Page |
|---|------|--|------|
| 21. cap. 5. (Assets)  | 106  | 4. and 5. cap. 10. (Persons enlisting Sheriff) | 697  |
| 27. cap. 10. (Barring Dower)  | 366  | 9. cap. 14. (Gaming)                           | 292  |
| 28. cap. 11. sect. 7. (Demise of Benefice by spiritual persons)                 | 205  | 12. cap. 16. (Interest of Money)               | 145  |
| 34. and 35. cap. 8. (Exposition of the words " <i>Estates of Inheritance</i> ") | 499  |  |      |
| 37. cap. 12. (Tithes of London)   | 747  |  |      |

### GEORGE I.

|   |     |
|---|-----|
| 11. cap. 18. sect. 17. (Custom of London) | 111 |
|---|-----|

### PHILIP AND MARY.

|  |     |
|--|-----|
| 1. and 2. cap. 17. (Demise of benefice by spiritual persons) | 205 |
|--|-----|

### ELIZABETH.

|                       |          |
|-----------------------|----------|
| 43. cap. 4. (Charity) | 387, 453 |
|-----------------------|----------|

### CHARLES II.

|                                 |               |
|---------------------------------|---------------|
| 16. cap. 7. (Gaming)            | 292           |
| 29. cap. 3. (Statute of Frauds) | 209, 303, 499 |

### WILLIAM III.

|  |     |
|--|-----|
| 8. and 9. cap. 27. sect. 4. (Keepers of Prisons) | 174 |
|--|-----|

### ANNE.

|  |     |
|--|-----|
| 4. cap. 16. sect. 9. 10. (Attornment)        | 113 |
| 4. cap. 16. sect. 19. (Limitation of Action) | 541 |

### GEORGE II.

|   |               |
|---|---------------|
| 1. cap. 14. sect. 7. (Assignment of Seamen's Wages)                 | 595           |
| 5. cap. 30. (Possibility)   | 564           |
| 7. cap. 15. (Ship's Husband)  | 643           |
| 9. cap. 36. (Charity)   | 453           |
| 11. cap. 19. sect. 11. (Attornment)                                 | 113           |
| 14. cap. 20. sect. 9. (Estate <i>pur autre vie</i> )                | 320, 719, 720 |
| 19. cap. 17. sect. 3. (Insurance)                                   | 269           |
| 19. cap. 32. sect. 2. (Bottomry Respondentia Bonds)                 | 662           |
| 19. cap. 37. (Insurance)  | 716           |
| 25. cap. 25. sect. 1. (Persons avoiding Process)                    | 370           |
| 31. cap. 10. sect. 21, 22. (Letters of Attorney for Seamen's Wages) | 391           |

### GEORGE III.

|                                  |     |
|----------------------------------|-----|
| 14. cap. 79. (Interest of Money) | 398 |
|----------------------------------|-----|

### GEORGE IV.

|                      |               |
|----------------------|---------------|
| 6. c. 16. (Bankrupt) | 609, 662, 706 |
|----------------------|---------------|



MEYNELL v.  
MASSEY.

that the lands subject to the portion beyond the jointures, were but 120*l. per ann.*<sup>o</sup>; and though in this case there was no power given to the trustees to sell by the settlement, nor to the daughter to enter and hold till she was satisfied; but barely a power of distress: Yet inasmuch as it was to be paid with damages, and the portion was to be paid at sixteen, and was no more than her mother's portion, and the plaintiff was twenty years old when she married, and was now twenty-four; the Lord *Chancellor* declared, though there was no manner of proof to that purpose, that he would take it, that it was intended that, in case the remainder-man failed to pay it at the day, the trustees were to sell to raise it: and decreed the trustees accordingly to sell and raise the portion (1).

(1) The Decree declared, that the 2000*l.* and damages were due to the plaintiff, and that the premises ought to stand charged therewith: and then that in order to the raising so much of the 2000*l.* and damages, from the 24th day of June 1679, as should appear on the Master's Report to remain unpaid, the surviving trustee in the settlement named should make and execute such leases, mortgages, or other estates of the said premises, or any part thereof, as should be necessary and sufficient to raise and pay the same, on the present or future tenants of the said premises whose leases or estates are in part, or in the whole expired: and should be at liberty to renew and fill up the same

with any life or lives not exceeding three lives, paying a valuable consideration therefore and in case of the refusal of any or all of such tenant or tenants to renew, then forthwith to make and execute any grant or grants, lease, mortgage or conveyance, of such parts thereof, whereof such tenants refused to renew, as he could. Reg. Lib. 1685. B. fol. 790. Vide on this doctrine, *Anon.* ante vol. 1. p. 104. and cases cited in note there, *Sheldon v. Dormer*, post 310. *Warburton v. Warburton*, post. 420. *Stanhope v. Thacker*, Pre. Ch. 435. et vide also *Powell on Mortgages*, p. 82. et seq. and cases there referred to.

[ 3 ]  
CASE 2.

ANGELICA MAGDALENA WHARTON, } Plaintiff;  
Widow of PHILIP WHARTON,

MASTER of the  
ROLLS, 1686.

MARY WHARTON, Daughter and Heir of }  
PHILIP WHARTON by a former Wife, by } Defendants.  
her Guardian & al',

Whether equity will supply the defect of a fine, where the Co-nusor dies after the Cap-tion, and before the fine is perfected.

IN 1684, in consideration of 6000*l.* portion paid by the plaintiff and her friends, to *Philip Wharton* and his father, and of the marriage intended betwixt her and *Philip*, they by lease and release convey the manor of *Hutton Pannell*, &c., the manor of *Edlington*, and part of *Ravensworth* to the trustees of the plaintiff's nomination; in trust that after *Philip's* death they should, during the plaintiff's life, receive and take out of

the profits 600*l.* yearly, to be paid half yearly, as the plaintiff should appoint; with power to the trustees to distrain, and to enter and receive the profits, until the same, and the arrears thereof and damages for non-payment were paid; and after other remainders spent, to the right heirs of *Philip* and his father, which the defendant is; and *Philip* and his father did covenant to make further assurance, and to levy a fine of *Edlington* to those uses, and that they or one of them were seised in fee of all the premises, and that the same should continue to those uses free of all incumbrances.

WHARTON v.  
WHARTON.

The marriage was had, and the portion paid. Sir *Thomas* the father of *Philip* died, and *Philip* surviving his father, 20th Feb. 1684, made his will, and did confirm the plaintiff's jointure, and devised all his lands to the defendant *Mary* in tail, subject to the plaintiff's jointure, and appointed that all persons, any way concerned, should make further assurance, and that all his and his father's and father-in-law's debts and legacies should be paid out of his real estate, and died without leaving any issue but the defendant: And the bill complained, that the defendant set up entails against her jointure, and the lands were liable to pay the debts and legacies, and set forth, that *Philip* had acknowledged a fine for perfecting the jointure; and though he died before the same was perfected, yet it ought to be made good in equity, and the plaintiff's jointure decreed to her, and the debts and legacies paid out of the real estate.

[ 4 ]

The defendant set up several entails in settlements, whereby she was intitled to all the lands but *Ravensworth*, (notwithstanding the marriage-settlement) being about 300*l.* per ann., and that her title was not barred in regard the fine was not perfected, and that in the plaintiff's marriage-deed Sir *Thomas* covenanted, that her 6000*l.* portion should be laid out in a purchase for better securing her 600*l.* per ann., and then *Edlington* to be discharged of it; and that the 6000*l.* being paid to Sir *Thomas* and *Philip*, they deposited it in the *East India* Company, and insisted that none of the lands were liable to the plaintiff's rent-charge, but those in *Ravensworth*; and set forth several settlements for that purpose, and insisted, that the plaintiff ought not to be aided in equity by the fine, it having proceeded no further than barely a *Caption* from *Philip*; and that she ought not to have both the 6000*l.* and her jointure, but that the 6000*l.* ought first to be applied to make up her jointure 600*l.* per ann. and the surplus of it to the payment of debts and legacies in ease of the real estate.

For the plaintiff it was insisted, that she being a purchaser,

WHARTON v.  
WHARTON.

the defect of the fine not being perfected ought to be supplied in equity, as much as a defect in livery. (1)

[ 5 ]

But as to that it was insisted that the defendant's title was *per formam doni*, and so not to be decreed against in equity: And in that point the *Master of the Rolls* did not think fit to relieve the plaintiff. (2) But as to the 6000*l.* though Sir *Thomas* had covenanted to lay it out in a purchase for the better securing the jointure, which if he had done, the remainder would have descended upon *Philip*, and *Philip* was his heir and executor; it was conceived by the *Master of the Rolls*, that therefore and inasmuch as by the marriage-settlement, *Ravensworth*, (being 300*l. per ann.*) was settled towards the jointure, and which the plaintiff's counsel insisted the trustees might hold over after her death, to answer all arrears of her 600*l. per ann.* in her life-time, with damages; and the plaintiff's counsel seeming willing to take the 6000*l.* and 300*l. per ann.* for her life, out of *Ravensworth*; the *Master of the Rolls* did so decree it, and that the plaintiff should have the 6000*l.* discharged of debts and legacies, and the 300*l. per ann.* for her life. (3)

(1) Vide Cases cited in *Lyford v. Coward*. Ante 1 vol. 196. Eq. Ca. Ab. 306. pl. 1. where after long possession livery presumed both in this Court, and at law.

(2) So where tenant in tail sold for full value and received the money and covenanted to levy a fine, and afterwards was decreed to do it yet dying

(though in prison for not performing the decree) his issue could not be bound, *Weale v. Lower*. cited in *Fox v. Crane*, post. 306. *Powell v. Powell*, Pre Ch. 278. *Frederick v. Frederick*, 1 P. Wms. 720. *Cotter v. Layer*, 2 P. Wms. 626. *Holt v. Holt*, ibid. 652. et vide *Stapilton v. Stapilton*, 1 Atk. 9.

(3) Reg. Lib. 1685. B. fol. 763.

CASE 3.  
Eq. Ca. Ab.  
358. pl. 3. S.C.  
LORD CHAN-

CELLOR,  
June 1686.  
Where lands  
are vested in  
trustees by Act  
of Parliament,  
to be mort-  
gaged for a  
particular  
purpose, it is  
incumbent on  
the mortgagee  
to see the mo-  
ney applied  
accordingly.

Sir JOHN COTTEREL, and JOHN HOLT, Esq. Plaintiffs ;  
Serjeant HAMPSON, CHARLES BILL, & al'. Defendants.

MAJOR *Bill*, the defendant *Bill*'s father, and his trustees *Chump* and *Johnson* in May 1677, mortgaged a tenement called *Dovers*, in *Surrey*, to the Earl of *Leicester* in fee. In 1680, Major *Bill* made his will, and *Garrett* his executor in trust for the defendant *Charles*, during his minority, who having married the defendant *Hampson*'s daughter, he and his mother, and *Garrett*, by articles transferred the executorship to *Hampson*, in July 1682; and Major *Bill*'s trustees by appointment of *Garrett*, transferred the equity of redemption of

the mortgage to *Hampson* and *Hodges*, and they and the Earl of *Leicester* for 1800*l.* paid by the plaintiff *Cotterel*, assigned the mortgage to him. In *December* 1682, the plaintiff, *Holt*, lent *Serj. Hampson* 260*l.*, which *Hampson* agreed should be secured by the said mortgage ; and *Cotterel*, by writing under hand and seal by *Hampson's* directions, acknowledged himself a trustee for *Holt* in the mortgage, as to the securing the 260*l.* after his own 1800*l.* and interest was paid ; and *Hampson* and *Hodges* assigned the equity of redemption to *Holt* for that purpose ; and that the defendants might redeem or be foreclosed was the bill.

The defendant *Bill* insisted by answer upon a settlement in 1658, upon his father and mother's marriage, of the tenement called *Dovers*, and the *Printing-House*, on the defendant's father for life, and his mother for life, and afterwards on the defendant in tail ; and that in the fire in 1666, the *Printing-House* being burnt, and the defendant's father but tenant for life, could not raise money to rebuild : Whereupon 22 *Car. 2.* an Act of Parliament passed (reciting that marriage-settlement, and the father's incapacity to rebuild) which did enable the defendant's father to sell his lands in *Kent* and *Surrey* to rebuild, and stock the *Printing-House* for the benefit of the defendant's mother and children ; and the tenement called *Dovers*, and land in *Kent* were vested in *Crump* and *Johnson*, to sell to raise money for the building and stocking the *Printing-House*, and the surplus to purchase land to be settled to the uses of the said marriage-settlement of the defendant's said father and mother ; and insisted, that he was abused in his minority by *Hampson* in transferring the executorship, and that no more money ought to be charged on the mortgage, than what was taken up and employed according to the trust of the act of parliament ; and the *Lord Chancellor* did so decree it, and that an account should be taken of what monies had been employed in building or stocking the *Printing-House*, according to the trust of the act of parliament, and that the defendant *Bill* paying so much with interest and costs, discounting the profits received by the mortgagees, should be let in to redeem ; though for the plaintiffs it was insisted, that it could not reasonably be intended, that they could be privy to, and could prove the laying out of the money according to the act of parliament ; and that no man would lend money upon the trusts of an act of parliament, if it was incumbent upon him to see the money laid out, and employed according to the act ; and

**COTTEREL v. HAMPSON.** such a construction of the act could not consist with the intention of the act, but utterly prevent the same. (1)

(1) Reg. Lib. 1685. A. fol. 1031. vide *Spalding v. Shalmer & AL.* ante vol. 1. 301. So where money advanced on sale or mortgage under a decree of the Court to be applied in payment of debts ascertained in a report, mortgagee or purchaser bound to see to the application, *Lloyd v. Baldwin*, 1 Vez. 173. and generally on the doctrine on the obligation upon mortgagees and purchasers to see to the application of mortgage or purchase-money, vide *Powell's Law of Mortgages*, 1 vol. 285. et seq. Fonbl. Tr. Eq. 1. 153, 4. and cases there respectively referred to: in addition to which, it appears to be considered as the settled doctrine of the Court, that where a man by deed or will, charges or orders an estate to

be sold for the payment of debts generally, and then makes specific dispositions, the purchaser is not bound to see to the application. Vide *Jenkins v. Hiles*, 6 Ves. 654. Not. (a) [but if the transaction affords intrinsic evidence that the sale or mortgage is a breach of trust, the purchaser or mortgagee shall not hold the estate discharged from the trust. *Watkins v. Cheek*, 2 S. & S. 199.] et vide *Quære* as to the application of the general rule, that purchasers are not bound to see to the application where only a general charge of debts, to the case of purchase to the assignee of the original trustee for the purpose of sale. *Lord Braybrooke v. Inskip*, 8 Ves. 424. Arg.

CASE 4.  
LORD CHANCELLOR,  
30 June, 1686.

Feme covenants to stand seised to the use of herself in tail, remainder to such uses as she by writing under her hand should appoint; for want of such appointment, to the use of the plaintiff her kinsman in fee. Whether this remainder to such uses as she should appoint is not a void remainder, being on a covenant to stand seised.

[ \*8 ]

1 Co. 175, 176.  
Mildmay.

DANIEL WARWICK, Plaintiff;  
CHARLES GERRARD, Defendant.

THE defendant's wife being seised in fee, before her marriage covenanted to stand seised to the use of herself for life, and after to the heirs of her own body to be begotten, remainder to such uses as she by will, or writing under hand and seal, should appoint, and for want of such appointment, to the use of the plaintiff and his heirs: then she married the defendant, and had issue one daughter; the mother died, and afterwards the daughter died without issue; the plaintiff was of the blood and kindred of the mother: The mother after the execution of the deed of covenant made her will, and thereby reciting that deed, she gave to the child she then went with, and its heirs, all her lands, and for lack of such issue, to the defendant and his heirs, charged with the payment of several legacies, of which one was 100*l.* to the plaintiff, part of which legacies the defendant hath paid, and offered\* to pay the rest. The plaintiff's bill was for the writings.

And for the plaintiff it was insisted, that the power in the covenant to stand seised being general was void, and that by consequence the devise was void: but for the defendant it was

WARWICK v.  
GERRARD.

insisted, that though the power was general; yet it ought to be supported so far, as to make good any disposition which she might have made by a covenant to stand seised; for that this covenant was made before her marriage; and at the same time the defendant made a settlement upon her, in consideration of the intended marriage; and if she had covenanted for that consideration, to stand seised to the use of her husband, it would have been good, and so by consequence her disposition to the husband by virtue of that power, though the same was general, being such as the law would bear upon a covenant to stand seised, ought to be taken to be good.

Upon the hearing, the court left the parties to try it at law and at law a verdict was given for the plaintiff, though the defendant stood upon a special verdict, that so the same might have been argued. And afterwards the cause being heard, it was decreed according to the verdict. (1) *Quære tamen*.

---

(1) And no costs on either side. Reg. *Thompson v. Attfield*, ante 1 vol. 40. Lib. 1685. B. fol. 840. As to covenants to stand seised in general. Vide *Sanders on Uses*, 3 vol. 90.

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EDWARD ARCHER, Plaintiff;  
THOMAS MOSSE & al'. Defendants.

CASE 5.  
Eq. Ab. 136.  
pl. 5. 405. pl. 1.  
S. C.

LORD CHANCELLOR,  
about June  
1686.

Fraud in obtaining a will relating only to a personal estate, is not examinable in Chancery, after the will is proved in the Spiritual Court, so long as that probate is in force.  
Post. Case 70.

[ \*9 ]

JOHN *Archer* the plaintiff's uncle, who died in *January* 1682, had before (when in perfect health) made his will, and thereby given the plaintiff the greatest part of his personal estate to the value of 5000*l.* as was proved in the case: \* But one *Bridget Sandyman*, his maid-servant, had in sickness prevailed upon him (as was alledged) to make another will, and to marry her a week before his death, when he lay in his sick bed, at six of the clock at night, though it was really proved by two ministers, that she was a year before actually married to the defendant *Mosse*, and was then his wife, and that *Mosse* procured the license for the marriage of *Archer* to *Bridget*; and that, though they had set up a will dated a week before *Archer's* death, whereby *Bridget* was made executor, and all given to her; and that she had suppressed the former will, by which the plaintiff claimed; yet that will so by her set up being proved in the *Prerogative* court, and she having made her will, and *Mosse* her executor, (though in this case there was as gross a practice proved, as could possibly be, in gaining that



ARCHER *vs.*  
Mosse.

will by *Bridget* from *Archer*, and that he was not *compos*, neither when he made it, nor when his pretended marriage was to *Bridget*, and that he knew in his health, that she was married to *Mosse*,) and the matter in question being purely relating to the personal estate; the Lord Chancellor was of opinion, that whilst that probate stood, this matter was not examinable in Chancery; and though the fraud was fully proved as aforesaid, and was opened to him, he would not hear any proofs read, but dismissed the bill. (1)

(1) Vide *Goss v. Tracy*, 1 P. Wms. 287. and Cases cited in not. there. So *Plume v. Beale*, *ibid.* 388. *Stephenton v. Gardner*, 2 P. Wms. 286. and where a devise to pay debts and legacies, whatever the Ecclesiastical Court will establish as a legacy it is sufficient to create a charge, *sic dict.* per *Loughborough*, Lord Chancellor. *Haberg-ham v. Vincent*, 1 Ves. jun. 411. And even in the case of a will of lands it has been decided in the House of Lords, that this Court cannot set it

aside for fraud, but it must first be tried at Law on an issue directed *devisavit vel non*. July 28, 1726, *Bransby v. Kerridge*, Eq. Ca. ab. 406. 3 Bro. Parl. Ca. 358. though it appears to have been considered formerly that there were cases respecting wills of lands in which equity would relieve for the fraud, *Goss v. Tracy*, *ub. sup.* post 700. S. C. et vide *Farrington v. Knightly*, 1. P. Wms. 549. and cases cited in not. there.

[ 10 ]

DE

## TERM. S. MICHAELIS, 1686.

IN CURIA CANCELLARIÆ.

KNIGHTLY, ROBINSON, & al', Plaintiffs;  
BURDETT, HUTCHINSON, & al', Defendants.

CASE 6.

Lord Chan-  
cellor  
JEFFRIES,  
23 November.

THE *King* having granted a duty upon *Sea-Coal*, for the *King's* life, to the Lord *Townsend*, the defendants were farmers of that duty; and the plaintiffs insured the defendants, that the duty should not determine before *Michaelmas* 1685, and that if it did, they would pay the defendants the several sums of money subscribed on the policy without abatement, and without questioning what the defendants might lose thereby, and without any farther dispute, plea or pretence whatsoever.

The duty determined by the *King's* death in *February* 1684, and the premium paid to the plaintiffs was three guineas per cent. for insurance. The defendant *Burdett* had recovered at law of the plaintiff *Knightly* the sum of 50*l.* being the sum subscribed by him: The bill suggested, that though the duty did expire by the demise of the *King*, yet there was no interruption or stop of payment of the duty: but his present majesty did declare by proclamation, that *Tonnage* and *Poundage* should be collected as in his brother's time; and that thereby the patentee, and the defendants under him did enjoy the duty 'till *Michaelmas* 1685, or made some composition touching the same; and so were not damnified, and therefore prayed to be relieved against the policy and verdict, which the defendants insisted upon by plea: and though it was so express, that in case the duty expired before *Michaelmas* 1685, the plaintiffs would pay the subscription without abatement, &c. as aforesaid, yet the Lord *Chancellor* overruled the plea, and ordered the defendants to answer (1).

KNIGHTLY v.  
BURDETT.

[ 11 ]

(1) But the benefit of the plea reserved till the hearing without costs on either side. Reg. Lib. 1686. A. fol. 213. And that a court of equity will relieve against the strict breach of a policy of insurance, where it appears that no real loss hath happened to the

party insured, vide *Sadler's Company v. Badcock*, 2 Atk. 554. *Lynch v. Dalzeel*, in the House of Lords, March, 1729. 3 Bro. Par. Ca. 497. et vide *Goddart v. Garrett*, post 269. [*Godsall v. Boldero*, 9 East. 72.]

JOHN SEABOURNE and THOMAS SEABOURNE, } Plaintiffs;

CASE 7.

GEORGE POWEL, THOMAS SEABOURNE, }  
Senior, ALICE AUSTIN the Wife of } Defendants.  
JOSEPH AUSTIN, WILLIAM MACK- }  
LEY, and JUDITH his Wife, }

MASTER of the  
ROLLS.  
Nov. 8, 1686.

THOMAS *Cowls* demises houses and grounds in *Chick-lane*, in 1674, for a long term to build upon; which term came by assignment to the defendant *Austin* and her husband, which they believed to be a good title, and borrowed 100*l.* of the defendant *Mackley's* wife, upon a mortgage of it, for which the plaintiffs became bound. That the defendant *Austin's* husband nine years since run away for debt, and they thinking their title good, had borrowed, and built upon the ground with lease in trust for her. Decreed the trustees to make a new mortgage to B,

A. and his wife being assignees of a lease, mortgage to B.; A. becomes insolvent, and the title not being good, C. who had the real title, in compassion to A.'s wife, makes a



SEABOURNE v.  
POWELL.

[ 12 ]

it, and but 15*l.* of *Kerrington's* money was that way employed. Seven years after her husband's going away, the defendant *Austin* found her title not good, the real title being in one *Haynes*; and he compassionating her case, for ten guineas fine, leased the premises for a long term, at four pounds yearly rent, in trust for her to the defendant *Powell & Al'*, and she had instigated *Mackley* to sue the plaintiff upon the bond for the mortgage-money.

The plaintiff's bill was, that though the mortgage might not in strictness of law be good, yet the estate granted by *Haynes* was, in regard of the monies laid out in building upon the other title, and that the estate mortgaged was of better value than the mortgage, besides what was reserved to be paid to *Haynes*; and that the mortgagee had therefore a plain equity, to have the benefit of that title, which was but a graft into that stock from which he derived; and that the defendant *Alice* had since the taking of that estate (and so it appeared on proof) paid the interest to the mortgagee; and that therefore the plaintiffs being but sureties in the bond had an equity to have the benefit of the mortgage, and of that new acquired title, to save them harmless against the bond; or else the trustees ought to be decreed to make a new mortgage to the mortgagee; and he to forbear suing upon the bond.

The Master of the *Rolls* in this case, did look upon the estate made by *Haynes* to be as a graft into the old stock, and the benefit of it above 4*l.* per ann. reserved to *Haynes* did arise in consideration of the former title; and therefore did decree the trustees to make a new mortgage to the mortgagee. (1)

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(1) The decree to this purpose is recited in a subsequent order respecting costs, made the 30th Nov. Reg. Lib. 1686. B. fol. 83.

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[ 13 ]

CASE 8.

MASTER of the  
ROLLS.  
Nov. 1686.

Marriage-  
Articles for  
settling Lands  
varied by  
decreeing an  
estate for life,  
instead of an estate tail,

THOMAS GRIFFITH, WILLIAM BUCKLE, } Plaintiffs;  
& Ux',

WILLIAM BUCKLE, Senior,

Defendant.

THE bill was to have a marriage-agreement in 1683, betwixt the plaintiffs and defendant, executed, whereby the defendant in consideration of a marriage to be, and afterwards had, betwixt the plaintiff *Buckle* and his wife, the plaintiff *Griffith's*

daughter, and in consideration of 1500*l.* that was her portion, 1200*l.* of which was paid to the defendant, and the other 300*l.* returned, did article to convey the lands in question to the use of himself, till the marriage had, with remainder to the heirs of the plaintiff *Buckle*, upon the body of *Elizabeth*, remainder to the plaintiff *William Buckle* in fee.

GRIFFITH v.  
BUCKLE.

The defendant insisted, that he was surprised in the wording of the articles, and that he intended only an estate for life to the plaintiff, with remainder to his sons in tail; and that in case of his sons dying without issue, it should come to the defendant's own children; and that it was plain, (however the articles were worded) that it was so meant, for that there was a clause in the articles, as indeed there was, that his son should do no waste, which would have been repugnant in case he had been to have had the estate of inheritance: and though there was no surprise proved in the gaining of the articles, the Master of the *Rolls* decreed the father to execute a conveyance, whereby the plaintiff was to be but tenant for life, with remainder in tail to his issue successively, and that thereupon the articles should be delivered up. (1)

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(1) Reg. Lib. 1686. A. Fol. 237. *nall v. Beachinall*, *ibid.* p. 246. and No costs on either side, vide *Seymour* cases cited in not. there respectively. v. *Fotherly*, ante 1 vol. 321. *Beachi-*

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DE

[ 14 ]

## TERM. S. HILLARII, 1686.

IN CURIA CANCELLARIÆ.

LORD CHAN-  
CELLOR.  
Jan. 1686.

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BERNY *versus* PITT, Esq.

CASE 9.  
2 Ch. Ca. 391.  
S. C.

THE plaintiff being a young man, as he alledged, and his father tenant for life only of a great estate, which by his death was to come to the plaintiff in tail; and during his life allowing the plaintiff but a narrow allowance, he became indebted, and borrowed 2000*l.* of the defendant in 1675, and entered into two judgments of 5000*l.* a piece, defeasanced each of them, that if the plaintiff out-lived his father, and within a month

An uncon-  
scionable bar-  
gain, got from  
an heir in the  
life of his  
father, set  
aside. Post.  
Case 18.

BERNY v.  
PITT.

[ 15 ]

after his father's death, paid the defendant 5000*l.* and if the plaintiff should marry in the life-time of his father, then if he should from such marriage during his father's life, pay the defendant interest for his 5000*l.* the defendant should vacate the judgment ; with this farther clause in the defeasance, that it was the intent of the parties, if the plaintiff did not outlive his father, that the money should not be repaid. *January* 1679, the plaintiff's father died, and to be relieved against the said judgments upon payment of the 2000*l.* lent with interest, was the bill ; which complained of a fraud, and a working upon the plaintiff's necessity when in streights.

This cause came first to be heard in *Hillary-Term*, 27 *Car.* 2. before the Lord *Nottingham*, who in regard the judgments were for money lent, and not for wares taken up to sell again at under-value, as improvident heirs used to do (1) ; and in regard of the express clause in the defeasance of the defendant's losing all, if the plaintiff died before the father, did not think fit to relieve the plaintiff against the bargain itself, without paying the 5000*l.* with interest from a month after the plaintiff's father's death ; and did decree upon the payment of the 5000*l.* with interest, the defendant should acknowledge satisfaction upon the judgments ; and the money was paid, being 5390*l.* and the judgments vacated accordingly.

And now the cause coming to be re-heard at the plaintiff's instance, before the Lord Chancellor *Jefferies*, it was insisted that there was no true difference in the case of an unconscionable bargain, whether it be for money or for wares ; and that the inserting the clause in the defeasance, that the defendant should lose his money, if the plaintiff died before his father, did not differ the case in reason at all from any other bargain made by the plaintiff, or other tenant in tail, to be paid for at their father's death ; for that in these cases, if the tenant in tail died living the father, the debt would be lost of course, and therefore the expressing of it particularly in the defeasance, made the bargain the worse, as being done to colour a bargain, that appeared to the defendant himself unconscionable ; and though there was not in this case any proof of any practice used by the defendant, or any on his behalf, to draw the plaintiff into this security ; yet in respect merely to the unconscionableness of the bargain, the Lord Chancellor discharged

[ 16 ]

(1) This distinction is not stated in the Registers Book, the words are, " that as the cause was, his Lordship

" could not relieve the plaintiff otherwise than against the penalties."—  
R. L,

the Lord *Nottingham's* decree; and did decree the defendant *Pitt* to refund to the plaintiff, all the money he had received of him, except the 2000*l.* originally lent, and the interest for the same. (1)

BERRY v.  
PITT.

(1) Reg. Lib. 1686, A. fol. 273. there. *Bill v. Price*, ante 1 vol. 467, vide on this head, *Batty v. Lloyd*, ante 1 vol. 141. and cases cited in not. *Lamplugh v. Smith*, post 77. *Whitley v. Price*, post 78.

NATHANIEL SPINDLAR,

Plaintiff;

CASE 10.

EDWARD WILFORD, and PRISCILLA,  
Executrix of GEORGE ADAMS, } Defendants.

LORD CHAN-  
CELLOR.  
Feb. 1686.

MERCY *Thorn*, in 1614, surrendered a copyhold tenement to the use of *Adam Johnson* and his heirs, on condition that *Johnson* and his heirs should pay *Abel Peterson* and his heirs 5*l.* per annum for ever, and in default of payment, the use to *Johnson* and his heirs to be void, and to be to the use of *Peterson* and his heirs. *Johnson* was admitted, and there were several alienations of the copyhold tenement by surrender and admittance; and there were also alienations of the 5*l.* per annum rent, which had always been done too by surrender and admittance, on assigning the rent. The plaintiff was the last surrenderee of the rent, and the defendants *Wilford* and his wife were tenants in possession of the copyhold, and denied to pay the rent; and the bill was to force them to pay it.

A rent out of a Copyhold aliened by surrender and admittance, for a valuable consideration, good inequity.

The defendants demurred, and insisted that the plaintiff's title being by several mesne surrenders of the 5*l.* per annum, and the admittance thereupon was not good; so that the 5*l.* per annum being a rent created *de novo*, and no copyhold or customary interest, could not pass in that manner, and the plaintiff had no title in equity.

But for the plaintiff it was insisted, that though in strictness the rent would not pass in law by way of surrender, yet the surrender and admittances were evidences of the agreement for the sale; and the plaintiff was a purchaser, and ought therefore to be helped in equity: and the Lord Chancellor was of that opinion. and over-ruled the demurrer.

[ 17 ]

And 27th October, 1687, it was decreed for the plaintiff, that the defendant should pay the 5*l.* per annum, and arrears. (1)

(1) And costs to be taxed Reg. Lib. 1687. B. fc'. 8.—As to surrenders on condition, Vide *Mappletoft v. Mapple-* toft, Gilb. Eq. Rep. 8. *Wood v. Pessey*, 5 Vin. Ab. 547. Pl. 36. *Portman v. Seymour*, 9 Mod. 280.

## DE TERM. PASCHÆ, 1687.

the estate to remain at his own disposal, the child will be declared to be a trustee, *Prankerd v. Prankerd*, 1 S. & S. 1. *Murless v. Franklin*, ub. sup.] and in addition to these, *Jennings v. Selleck*, ante 1 vol. 467. and as to the son's being a trustee for his father in the case of a conveyance by the father for natural love and affection, vide *Baylis v. Newton*, post 28. As to the doctrine of resulting trusts it is considered, 1st. That nothing can be construed a resulting trust but such as are called trusts by the operation of law, *Lloyd v. Spillet*, 2 Atk. 148. 2d. That the clause in the 8th sect. of the Stat. of Frauds, which saves resulting trusts from the operation of the statute relates only to trusts and equitable interests, and not to an use which is a legal estate, *Lamplugh v. Lamplugh*, 1 P. Wms. 112. 3dly. That the statute does not extend to save any resulting trusts, save such as were resulting trusts before the passing thereof. *Lady Bellasis v. Compton*, post. 294. 4th. That parol evidence is admitted to rebut a resulting trust, *Gascoigne v. Thwing*, ante 1 vol. 366. *Lamplugh v. Lamplugh*. *Lady Bellasis v. Compton*, ub. sup. *Lady Granville v. Duchess of Beaufort*, 1 P. Wms. 116. and cases cited in Mr. Coxe's note there, in addition to which see *Nourse v. Finch*, 1 Ves. jun. 344. *Hornsby v. Finch*, 2 Ves. jun. 78. S. C. *Dicks v. Lambert*, 4 Ves. 730. which see, and also *Clennell v. Lewthwaite*, 2 Ves. jun. 649. [*Rachfield v. Careless*, 2 P. Wms. 158.] for the grounds on which parol evidence is admitted as to resulting trust between executor and next of kin. *Pole v. Lord Somers*, 6 Ves. 324. [*Walton v. Walton*, 14 Ves. 318. and see *Langham v. Sandford*, 17 Ves. 442. and 2 Mer. 17, *Gladding v. Yapp*, 5 Mad. 56. *Lynn v. Beaver*, 1 Tur. 66.] As to the cases and circumstances under which a trust shall result, the cases are very numerous, and it will be impossible to do more in a short note than to refer to the leading cases, dividing for the sake of convenience and perspicuity those which relate to land or to questions between real and personal representatives, from those which relate to personal estate, or to questions between personal representative and next of kin:

those relating to the former are *Horton v. Horton*, Cro. Jac. 75. *Gardner v. Sheldon*, Vaughan, 263. *Higham v. Baker*, Cro. Eliz. 15. *Hutton v. Simpson*, post 723. *Sympson v. Hornsby*, Pre. Ch. 439. S. C. *Starkey v. Brooks*, 1 P. Wms. 390. *Hobart v. Lady Suffolk*, post 644. *Cruse v. Barley*, 3 P. Wms. 20. and the cases cited in note there, p. 22. *Philips v. Philips*, 1 P. Wms. 33. post 430. Pre. Ch. 167. 2 Freem. 11. 247. S. C. *Willis v. Lucas*, 1 P. Wms. 473. *Countess of Bristol v. Hungerford*, post 645. *Hill v. Bishop of London*, 1 Atk. 618. *Sherrard v. Lord Harborough*, Amb. 165. *Grosvenor v. Hallum*, Amb. 643. *Gibson v. Lord Mountford*, 1 Vez. 485. *Leslie v. Devonshire*, 2 Bro. Ch. Rep. 188. *Davidson v. Foley*, ibid. 203. *Robinson v. T aylor*, ibid. 589. 1 Ves. jun. 44. S. C. *Hutchinson v. Hamond*, 3 Bro. Ch. Rep. 128. These cases go upon a principle that seems to give birth to a two-fold general rule. 1st. That where lands are given for particular purposes in trust, nothing more is subject than those purposes require, and if not exhausted there shall be a resulting trust after the purposes are answered for the heir at law. [See *King v. Denison*, 1 V. 2 B. 273.] And 2dly. That though the whole of the real property be disposed of, yet if by any circumstances the disposition fail or cannot take effect, there shall be a resulting trust as to so much thereof as shall not be affected by the disposition; but this general rule seems subject to exceptions, as in the case of a will where the intention of testator appears to be in favour of his executor. *Coningham v. Mellish*, Pre. Ch. 31. *Rogers v. Rogers*, 3 P. Wms. 193. and in which an express distinction is taken between a will and a conveyance. *Mallabar v. Mallabar*, Forr. 79. *Cook v. Duckenfield*, 2 Atk. 562. *Popham v. Lady Aylesbury*, Amb. 68. *Wright v. Row*, 1 Bro. Ch. Rep. 61. *Bland v. Wilkins*, Feb. 1782. cited in not. there. And it is clear that at law, where the real legal estate is devised away, there can be no resulting trust for the heir. *Hawkins v. Chappel*, 1 Atk. 622. A resulting trust of a copyhold estate, as well as of a freehold, is within the statute of frauds. *Howe v. Howe*, ante 1 vol. 415. and cases

cited in not. there. And no difference whether the heir has a legal or equitable right on a resulting trust. *Gibson v. Lord Mountford*, 1 Vez. 490. The leading cases relating to personal estate, where the question is between the personal representative and next of kin, are to be found in note to *Foster v. Murt*, ante 1 vol. 473. Where the fund is mixed the trust results in proportions, so much as is of the real estate to the heir, and so much as is of the personal to the next of kin, *Ackroyd v. Smithson*, 1 Bro. Ch. Rep. 503. to Mr. Scott's argument in which the reader is referred for a very profound discussion of this subject. *Spink v. Lewis*, 3 Bro. Ch. Rep. 355. *Middleton v. Cater*, 4 Bro. Ch. Rep. 409. [*Williams v. Coadè*, 10 Ves. 500. *Smith v. Claxton*, 4 Mad. 484. *Jones v. Mitchell*, 1 S. & S. 290. *Dixon v. Dawson*, 2 S. & S. 334.]

RICHARD KNIGHTS, Plaintiff.  
 Sir JONATHAN ATKYNS, JOHN PIERCE, } Defendants.  
 and FRANCES his Wife, and Al',

[ 20 ]

CASE 13.  
 LORD CHANCELLOR,  
 20 April, 1687.  
 Eq. Ca. Ab.  
 274. pl. 6. 2 Ch.  
 Rep. 400. S. C.  
 The wife's  
 portion, and  
 the like sum  
 of the hus-  
 band's money,  
 is agreed to be  
 laid out in  
 lands, to be  
 settled on  
 them and the  
 heirs of their  
 bodies, with-  
 out mention-  
 ing how the re-  
 mainder over  
 should be li-  
 mited. They  
 both died  
 without issue,  
 and before any  
 purchase  
 made; the  
 money shall  
 be paid to the  
 heir of the  
 husband, and  
 not to the ad-  
 ministrator of  
 the wife, who  
 survived her  
 husband.

[ 21 ]

It was agreed upon the marriage of *Benjamin Knights*, and the defendant *Frances*, daughter of *Sir Jonathan Atkyns*, that *Sir Jonathan* should give her a portion of 1500*l.* and that *Benjamin* should put 1500*l.* more to it, and this 3000*l.* to be laid out in the purchase of lands, to be settled on *Benjamin*, and *Frances* for her jointure, and on the heirs of their two bodies.

*Benjamin* dying without issue, *Frances* intermarried the defendant *Pierce*: the plaintiff being heir (1) of *Benjamin*, brought his bill to have the money owing by *Sir Jonathan Atkyns*, together with 1500*l.* more, which he offered to lay down, laid out in a purchase, according to the marriage-agreement. *Frances*, *Pierce's* wife, died before answer.

For the defendant *Pierce* it was insisted at the hearing, (though no mention of it in his answer) that he as administrator to his wife, who survived *Benjamin*, was intitled to the money, and not the heir of *Benjamin*, all the uses for which the purchase was agreed to be made, being spent by the death of *Benjamin* and *Frances* without issue; and that there was no mention in the marriage-agreement, how the remainder in fee should go; and that the wife's portion being equal to the money laid down by the husband, it would have been reasonable, if a question had been made in this Court, how the remainder should have been limited in the life of the parties, to have decreed it for the right heirs of the survivor; and that therefore the purchase being never made, and the wife surviving, she was intitled in equity to the whole money, and the defendant her husband as her administrator had the same

(1) [He was also executor, 2 Ch. Rep. 400.]



*Benjamin Knight* right if not to the whole, at least as a moiety, which was her own proper portion.

But for the plaintiff it was insisted, that if a bill had been brought in the life-time of the husband and wife to have had the purchase made, it would have been decreed to have been to the use of the husband and wife, and the heirs of their two bodies, with remainder to the right heirs of the husband.

The Lord Chancellor decreed it for the heir, upon presumption that it was so intended; and that Sir Jonathan Atkins should pay what remained in his hands of the 1500*l.* to the plaintiff the heir. (1)

(1) The plaintiff paying the defendant *Pierce* interest for the 1500*l.* which *Benjamin Knight* (Benjamin and the defendant Sir Jonathan Atkins, having mutually entered into bonds for that purpose) was bound to lay out and

also interest for 300*l.* which *Benjamin* had received of Sir Jonathan, in part of his wife's portion, from the death of *Benjamin* to the death of *Frances*. Reg. Lib. 1686. A. fol. 604.

CASE 14.

ELIZABETH FOTHERBY, Widow, Executrix of ELIZABETH BROME, who was the Executrix of Mr. Serjeant BROME, } Plaintiff.

LORD CHANCELLOR.  
May 4, 1677.

WILLIAM HARTRIDGE, WILLIAM PYSEING, and ALICE ux' ejus, BERNARD KENDAL and ANNE his Wife, } Defendants.

Legacy pronounced to be paid after a great length of time.

*Lewis Lees*, father of the defendants *Alice* and *Anne*, in the year 1641, made his will, and by it (int' *Al*) gave to the defendant *Alice*, and to *Abraham Lees*, one of his sons, 100*l.* a-piece; and made his wife *Anne*, his executrix, and shortly after died. *Anne* the executrix afterwards intermarried with the defendant *Hartridge*; and above thirty years since she died, and the defendant *Hartridge* took administration of her goods, and *de bonis non*, &c. of *Lewis Lees* the testator. In the year 1654, because the defendant *Alice*, and her brother *Abraham* were then under age, the defendant *Hartridge* deposited their legacies of 100*l.* a-piece, or securities for the same in the hands of the defendant *Anne* who was then unmarried, to the end she might pay them over; whereupon the defendant *Kendal*, together with Mr. Serjeant *Brome*, entered into bond, to the defendant *Hartridge*, of 400*l.* penalty, with condition to save him harmless against the said legacies so deposited. The defendant *Anne* married the defendant *Bernard Kendal*; and thereupon *Bernard Kendal* the better to secure the defendant

FOTHERBY v.  
HARTRIDGE.

*Alice*, gave bond to her elder brother in trust for her legacy. Afterwards the defendants *Alice* and *William Pyseing* intermarried; and then *Lewis Lees* their brother assigned the defendant *Kendal's* bond, to the defendant *Pyseing*, who thereupon altered the security, and took bonds from *Kendal* in his own name, and obtained judgment upon the bonds. About the year 1679, *Abraham Lees* dying intestate, the defendant *Alice Pyseing* took administration of his goods; of which (all debts and charges paid) there remained a great overplus; one third part whereof was ordered by the Spiritual Court to be paid to the defendant *Anne*; but it was never paid, the defendant *Alice* detaining it still for satisfaction of the legacies given, and deposited as aforesaid; so that by detaining the defendant *Anne's* part of her brother's estate, and by the bonds and judgment which the defendant *Kendal* gave as aforesaid, *Pyseing* and his wife are satisfied the two legacies. That nevertheless in *Michaelmas Term* 1685, when *Lewis Lees* the testator had been dead about forty-four years, the now defendant *Pyseing*, and his wife by combination, exhibited their bill against the defendant *Hartridge*, for both the said legacies; and the defendant *Hartridge* hath brought an action against the plaintiff upon the said bond given by the said Serjeant *Brome* and the defendant *Kendal*, *dum sola*, to save him harmless; all which is done by contrivance, after the plaintiff hath paid in debts and legacies more than the testatrix's estate amounted to.

[ 23 ]

The *Lord Chancellor* declared, that in this length of time he would presume the legacy paid; and decreed a perpetual injunction against the bond, and discharged the former decree against *Hartridge*, (though inrolled) on this bill; and though no relief was particularly prayed against that decree. (1)

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(1) This and the point of inrollment not mentioned in the Register's Book, but the decree is there considered to have been obtained by collusion, and the bond decreed to be delivered up to be cancelled, Reg. Lib. 1686. A. fol. 607. vide *Parker v. Ash*, ante 1 vol. 256.

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## WARD versus BRADLEY. (2)

CASE 15.  
MASTER of the  
ROLLS,  
May, 1687.

COLB being possessed for 2000 years of a tenement, in consideration of a marriage to be and after had, and of 350*l.* portion of years is assigned upon trust for *A.* for 99 years, if he lived so long, then to his wife for her life, remainder to the heirs of *A.* begotten on his wife. The whole term does not vest in *A.* but after the death of him and his wife, shall go to all their children equally.

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(2) Cited arg. *Webb v. Webb*, 1 P. Wms. 134.



WARD v.  
BRADLEY.

tion, and for provision and stay of living of the husband and wife and their children, demises to trustees for 1700 years, if he and his wife, or any of their issue, live so long ; remainder to the heirs of the body of *Cole* on that wife. They had issue the plaintiff and the two defendants, who had gotten an assignment of the whole term, and had administration to the father.

[ 24 ]

Constructions  
of trusts must  
be governed  
by intention.

And the question was, whether the plaintiff should have a third with the other two sisters the defendants ; for though it was insisted for the defendants, that the trust of the whole term vested in the father, and was executed in him ; and that daughters, though the heirs of his body, could not take by purchase in this case ; yet the *Master of the Rolls* conceived, that inasmuch as there was a particular term of ninety-nine years taken out of the 1700 ; and that the father had a particular estate limited unto him during ninety-nine years, that the trust of the whole term, as to the 1700 years, was not executed to the father ; and said, that *constructions of trusts must be governed by intention* : And this being in case of a marriage-settlement, and the intention plain, it ought to be supported ; and cited the case of *Oakes and Chaford*, and *Traherne and Crompton*, 24 Car. 2. and the case of *Warman and Seymour* ; where by the advice of judges, where alienation of a term was to one for life, and then to her issue, that the issue took by purchase, and *issue* was not taken to be a word of limitation, so as to vest the whole term in the mother : And yet *issue*, in legal understanding, is a word of limitation, and not of purchase. And therefore did conceive in this case, that though the word *heirs* be not properly a word of purchase ; yet there being a particular estate for life, during a particular term, limited to the father, that the limitation to the heirs of his body, afterwards on that marriage, would carry it to all the children equally : And he was the more of that opinion, for that it was declared in the deed, that after the death of the father, the trustees should execute estates to the person and persons respectively, that should be interested according to their respective shares therein ; which shewed that the children should all take their several shares. (1)

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(1) This cause was heard the 2d May, but the court took time to deliver judgment till the 18th June, when the decree as above. Reg. Lib. 1686. B. fol. 712.

NORTON *versus* MASCALL.

CASE 16.  
LORD CHAN-  
CELLOR.  
May, 1687.  
Eq. Ca. Ab. 51.  
pl. 8. 2 Ch.  
Rep. 304. S. C.

THE plaintiff and defendant had submitted to an arbitrament by bond, and an award was made, not binding by form of law, by which the plaintiff was to pay the defendant 900*l.* and to seal a release to the defendant; and the defendant was to assign several securities he had from the plaintiff. The plaintiff sold some lands to raise the 900*l.* expecting the defendant would receive it, as he gave him intimation he would, and tendered him the 900*l.* and a release executed by the plaintiff; and though there was no other execution on the plaintiff's part of the award, and though the award was *extra judicial*, and not good in strictness of law, yet the Lord Chancellor decreed it should be performed in *specie*. (1)

[ 25 ]

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(1) Vide *Brown v. Brown*, ante 1 vol. 157. *Cresly v. Carrington*, *ibid.* 469. and cases there cited, and see distinction taken between the case of award for payment of money, and to do any act in *specie* as to convey an estate, &c. where the interference of equity is called for. *Hall v. Hardy*, 3 P. Wms. 187, [and see *Wood v. Griffith*, 1 Swan 54.]

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DE

[ 26 ]

## TERM. S. TRINITATIS, 1687.

## IN CURIA CANCELLARIÆ.

BERRY *versus* ASKHAM, Widow and Executrix, and ASKHAM the Heir.

CASE 17.  
MASTER of the  
ROLLS.  
June, 1687.  
Eq. Ca. Ab.  
199. pl. 10.  
S. C.  
Where Debts  
are directed  
by will to be  
paid out of  
rents and pro-  
fits, the court,  
if 'tis neces-  
sary, will de-  
cree a sale.

---

ASKHAM the father, being indebted to the plaintiff by bond, devises that his executors shall receive the rents, issues and profits of his real and personal estate, in the first place to pay 60*l.* per annum to one for life, and after that person's death, out of the remainder of his estate, his debts being paid, to raise portions for several children payable at twenty-one, and maintenance in the mean time; and devises all his lands in several parcels to several persons at future times; and those devisees were not parties to the suit.

And whether the lands were to be sold for payment of debts, was the question.

BERRY v.  
ASKHAM.

[ 27 ]

The *Master* of the *Rolls* conceived, they should: but first directed an account of the personal estate and the rents and profits of the lands; and if those not sufficient to pay the debts in a reasonable time, declared he would decree a sale; And directed the devisees to be made defendants, if they would not come in before the Master, declaring that the sales should be out of all the devisees lands. (1)

(1) The defendants to be examined on interrogatories, and to have their costs out of the estate *Reg. Lib. 1686.* *A. fol. 1139, vide Anon, 1 vol. 104. Meynell v. Massey, ante p. 1.*

CASE 18.  
LORD CHAN-  
CELLOR.  
June, 1687.  
Eq. Ca. Ab.  
275. pl. 1.  
2 Ch. Ca. 120.  
S. C.  
1 Vol. Case  
161. A pur-  
chase from an  
heir at under-  
value in the  
life of his  
father set  
aside.  
Ant. Case 9.

THOMAS NOTT, Son and Heir of Sir } Plaintiff.  
THOMAS NOTT,

JOHNSON and GRAHAM, Executors of } Defendants.  
GEORGE HILL,

THE plaintiff being intitled to an estate-tail after the death of his father in lands, which if in possession, were worth to be sold about 800*l.* and being cast off by his father, and destitute of all means of livelihood, did in 1671, for 30*l.* paid, and 20*l.* per annum secured to be paid to him during the joint lives of him and his father, absolutely convey his remainder in tail to the defendant *Hill's* father, and his heirs. The plaintiff's father lived ten years after this conveyance; and then the plaintiff brought his bill to be relieved against this conveyance, charging that it was intended only as a security; and though there was no proof to that purpose, and the deed absolute; and though *Hill* would have lost all, if the plaintiff had died in his father's life-time, yet upon the first hearing of this cause, 24 June, 34 Car. 2. the Lord Nottingham decreed a redemption.—The 18th May, 35 Car. 2. the Lord North upon a re-hearing dismissed the bill; (1) and that dismissal not being signed and inrolled, the 27th May 1687, the Lord Chancellor ordered a re-hearing; and now upon the re-hearing declared, he took it to be an unrighteous bargain in the beginning; and that nothing happening afterwards would help it; and so discharged the Lord North's order, and confirmed the Lord Chancellor Nottingham's decree. (2)

(1) No trust appearing, and the conveyance being absolute, per Lord Keeper, R. L. taxed, and to have the bond for payment of the annuity delivered up. *Reg. Lib. 1686. B. fol. 655, vide Batty v. Lloyd, ante 1 vol. 141. Berney v. Pitt, ante p. 15, and cases there respectively cited.*

(2) The defendants accounting for the profits received, and to have their costs at law and in this court to be

WILLIAM BAYLIS, Administrator of } Plaintiff.  
 FORTUNE, his Wife,

CASE 19.

JONATHAN NEWTON, Son, Heir and } Defendant.  
 Executor of MATTHEW NEWTON,

LORD CHAN-  
 CELLOR,  
 June, 1687.

MATTHEW *Newton* being seised in joint-tenancy of a third of a village called *Caldicot*, by lease and release the 22d and 23d Nov. 1668, conveyed his third part for natural love and affection to the use of himself for life, remainder to his wife for life, remainder to the defendant in fee. The 25th of the same Nov. he made his will, and thereby devised to the defendant, and the heirs of his body, his lands in *Caldicot*, and, amongst other things, to the plaintiff *Fortune* his daughter, out of a debt *Fenwick* owed him, 250*l.* his debts being first paid; and if *Fenwick's* debt was not sufficient to pay them, over and besides the 250*l.* to his daughter, then he appointed his debts to be paid out of his whole estate.

A. jointly seised with two others, conveys his third part to the use of himself for life, remainder to his wife for life, remainder to his son in fee, and at the same time makes his will, and gives the same lands to his son in tail, charged with his debts. The son not a trustee for the father in the settlement; otherwise it would have been, if the intire fee had been conveyed to the son.

*Fenwick's* debt and the personal estate were not sufficient to pay the testator's debts, and the bill was to have the lands in *Caldicot* subjected to the debts, that so the plaintiff might have the 250*l.* out of *Fenwick's* debt: and for the plaintiff it was insisted, that the estate the defendant had in *Caldicot* by the lease and release was a trust for his father, and that he ought to take it subject to the will; and that the lease and release were made to prevent survivorship; and which was proved by two witnesses expressly; and so it also appeared by the dates of the lease and release and will, they being all at the same time; and had not the lease and release been made, the father as a joint-tenant could not have devised.

[ 29 ]

This cause was heard 19 Feb. by the *Master* of the *Rolls*, who directed an account of the personal estate; and if that was not sufficient to pay the 250*l.* the *Master* to report specially as to *Caldicot*; which matter coming now to be heard before the *Lord Chancellor*, he declared, that if the entire fee had been passed to the son by the lease and release, he would not have taken it to be a trust in the son: but inasmuch as it was limited to the father for life, and then to the mother for life, with remainder to the son in fee, he *could not* take it to be a trust in the son. (1)

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(1) Sed quære. Vide *Mumma v. Mumma*, ante p. 19, and cases cited in not. there.

CASE 20.  
LORD CHAN-  
CELLOR.  
June, 1687.  
Eq. Ca. Ab.  
323. pl. 4. S. C.  
After a bill  
brought by a  
second mort-  
gagee against  
the first and  
third mortga-  
gees to disco-  
ver incum-  
brances, the  
last mortgagee  
may get in the  
first incum-  
brance, and  
protect him-  
self against  
the second.

HAWKINS,

Plaintiff.

TAYLOR &amp; ux', and LEIGH &amp; al,

Defendants.

THE defendant *Leigh* having an incumbrance on the lands in question subsequent to the plaintiff's, and the bill being against him and other incumbrancers to discover their incumbrances, *Wilson*, who was a defendant, and had the first incumbrance, assigned to *Leigh*, *pendente lite*: and the question at the hearing was, whether the defendant *Leigh*, who had a mortgage subsequent to the plaintiff's, should help himself against the plaintiff, by buying in *Wilson*'s incumbrance, that was prior to both.

The Lord Chancellor conceived, he might lawfully do so ; and dismissed the plaintiff's bill without costs. (1)

(1) There is merely an order of dismissal, without costs. Reg. Lib. 1686. A. fol. 886. vide *Edmonds v. Povey*, ante 1 vol. 187, and cases cited there. Lord Chief Justice Holt v. Mill, post 279. *Earl of Bristol v. Hungerford*,

post 525. [A third mortgagee will not have this equity if at the time he lent his money on the third mortgage, he knew of the second. *Brace v. Marlbro'*, 2 P. Wms. 495. and cases cited in not. there.]

[ 30 ]

DE

## TERM S. MICHAELIS, 1687.

IN CURIA CANCELLARIÆ.

CASE 21.  
MASTER of the  
ROLLS.

ANN STANTON,

Plaintiff.

SADLER and BUSH,

Defendants.

A subsequent purchaser protected by getting in an old satisfied statute.

THE plaintiff was a jointress, and the defendant was a mortgagee subsequent to the jointure ; and got an assignment of a statute, that was precedent to the jointure, but was satisfied ; and extended it on the lands mortgaged.

The bill was to set aside the extent, for that the statute was satisfied :—and whether the statute being satisfied should protect the mortgage, or be set aside without payment of the mortgage-money was the question.

And the *Master* of the *Rolls* decreed, that upon the plaintiff's paying the mortgage-money with interest and costs, the defendants should assign all their securities to the plaintiff : But would not set aside the extent without payment of the mortgage-money. (1)

(1) Vide *Hawkins v. Taylor*, ante 29. *Turner v. Richmond*, post 81. *Hitchcock v. Sedgwick*, post 159.

LUKE *versus* ALDERNE.

A LEGACY of 500*l.* was given to the defendant's testator, when he should be twenty-four years old : The plaintiff being his sister, and executrix to the testator that gave the legacy, paid the legatee 250*l.* of it at twenty-one, to put him out into the world ; and gave him a bond to pay him the other 250*l.* at a day certain ; which was the very day he would attain his age of twenty-four years. He died before that age, and the defendant was his executor.

The bill was to have the bond up, and the 250*l.* repaid, for that he died before twenty-four, and so no legacy was ever due (1) ; and charged an agreement by the legatee, to repay in that case, and deliver up the bond. *That* agreement was denied by answer, and as to the repayment of the 250*l.* and delivery up of the bond, the defendant pleaded the payment, and the bond which was for payment at a certain day, and became a duty thereby, and not as a legacy ; and did waive the penalty.

Upon debate the plea was to stand for an answer, the *Lord Chancellor* declaring it was fit to be heard on the merits. (2)

CASE 22.  
LORD CHAN-  
CELLOR,  
Dec. 1687.  
Eq. Ca. Ab.  
300. pl. 4. S.C.  
A legacy is  
given to *A*,  
when he  
should be 24.  
At 21 he re-  
ceives part,  
and the exc-  
utor gives  
bond to pay  
the remainder  
at a day cer-  
tain, being the  
time when he  
would attain  
24. He dies  
before that  
time. Whether  
the money re-  
ceived shall  
be repaid, and  
the bond de-  
livered up.

(1) Vide *Jones v. Westcomb*, Pre. Ch. 316.

(2) This cause came on the 31st May, when the case appeared to be as follows. *John White*, a citizen of London, by his will devised certain lands to his daughter the plaintiff's wife in fee, and he by his said will, did devise and appoint his said daughter to give and allow to his son *William White*, maintenance and education till he should attain the age of 24 years, and that then she should pay and satisfy to the said *William White*, the sum of 500*l.* and made his said daughter executrix, who proved the same, and then intermarried with the plaintiff *Luke*, who gave security to the orphan's court in London, for payment of the said legacy of 500*l.* to the said *William White*, at his age of 24 years ; the daughter of the testator then died, and the plaintiff took out administration with the said will annexed. *William White* was the sole orphan of the testator unadvanced, and the testator having no wife, a moiety of the testator's personal estate belonged to him by the custom of London, over and besides

the said legacy of 500*l.* An inventory was brought into the orphan's court, by which it appeared that the money due to the said *William White* as orphan, amounted to 195*l.* 19*s.* 3*d.* and that his part as legatee came to 195*l.* 18*s.* 3*d.* for which the plaintiff gave bond to the orphan's court ; and he also gave another bond in that court for the payment of 118*l.* 1*s.* 6*d.* to the said *William White*, all payable at his age of 21 years, for that the orphanage money is then due by the custom, and the interest in the mean time. Before *William White* had received any of his orphanage, and after he had attained the age of 21 years, the plaintiff *Luke* prevailed upon him to discharge the said bond given by the plaintiff in the orphan's court, and to release *Luke*, and to accept 500*l.* in full both of orphanage and legacy money, 250*l.* whereof was to be paid down, and the remaining 250*l.* secured by the bond in question, payable at a day certain. And it was insisted on the part of the defendants, that if any contingency was in the testator's will, relating to the 500*l.* legacy, yet the said *William White* released



all his orphanage part in consideration of the bond in question ; and the said bond being given for 250*l.* with interest, at a day certain without any contingency that the plaintiff had thereby waived all the contingency in the will.

It was stated on the part of the defendant, that *Luke* had paid no part of the 250*l.* which was to be paid down, and set up the general release, and the plaintiff *Luke* on a cross bill by his

answer swore that it was in the instructions to the person who drew the bond for 250*l.* to *William White*, that in case *William White* died before 24 years of age, then the bond should be void. It was decreed that the plaintiff *Luke* do pay to the defendant *Alderne*, the 250*l.* secured by the bond in question with interest, and the costs in both causes to be taxed. Reg. Lib. 1687. B. fol. 498.

[ 32 ]

DE

## TERM. S. HILLARII, 1687.

In court, Veneris 10 die  
Feb. 1687.

IN CURIA CANCELLARIÆ.

CASE 23.

Eq. Ca. Ab. 72.

pl. 7. S. C.

If a bill is brought for discovery of a bankrupt's estate, the bankrupt must be a party.

SHARPE *versus* GAMON.

**BILL** for the discovery of a bankrupt's estate ; the defendant demurred, because the bankrupt was not made a party, and the demurrer was allowed. (1)

(1) Vide note (1) in *Wych v. Meal*, 3 P. Wms. 811.

CASE 24.

Eq. Ca. Ab. 11.

pl. 3. S. C.

Eodem die.

In Court.

A dismissal upon an election to proceed at law is not peremptory but the plaintiff may, after she has failed at law, bring a new bill.

COUNTESS OF PLYMOUTH *versus* BLADON.

**THE** bill was to call the defendant, who was the plaintiff's steward, to an account. The defendant by way of plea insisted, that the plaintiff ought not to be relieved in this Court, nor be compelled to account. *First*, for that the plaintiff had before exhibited a bill in this Court to the same purpose, and likewise sued at law for the same matter ; and afterwards being put to her election, chose to have her bill dismissed ; and not having met with such success at law, as she expected, would now resort back again to this Court. *Secondly*, That the plaintiff had disabled the defendant from giving any account, by reason that she had, in a violent and undue manner, seised his writings and evidences, and even imprisoned his person ; and so in effect hath made herself both judge and executioner : And *Detinue of Charters* is a good plea at law in bar of an account ; and ought to be so here : And although they may

[ 33 ]

now alledge that the trunk, in which the writings were, has been since, with the writings that were in it, restored, *that* ought not to excuse the plaintiff in this case: for such violent seizure is an evidence of the plaintiff's design to take from the defendant some material papers, and when she had got them into her power, it is to be presumed, she did take them: And it is not to be expected from the defendant, that he should prove what papers the plaintiff took out of the trunk.

COUNTRESS OF  
PLYMOUTH v.  
BLADON.

*Per Cur.* As to the first objection, a dismissal upon an election is not peremptory, no more than a nonsuit at law.— And as to the second objection, although such proceedings are not to be approved of, or countenanced, yet they cannot amount to a forfeiture of the right, which the plaintiff hath to call her steward to an account; and although *Detinue of Charters* is a good plea at law in bar of an account; yet it is not a good plea, to say the plaintiff did once seize his writings; but it is the detainer of them, that makes the plea good. And as touching the plaintiff's imprisoning the defendant, he may take his remedy by an action of *False imprisonment*, but a man may surely justify the detaining of his servant, that was taking away his goods.

Detinue of  
charters is a  
good plea at  
law in bar of  
an account,  
and so it is in  
equity.

The Court therefore ordered, that whereas there was a considerable sum of money in the trunk, that the money, as well as the writings should be restored. For although the defendant might be greatly in the plaintiff's debt yet she must not levy her own debt after that manner; and ordered the defendant to answer. (1)

(1) The decree was for an account in the usual way, and the trunk was to be deposited with the master, who was to examine the papers therein in the presence of both parties, and to make an inventory thereof, and to allow either party at their own cost to take copies, but the originals were to remain with the master till further order, and as to all such papers and writings as did not relate to the account directed, the master was also to take an inventory of them, and deliver them

to the several persons to whom they severally belonged, and as to any monies they were to be delivered to the defendant, unless it appeared by any note or notes of the defendant's handwriting in or affixed to any of the bags in which the monies were contained, that the same were the plaintiff's monies; then such monies are to remain with the master till further order. Reg. Lib. 1687. A. fol. 408. Vide *Fish v. Jesson*, post 114.

### COKES *versus* MASCAL.

THE bill was to compel the defendant, whose daughter the plaintiff had married, to perform an agreement alledged to have been written during a treaty of marriage, and there are subsequent treaties and proposals, is an agreement within the statute of frauds, &c.

[ 34 ]  
CASE 25.  
Sabbati 11.  
Feb.  
Eq. Ca. Ab. 22.  
pl. 18. S. C.  
Whether a let-



COKE v.  
MASCAL.

been made on the marriage. The defendant by answer insisted, there was a treaty, but never any fixed agreement in writing, nor any signed by him, and relied on the benefit of the act made for prevention of *Frauds and Perjuries*.

Upon the proof the case appeared to be, that there were several discourses and treaties had before the marriage, and Sir *Thomas Cokes* was to have made a settlement on the plaintiff's side, but afterwards flew back from it; and the defendant wrote a letter importing what he intended to settle on his daughter, and after this an agreement is drawn and reduced into writing, but not signed by either party; but a witness examined in the cause deposed, that both parties heard the agreement in writing read over, and agreed to it; and it was proved that the marriage was shortly afterwards had, and the wedding dinner kept at the defendant's house.

The plaintiff's counsel chiefly relied on the letter, and would have that to be a good agreement in writing, and valid according to the act of parliament, and that the subsequent agreement was the same in effect, but drawn in a more formal manner; and that a marriage having been had upon it, and the agreement thereby in part executed, ought to be performed.

[ 35 ]

But for the defendant it was insisted, that here was no ground for a decree of this court: that there was a manifest difference, as to the settlement intended to have been made, between the letter and the subsequent agreement in writing: and it was likewise proved on the defendant's behalf, that after the letter and agreement in writing, there were several treaties and proposals made, and the parties differing, the agreement broke off; and besides, an agreement ought to be mutual, and there was nothing done in this case, that any way obliged the husband: so the court inclined to dismiss the bill; but at the instance of the plaintiff's counsel gave him a twelve-month's time to try it at law, whether there was an agreement so fixed, as they could maintain an action at law upon it, and that afterwards either side might resort back to this court. (1)

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(1) Vide *Moore v. Hart*, ante 1 vol. *Halfpenny v. Ballett*, post 373. and for 110. and cases cited in not. p. 112. the decree in this case, post 200.

CASE 26.  
LORD CHAN-  
CELLOR.

### KELLEY versus BERRY.

Lunæ 20 Feb.  
Eq. Ca. Ab.

167. pl. 1. S.C.  
A remainder-

man in tail in a voluntary settlement, brings a bill for the discovery of the deed, and it appearing the entail was discontinued, the court would not relieve him. Post. Case 48.

THE plaintiff was a remainder-man in tail in a voluntary settlement, and the bill was for discovery of the deed; but it ap-

pearing to the court that the entail was discontinued, the court would not relieve the plaintiff. (1)

(1) There is merely an entry of dismissal without costs. Reg. Lib. 1687. A. fol. 326. So *Bunce v. Phillips*, post 50.

**GIFFORD versus GOLDSEY & al'.**

A MAN possessed of a term for years determinable on lives devises 20*l.* per ann. to *J. S.* to be paid half yearly out of this estate; if the *cestuy que vies* should so long live. *J. S.* dying in the life-time of the *cestuy que vies*, the question was, whether this rent should determine by his death, or go to the plaintiff who was his executor, and be paid him during the term. *cestuy que vies* lived so long. *B.* dies during their life-time. Decreed the rent was not determined, but should be paid to the executors of *B.* during the term.

CASE 27.  
LORD CHANCELLOR.  
Lundæ 27 Feb.  
*A.* devises to  
*B.* rent out of  
a lease for  
years determinable on  
lives, to be  
paid half  
yearly, if the

The Court decreed it for the plaintiff, the executor of *J. S.* and said, if the rent would have continued as long as the term lasted, if *J. S.* had so long lived, why will it not last so long, though *J. S.* happened to die sooner; there is nothing said in the will to determine it. And the case in *Roll's* abridgment, first part, *Title* estate, fol. 831, where it is said, that if a man possessed of a term for years grants a rent generally without limiting any estate, the rent shall continue during the whole term, was looked upon to be an authority in point. (1)

[ 36 ]

(1) It appeared by the answer that the testator was possessed of a messuage or tenement at *Quarhill*, and also of a messuage or tenement called *Witham Frary*, for terms for years, determinable on one life in each, and the devise is in the following words:—  
“I give unto my grand-daughter *Elizabeth Smithwick*, 20*l.* per ann. to be  
“paid unto her at the two most usual  
“feasts, out of the messuage or tenement at *Quarhill*; the first payment  
“to begin on the 29th day of *September*, 1681, if *John Smithwick* the  
“younger, so long live. Item, I give  
“unto my said grand-daughter, 20*l.*  
“yearly out of my means in *Witham Frary*, to be paid unto her by my  
“executrix half yearly, the first payment to commence on the 29th *September*, 1683, if my executrix should  
“so long live.” It appears that the grand-daughter, the devisee, having intermarried with the plaintiff, died after the 29th *September*, 1681, but

before the 29th *September*, 1683, the plaintiff had taken out letters of administration to his said wife. It was in proof amongst other things that the executrix had agreed upon the marriage of the plaintiff with the devisee, that the said annuities of 20*l.* each, should continue to be paid to the plaintiff during the lives in the said testator's will mentioned, whether the plaintiff's said wife lived or died, but the court appears to have determined on the words of the devise, and decreed the payment of both the said annuities, “during the respective terms, out of  
“which they were devised, together  
“with the arrears due thereon, up to a  
“day therein mentioned, and on default, then with interest to be computed from the respective times at  
“which the same ought to have been  
“paid, together with the costs to be  
“taxed.” Reg. Lib. 1687. A. fol. 390. So *Lock v. Lock*, post 666. *Rawlinson v. Dutchess of Montague*, post 667.

But where the bequest is merely personal, and controuled by a condition which could have no relation but to the life of the devisee, *pur auter vie*, there the bequest shall terminate with

his life. *Neal v. Hanbury*, Pre. Ch. 173. *Lomax v. Holmeden*, 3 P. Wms. 176. *Savery v. Dyer*, in Ch. 21. Feb. 1752.

CASE 29.  
LORD CHAN-  
CELLOR.  
1 Martii.

### SPRIGNALL *versus* DELAWNE.

THE plaintiff's bill was to have satisfaction of a debt owing him by *J. S.* to whom the defendant was executor; the case was, that the defendant was bound to a third person as surety for *J. S.*; and to indemnify him on that behalf, *J. S.* assigned to him a term for years, and dies, and makes the defendant his executor, who pays that debt out of the personal assets; and the plaintiff being a creditor by simple contract, and there being no personal assets left, would have had the benefit of that security for payment of his debt; and it was urged to be reasonable he should have that benefit, in regard that the personal assets, which would have satisfied his debt, were employed in discharge of the debt which was chargeable on this security. *Sed non allocatur*, for that it was in the power of the executor to apply the personal assets, the one way or the other. (1)

(1) The point stated in the printed report does not appear in the register's book. There were two plaintiffs, *William* and *Judith Sprignall*, who were bond creditors of *Sir William Delawne* deceased, the one for 500*l.* and the other for 200*l.* and *Sir William* being also indebted to many other persons, but who are not stated to be parties to the suit, wherein his brother *Michael Delawne* stood bound with him; he by deed dated 12th *May*, 1667, conveyed certain estates in *Bedfordshire*, whereof he was seized in fee to his said brother, for a term of 500 years, to raise money to pay his debts, wherein his said brother stood bound with and for him, and to indemnify his said brother against those debts; the bill then states that *Sir William* was also seized in fee of lands and hereditaments in *Lincolnshire*, and *Blackfriars* in *London*, which he by his will, dated 28th *June*, 1667, devised to be sold for payment of such debts as he should owe at the time of his death, and of such will made the said *Michael Delawne* and his the said testator's wife executors, and the bill

was in the usual way for an account. *Michael Delawne*, by his answer, claimed an estate in tail male in the *Bedfordshire* lands under the will, and that the deed was a mere counter security, and to indemnify him against the debts for which he was a security for his said brother; and that it contained a proviso to be void on payment by *Sir William* of certain debts mentioned in a schedule thereto annexed. And the decree was, that the said plaintiffs should be paid their debts out of the personal estate of *Sir William* in the first place, and if that fell short out of the produce of the *Lincolnshire* estate; and if those together did not prove sufficient, then so much money as the debts for which the said *Michael Delawne* stood bound amounted to, was to be raised out of the lands in *Bedfordshire*; the suit then became abated by the death of *Michael Delawne*, and was afterwards revived, and amongst other proceedings, the plaintiffs moved that the rents of the *Bedfordshire* lands which were brought into court in the former cause, and

the rents in future might be applied in satisfaction of their debts, but the court declared that the *Bedfordshire* lands could not be made liable to the plaintiff's debts, but in default of the personal estate; and it afterwards appearing by the master's report, that there was in hand of the personal estate and the rents of the *Bedfordshire* lands, not distinguishing how much of each, 1637*l.* 9*s.* 5*d.* sufficient to pay the plaintiff's demand with a great overplus; the plaintiff's bill was on the 15th *June*, 1677, dismissed as against the *Bedfordshire* lands, and that the rents thereof should be paid to the person intitled thereto, and now ten years after the signing and inrolling of the said decree, the plaintiffs brought their bill of review, to which a demurrer was put in, which was allowed without costs, and then the decree is as follows. "Whereupon, &c. his lordship declared that the said *Bed-*

*fordshire* lands being originally only "a counter security from *Sir William Delawne*, to the said *Michael Delawne*, for what debts the said *Michael Delawne* did stand bound with the said *Sir William Delawne*, and what he should afterwards be bound with him for, and the same being all paid, there was no misapplication in the executors, but they might pay those debts in the schedule with *Sir William's* personal estate, and the monies raised by sale of the *Lincolnshire* lands as well as other debts, and the *Bedfordshire* lands were never originally liable, that deed being but in the nature of a mortgage, with proviso to be void." Reg. Lib. 1687. B. fol. 371. Vide on the general doctrine of marshalling assets, *Sagittary v. Hide*, ante 1 vol. 455. and cases cited in not. there. *Porey v. Marsh*, post 182.

### COOKE *versus* COOKE.

UPON a bill for a specific performance of a covenant under hand and seal with *A.* for the benefit of *B.* *A.* must be a party to the suit. But if it had been only a promise, either *A.* or *B.* might have brought the action according to the case in *Yelverton's Reports*. (1)

covenant with *A.* for the benefit of *B.* *A.* must be a party. Rolls and Yate, fol. 177.

CASE 30.  
Eodem die.  
LORD CHANCELLOR.  
Eq. Ca. Ab. 73.  
pl. 8. S. C.  
Upon a bill for a specific performance of a

(1) [*Wood v. Williams*, 4 Mad. 186. *Head v. Teynham*, 1 Cox, 57.]  
*Cope v. Parry*, 2 J. & W. 538. and see

### SEARLE *versus* LANE. (1)

AN administrator pays money on specialties without notice of money decreed, and had fully administered the assets: and the Court nevertheless decreed, that the administrator should pay the money decreed. (2)

assets in satisfying debts on specialty. Decreed to pay a debt due by a decree, though he had no notice of the decree, before he had paid those debts.

[ 37 ]  
CASE 31.  
LORD CHANCELLOR.  
Lunæ 5 Martii.  
An administrator pays away all the

(1) [See this case on appeal, post 88.]

(2) It appears that the decree in this case for the sum of 85*l.* 10*s.* was had against one *Hayman*, who died, before writ of execution thereof could be served upon him, intestate, and to

whom the defendant took out letters of administration, on the 12th *March*, of what year the book does not say, but before he took out such letters of administration, viz. in the month of *February*, he paid 120*l.* and within a

week after the obtaining such letters of administration, he voluntarily paid away most of the estate, and the rest in *April*, so that no notice could be given of the decree, and the plaintiff's debt remained unpaid, but the order of the Court does not appear to have been made on that circumstance, and is as follows: "His Lordship declared "that the decree was equal to a judgment at law, and that the intestate's estate was bound by the said decree, "and that the defendant was in con-

"tempt for not paying the plaintiff, "and doth therefore order and decree "that the defendant *John Lane* do "forthwith pay unto the plaintiff the "said 85*l.* 10*s.* decreed against *Hayman*, with interest for the same, and "costs from the time the said defendant was served with the writ of "execution of the said decree." Reg. Lib. 1687. B. fol. 320. Vide *Harding v. Edge*, ante 1 vol. 143. and cases cited in not. there.

## CASE 32.

LORD CHANCELLOR.

Martis 6 die Martii.

Eq. Ca. Ab. 75.

pl. 5. 236. pl. 3.

S. C.

An executor

being desirous

to apply the

assets, as far

as they would go,

might, if they pleased,

Adjudged on a demurrer to be a proper bill.

## BUCCLE versus ATLEO.

THE plaintiff being executor, and his testator greatly indebted, and being desirous to be rid of the assets as far as they would go, and that his payments might not be afterwards questioned, brought a bill against all the creditors, to the intent they might, if they would, contest each others debts, and dispute who ought to be preferred in payment.

in satisfying the debts, brings a bill against all the creditors, that they might, if they pleased, contest each others debts, and that their preference might be settled.

The defendant being a creditor demurred, for that the bill contained multiplicity of matter, wherein he was not concerned. But the Court over-ruled the demurrer; and held it a proper bill, and a safe way for an executor to take. (1)

(1) But bills of conformity have since been discountenanced, vide *Morrice v. Bank of England*, Forr. 224, 5.

*Alderman Backwell's case*, ante 1 vol. 153.

## CASE 33.

Eodem die.

Eq. Ca. Ab. 14.

pl. 7. S. C.

Plea of out-

lawry to be on oath.

## PARROT versus BOWDEN.

A PLEA of outlawry over-ruled, because it was not put in upon oath. (2)

(2) So plea of privilege ought to be put in on oath *Gibson v. Whitacre*, post 83. sed vide *Took v. Took*, post

198. *Prat v. Taylor*, 1 Ch. Ca. 237. *Anon. ibid.* 258. vide *Bacon's Law Tracts*, 290. [And see *Mitf.* 3d edit. 243.]

[ 38 ]

CASE 34.

Eodem die.

A. having

lands contigu-

ous to B. brings his bill,

by his deeds. B. is not obliged to make this discovery.

## HUNGERFORD versus GOREING.

THE plaintiff and defendant's lands lying contiguous, the bill was to discover the boundaries of the defendant's estate, that B. may discover the boundaries of his estate, as they appear by his deeds. B. is not obliged to make this discovery.

alleging the same fully appeared by the deeds and writings in his hands; the defendant demurred. HUNGERFORD  
v. GORRING.

*Per Cur.* There is no reason to compel the defendant to discover the boundaries in his deeds, (1) for that would be to help a man to evidence to evict my possession. (2)

(1) [But see *Anon*, 2 Vez. 621. where Lord Hardwicke says, that in a question between the lord of one manor and the lord of another, a bill would lie for a discovery of books and court rolls. *Sed quære.*]

(2) The object of the bill in this case does not appear from the Register's Book; the entry of the order is as follows: "His lordship doth order that

"the defendant do answer the plaintiff's bill so far only as to put the matter in issue, whereby to enable the plaintiff to examine his witnesses in *perpetuam rei memoriam*, but the plaintiff is not to proceed any further thereupon, and the demurrer as to the rest of the bill was allowed." Reg. Lib. 1687. A. fol. 482.

SMITH & Ux',

Plaintiffs.

CASE 35.

WILLIAM CLEVER & Ux', and }  
WILLIAM FARMER & Ux', }

Defendants.

At the Rolls.

THE case was that one *Susan Beale* being possessed of a considerable personal estate made her will, and thereby appointed *Robert Franklyn* and *Joseph Fisher*, executors in trust, to receive and pay, act and do all things according to the intent and meaning of her will; and having thereby devised several particular legacies, devised further in the words following, viz. *And the rest and residue of my estate unbequeathed shall be put forth to interest by my executors, and one half of the interest shall be paid to my sister Anne Cole during her life, and the other half of the interest unto her daughter Anne Smith, and she to have one half of my household goods, and after her mother's decease to have all the interest during her life: And my will is, that if the said Anne Smith die without issue of her body, the principal of the residue shall be divided equally between Mary Clever and Eliz. Farmer, and such children as are or shall be born of their bodies then living.*

Interest of money is devised to *A.* for life, and if he died without issue, then the principal to go over to another. The remainder over is good.

[ 39 ]

The bill was brought by the plaintiff *Smith* and his wife, setting forth that the remainder over to *Clever* and *Farmer*, expectant on the plaintiff *Anne's* dying without issue was void in law, being of a personalty, and that the whole interest of this personal estate was well vested in the plaintiff *Anne*, and therefore prayed that the trustees might be directed to deliver the securities, and to pay the money unto the plaintiffs.

The defendants by answer confess the will, and insisted on their title by virtue of the limitation over.



SMITH v. CLEVER. The case was several times argued before his Honour the Master of the Rolls, who took time to consider of it. See the determination of the Court, post case 51.

CASE 36. LEGRIEL and MORESCOE, Plaintiffs.  
 MASTER of the ROLLS. WILLIAM BARKER, Esq. ; Sir WILLIAM BARKER, Serjeant KELLINGWORTH, } Defendants.

*A.* is bound with his father for the debts of the father, who enters into a statute to the son to pay the debts and indemnify the son. One of the creditors delivers up his bond and takes a mortgage from the father. The son shall not set up his statute to defeat the mortgage.

[ \*40 ]

THERE was 200*l.* of the plaintiff *Legriel's* money lent in the plaintiff *Morescoe's* name, upon bond from the defendant *William Barker* the father, and Sir *William Barker* his son, wherein they were jointly bound ; and the defendant Sir *William* being jointly bound in other bonds (as well as that) for his father, 9 Feb. 30 Car. 2. the defendant *Barker* the father entered into a statute of 2000*l.* to the defendant Serjeant *Kellingworth*, (1) defeasanced, that if *Barker* the father should within ten years, or before his death, pay the said several debts for which the defendant Sir *William* was bound, and interest, and indemnify the defendant Sir *William*\* from the said bonds, and all charges touching the same, the statute to be void.

The defendant *Barker* the father paid some of the said debts, but not the plaintiff's ; but desired to have the bond delivered up, and to secure the same by mortgage of some of his lands ; and thereupon for the same 200*l.* he made a mortgage to the plaintiff *Legriel* of lands in *Suffolk* for 500 years without impeachment of waste ; with a proviso, that if he paid her 212*l.* at a year's end, the lease to be void ; with covenants that the premises were free from incumbrances, and for further assurance.

The 200*l.* and interest was not paid ; whereupon the plaintiff *Legriel* endeavoured to enter upon the lands : but the plaintiff found that the premises were extended on the statute, and that the defendant Sir *William* insisted upon such extent ; and that 11 Oct. 1681, there were articles between him and his father, for his father's doing several things to him, and also that his father should pay all the debts unpaid upon the statute, according to the defeasance before mentioned, by *Christmas* then next ; and till then that the statute should not be put in suit, and that the statute and any other security the said *William* the father could give, should stand as a security for performance of the articles of 11 Oct. and that the defendant the son insisted upon great breaches of the last mentioned articles, and

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(1) In trust for the other defendant Sir *William Barker*.

that therefore he had extended the mortgaged premises with the statute.

LEGBIEL v.  
BARKER.

Note, the plaintiff is a purchaser of the land by the mortgage made to her; and that the incumbrance the defendant would set up, ought not to disturb her, or charge the land to prevent satisfaction of her debts; for the statute was originally given to take place only if the father did not pay the debt; and he did pay it by the mortgage he gave, and not otherwise; and if the plaintiff enjoy the mortgage, as she ought, the statute ought not to do her any prejudice: And by the father's giving the statute to his son to pay the debts, and indemnify the son, the statute was a farther security for the debts, and ought not to be set up to hinder the satisfaction of the debts: Besides the son has no wrong; for he was bound with his father in the original bond to *Morescoe*, and so was liable to pay it; and by the last defeasance of the statute the debts are to be paid also; and in truth many of the debts were the son's own, as he has confessed in his answer to a bill of his father's.

[ 41 ]

The *Master of the Rolls* took time to consider of this case; and afterwards decreed, that the defendants should redeem, or be fore-closed, and a perpetual injunction against the statute. (1)

(1) "And after the plaintiff shall be paid what shall be due to her for principal interest and costs, in respect of her aforesaid debt, she is to assign and convey the said mortgaged premises and all her estate therein to the said defendant Sir *William Barker*, or as he shall appoint, free from all incumbrances done by the said plaintiff, and the master is to settle and approve of such conveyance." Reg. Lib. 1686. B. fol. 733. Afterwards the money not being paid nor possession delivered, a petition was preferred by the plaintiff praying to stay the rents in the tenant's hands, which was ordered accordingly. Reg. Lib. 1687. B. fol. 328. For cases of favour in equity towards mortgagor, as where feme mortgagee having settled the mortgaged premises on her marriage to herself for life, remainder to the issue, and on bill by mortgagor to redeem, omitted to set forth the settlement in her answer, mortgagor had a decree, and paid the money; afterwards the defendant, the issue, claiming under the settlement, brought an ejectment and recovered the premises

at law; defendant decreed in equity to convey, and a perpetual injunction against the judgment at law, vide *Chapman v. Duncombe*, post 142. and where mortgagee gets an absolute conveyance from mortgagor, but suffers possession for some time contrary to it; it is but as a mortgage, *Harris v. Howell*, Gilb. Eq. Rep. 11. So in the allowance of time for payment where six months allowed on decree for foreclosure; time extended, first to twelve, then (peremptory) to eighteen months. *Anon.* Barn. in Ch. 221. and time computed by calendar not lunar months, *ibid.* 324. [In *Edwards v. Cunliffe*, 1 Mad. 287. a fourth order for enlarging the time was made under special circumstances; and see *Jessop v. King*, 2 B. & B. 97. A mortgagor is not debarred from gaining an extension of time, although he has applied under the 7 Geo. 2. c. 20. *Wakerell v. Delight*, Coop. 27. Upon a bill to redeem, the court will not enlarge the time for payment, *Novosielski v. Wakefield*, 17 Ves. 417. So inspection of deeds allowed to mortgagor, after notice to be paid off. *Thornhill v. Evans*, 2 Atk. 332. So mortgagor not bound to



account for by gone rents and profits received by him, and that even though the security is become insufficient, *Colman v. Duke of St. Albans*, 3 Ves. 25. 32. [*Ex parte Wilson*, 1 V. & B. 252. 1 Rose, 444. *Gresley v. Addersley*, 1 Swan, 579.] So interest cannot be turned into principal without the privity of the mortgagor. *Earl of Macclesfield v. Fitton*, ante 1 vol. 168. and cases cited in not. there. So in the application by mortgagee in possession of surplus rents and profits beyond the current interest, they must go in discharge of the arrear. *Lord Penrhyn v. Hughes*, 5 Ves. 99. [and the account will be directed to be taken with rests, *Shephard v. Elliot*, 4 Mad. 254.] So where mortgagee under bankruptcy applies to have the mortgage sold, and to prove for the residue, no interest lower than date of the commission, cases cited in Cullen's Bankrupt Law, 118. For cases in favour of mortgagee, as where mortgagor becomes a bank-

rupt, and the security becomes inadequate, he shall come in as a creditor for the deficiency, *Wiseman v. Carbonell*, 1 Eq. Ca. Ab. 312. pl. 9. et vide *Cooke's Bankrupt Law*, 1 vol. 119. *Cullen's Bankrupt Law*, 147. So mortgagee in possession, shall not by any suit for redemption be stripped of his possession before payment, *Brine v. Hartpoole*, 15 Vin. Ab. 467. pl. 15. [*Postlethwaite v. Blythe*, 3 Mad. 244.] So not obliged to quit possession in the case of a purchaser, *Davy v. Barker*, 2 Atk. 2. Nor to part with the deeds, *Thornhill v. Evans*, 2 Atk. 322. [Mortgagee of two distinct estates for separate debts from the same mortgagor shall hold against the purchaser of one of the estates until both demands are paid, *Ireson v. Denn*, 2 Cox. 425.] So where possession gained against mortgagee by fraud, no redemption till possession restored, *Lant v. Crisp*, 15 Vin. Ab. 467. pl. 16.

[ 42 ]

DE

## TERMINO PASCHÆ, 1688.

IN CURIA CANCELLARIÆ.

In Court.  
LORD CHAN-  
CELLOR. -  
Jovis, 3 die  
Maii.

CASE 37.  
Eq. Ca. Ab.  
288. pl. 1. Pre.  
Ch. 50. S. C.

WALKER *versus* PENRY.

Statute reduc-  
ing interest  
whether it  
affects prece-  
dent securi-  
ties. Post  
case 73.

THE bill was to redeem an ancient mortgage; and forasmuch as the mortgagor had paid interest after the rate of 8*l.* per cent. until 1675, whereas interest by the act of parliament in 1660, was reduced to 6*l.* per cent. the question was, whether the 2*l.* per cent. from 1660, should not be allowed to go in discharge of so much of the principal.

*Per Cur.* The contract being made prior to the statute for reducing interest to 6*l.* per cent. and the contract having not been changed or varied, and 8*l.* per cent. having been voluntarily paid, they saw no reason to relieve the complainant: For the statute for reducing interest respects only subsequent contracts; and as in this case no *Indebitatus assumpsit* will lie at law to recover back the 2*l.* per cent. so there is not any just

ground to decree it in equity; and the 8*l. per cent.* would have been assets at law in the hands of an executor, that had received interest after that rate.

WALKER v.  
PENNY.

[ 43 ]

The Court decreed, that from the time of the defendant's entry, which was in 1675, he should be allowed interest but after the rate of 6*l. per cent.* But thought not fit to give the plaintiff any relief, as touching the 8*l. per cent.* that had been paid from 1660, until 1675. (1)

(1) "And if at any time before the defendant's entry, 6*l. per cent.* only had been paid and received, the master in computing the interest was to allow no more." Reg. Lib. 1687. B. fol. 488. entered, *Walker v. Powell*,

and so decreed on a rehearing July 25. Reg. Lib. 1687. B. fol. 634, sed vide post 145. S. C. *Procter v. Cooper*, Pre. Ch. 146. *Hedworth v. Primate*, Hard. 318.

### PEACOCK *versus* SPOONER.

A TERM for years assigned in trust, that *Baron* and *Feme* might receive the profits during their lives, and the life of the longer liver of them, and after their death to the heirs of the body of the wife to be begotten by the husband.

in trust for Baron and Feme for their lives, remainder to the heirs of the body of the Feme by the Baron. If the whole term vests in the Feme, or shall go to the heir of her body. Post Case 178.

The Counsel for the plaintiff to support the remainder, would have the words (*heirs of the body*) to be taken to be words of purchase or description, and not of limitation: But *per cur.* the whole interest of the term vested in the wife, and must go to her executors or administrators. (2)

CASE 38.  
LORD CHAN-  
CELLOR.

Martis.  
8 die Maii.  
Eq. Ca. Ab.  
362. pl. 14.  
Post 193.  
2 Freem. 114.  
Term assigned

(2) The bill in this case was filed by *Thomas Peacock* the husband, who having survived the wife, had taken out letters of administration to her, and claimed to be entitled to the term, and the decree as to that was, "His lordship was satisfied that the premises being a term for years, cannot go to the defendants, who were the daughters and coheirs of the plaintiff's wife by a former husband, but must go to

"the plaintiff as her administrator, and  
"decreed an account of the profits (they  
"having entered) from the time of ex-  
"hibiting the bill. Vide *Ward v. Bradley*, ante p. 23. *Webb v. Webb*, 1 P. Wms. 134. 5. post 668. S. C. *Davis v. Gibbs*, 3 P. Wms. 30. and as to the authority of the principal case, vide *Webb v. Webb*, ub. sup. 1 Vez. 135. 2 Vez. 237. 660. and *Fearne's Cont. Rem.* 6th Ed. 493.

### WHITE *versus* WHITE.

THE cause was heard the 25th of *January* last (3), and came now to be re-heard. The case was, a man by his will devised

CASE 39.  
Eodem die.  
In court.  
LORD CHAN-  
CELLOR.

Personal es-  
tate applied in  
case of the real against a residuary legatee.

(3) Reg. Lib. 1687. B. fol. 290.

WHITE v.  
WHITE.

several particular legacies subject to particular charges thereon, and gave the surplus of his personal estate to his wife: The bill was brought by the heir to have the personal estate applied in ease of the real estate: And the court decreed the personal estate to be so applied. (1)

[ 44 ] *Per Cur.* It is not yet settled, whether the heir shall not have the personal estate so applied, even against a legatee of a sum of money. (2)

(1) Reg. Lib. 1687. B. fol. 290.

(2) This was a bill by the executor of *Elizabeth White*, who was the executrix, and residuary legatee of *James White* the elder, who had mortgaged his real estate, for securing the repayment of a sum of money, a great part of which had been discharged, together with the whole of the interest due thereon, either by the said *Elizabeth*, out of the profits of the real estate of *James White* the elder, which he had devised to her for life, or by the plaintiff, and the bill was against the heir at law, (amongst other things) to subject the real estate to the payment of this mortgage money, and a cross bill by the heir to subject the personal estate, and the decree on the hearing was as stated in the printed report, and the decree on the rehearing directed "that

" as well the profits of the real estate  
" as the personal estate, come to  
" the hands of the said *Elizabeth*,  
" ought, as against the heir, to be ap-  
" plied in the first place to pay the  
" debts, legacies, and funeral charges  
" of the said testator *James White*, the  
" elder, and that what assets remain,  
" if any after payment thereof, ought  
" to be liable, and applied in discharge  
" of the said mortgage in question, and  
" with these directions, the order on the  
" former hearing is to stand." Reg.  
Lib. 1687. B. fol. 504. vide on the doctrine of applying the personal estate in exoneration of the real, [*Lutkins v. Leigh*, Ca. Temp. Tal. 53. *Clifton v. Burt*, 1 P. Wms. 678.] *Wynn v. Littleton*, ante 1 vol. 4. *Pockley v. Pockley*, ibid. 36. and cases respectively cited in not. there.

CASE 40.  
LORD CHAN-  
CELLOR.  
Mercu. 9 die  
Maii.  
The heir  
claiming un-  
der a volun-  
tary settle-  
ment sells the  
land. If the  
money in the  
hands of the  
purchaser  
shall be assets  
to pay the an-  
cestor's bond.

### SAGITARY versus HIDE.

THE plaintiff is a creditor by bond to *J. S.* who settled his real estate on his wife for life, remainder to one *Middleton* in tail, (who happened afterwards to be heir at law) with power of revocation; and *Middleton* sold to the defendant *Hide*, who had part of his purchase money in his hands, out of which the plaintiff sought to be satisfied his debt.

For the plaintiff it was insisted, that the settlement was fraudulent, and that the estate ought to be assets, and made liable to the plaintiff's debt; and cited *Lenthal's* case in *B. R.* in debt upon a recognisance forfeited by reason of an escape: A voluntary settlement made thirty years before the escape was judged to be fraudulent.

*Per Cur.* Every voluntary conveyance is not therefore fraudulent, (3) but a voluntary conveyance, if there was a reasonable

(3) See *Battersbee v. Farrington*, 1 Swan. 106.

cause for the making of it, may be good and valid, even against a creditor: and here the defendant *Hide* before his purchase had notice, that there was a bond; (1) but there was no original filed, and before the commencement of the suit, he had covenanted to pay the residue of his purchase-money, and the court thereupon inclined to dismiss the plaintiff's bill. (2)

SAGITARY v.  
HIDE.

(1) Vide on this head, *Jones v. Marsh*, Forr. 64. and cases cited in not. there; [and *Doe v. Manning*, 9 East, 59. *Pulvertoft v. Pulvertoft*, 18 Ves. 84. *Metcalfe v. Pulvertoft*, 1 V. & B. 180.] (2) Vide Stat. 3. and 4 *William and Mary*, cap. 1. ante vol. 1. 455. S. C.

### MUSGRAVE *versus* DASHWOOD.

[ 45 ]

CASE 41.

THE case was, that a copyholder for life, where by the custom of the manor there is a widow's estate, agrees that J. S. should hold and enjoy during his life and the widowhood of such woman as he should leave at his death, and enters into bond for that purpose, and to surrender on request. In Court. Veneris. 11 Maii. Eq. Ca. Ab. 25. pl. 5. 120. pl. 11. S. C. A copyholder for life, where by the custom there is a widow's estate, agrees to sell, and dies. Whether his widow bound by this agreement.

The bill was brought against the widow, to have this agreement performed.

In arguing of this case was cited the case of *Twiford* and *Warcup*, where a man covenanted, that his estate was free from incumbrances, except an estate for life that was thereon; by the custom of the manor, of which the estate was held, the widow of the tenant for life, was to hold during her widowhood; and it so fell out that the tenant for life left a widow, yet this was adjudged to be no breach of the covenant. (1) And the case of *Neusberry* and *Wigorn* cited, where a man was admitted to a copyhold estate in trust for J. S. and the question that arose thereupon was, whether the widow of the trustee did not come in paramount the trust, and should enjoy her widow's estate, and the court at law was divided upon it: but in the principal case, the plaintiff was defective in his title, being he had not taken out letters of administration to J. S. and so the court delivered not any opinion in the case.

(1) The bill was dismissed with costs to be taxed, 25th May, but the pleadings are not stated. Reg. Lib. 1687. B. fol. 471. vide post 63. S. C. As to the authority of this case, vide *Hardwicke*, Lord Chancellor's judgment, *Hinton v. Hinton*, 2 Vez. 638. et vide *May v. Hook*, 19 December, 1773. L. I. Hall on Appeal, *Benson v. Scott*, Carth. 275.

NICCOL *versus* WISEMAN.

CASE 42.  
Eodem die.  
In Court.  
Eq. Ca. Ab. 43.  
pl. 1. 366. pl. 2.  
S. C.  
Where there  
is a plea and  
answer, and  
the plaintiff  
replies; the  
replication  
must be to the  
answer, as  
well as the  
plea.

THE cause came on to be heard the last Term, and then the plaintiff had replied to the plea only, and not to the answer; and the court thereupon made an order that the plaintiff should file a replication to the answer, *nunc pro tunc*, and that the cause should be heard this Term: and the plaintiff now set down the cause for hearing again, without having given rules for publication, and had also amended his bill and had not now served the defendants to answer, so the cause was again put off as coming on irregularly.

BUXTON *versus* HUTCHINSON.

CASE 43.  
In Court.  
LORD CHAN-  
CELLOR.  
Sabbati 12 die  
Maii.  
Tithe-ore not  
due, but by  
particular  
custom.

THE plaintiff's bill was to be relieved from tithe-ore (1) in *Brassington*, a township within the rectory of *Blackborne*, in the county of *Derby*.

*Per Cur.* Tithe-ore is not due of common right, but by particular custom only: and the court therefore directed a trial to be had at law, whether there was any, and what custom within the said township for the payment of tithe-ore, with direction to the Judge to endorse the *Postea*, how the custom was found upon the trial. (2)

(1) The tenth part or tenth dish of all lead ore for which any duty is payable to his Majesty, gotten out of the lead mines, dressed, washed, and cleansed from the earth. *R. L.*

(2) And if any custom, what proportion. Reg. Lib. 1687. A. fol. 667. as to parties and other matters relating to this question, vide *Brown v. Vermuden*, 1 Ch. Ca. 272. 282.

SAUNDERS *versus* BROWNE.

CASE 44.  
In Court.  
LORD CHAN-  
CELLOR.  
Mercurii.  
16 die Maii.  
Ca. Eq. Ab. 292.  
pl. 8. 3 Ch.  
Rep. 214.  
Carth. 15. S.C.  
Money devised  
to be laid out  
in land, and  
settled on the  
children of  
*J. S.* Land is  
purchased and  
settled on  
them and their  
heirs, and one dies.

The case was, that *J. S.* by his will directed two hundred and forty pounds to be laid out in the purchase of lands, to be settled on *Mary* and the heirs of her body; and if she died without issue, then on the children of *Elizabeth*, which she should leave behind her: *Mary* died without issue before any purchase had; afterwards the trustees lay out the money in a purchase, and convey the lands to the two children of *Elizabeth* and their heirs, who so held for several years, and then one of them dies, the single question was,\* whether the moiety of the dead child should survive.

Decreed the land should not survive.

[ \*47 ]

*Per Cur.* Decreed that it should not survive (3)

(3) For the cases on the doctrine of survivorship, vide *Kew v. Rous & Ux*, ante 1 vol. 353. et vide contra the principal case the report of S.C. 3 Ch. Rep. 214.

## BISSELL &amp; Ux' versus AXTELL &amp; al'.

The widow in the spiritual court set up a *Procurator* for her children the infants, and gets her account passed there, and each child's proportion ascertained, and distribution decreed, and on giving new security, got the old security discharged.

The Court, without regard had to the proceedings of the spiritual court, decreed an account of the whole estate. (1)

personal estate, notwithstanding an account before taken, and a distribution decreed in the spiritual court.

CASE 45.  
In Court.  
LORD CHAN-  
CELLOR.  
Lunm.  
14 Maii.  
Eq. Ca. Ab.  
12. pl. 9. 136.  
pl. 4. S.C.  
An account  
decreed of an  
intestate's

(1) And notwithstanding the proceedings in the spiritual court, all the defendants were to be examined on interrogatories Reg. Lib. 1687. A. fol. 674. So a bill may be brought against an executor for discovery of the personal estate, before the will is proved in the spiritual court, or during the litigation thereof, *Dulwich College v. Johnson*, post 49. And at law upon plene administravit pleaded, the account given to the ordinary shall not be given in evidence, nor any regard had to it, *Turner's Case*, 2 Roll. Ab. 678. So the judgments of the ecclesiastical court are as much subject to the equity of the court of chancery, as the judgments at law, sic dict. per Lord Keeper, *Vanbrough v. Cock*, 1 Ch. Ca. 200. Quere, Whether equity will relieve against sentence of delegates? Lord Keeper so inclined, ibid. So suit by infant legatee in the spiritual court, cannot be pleaded in bar to a suit in equity. *Howell v. Waldron*, 2 Ch. Ca. 85. So of a plea that the ordinary is the judge on a bill for distribution of intestate's effects, *Pamplin v. Green*, 2 Ch. Ca. 95. But it seems that as to fraud in obtaining a will after probate, and while the probate is in force, chancery will not intermeddle, *Archer v. Mosse*, ante p. 8. and cases cited there. Nor where spiritual court first possessed of a cause in which it has concurrent jurisdiction with chancery, *Nicholas v. Nicholas*, Pre. Ch. 546. et vide *Horrell v. Waldron*, ante 1 vol. p. 27. and cases there referred to. On what ground equity will grant an injunction, and a court of law a prohibition, as to a suit in the ecclesiastical court for subtraction of

tithes, vide *Rotherham v. Fanshaw*, 3 Atk. 628. As to the power of the court of chancery to order a Will out of the office of the spiritual court, vide *Frederick v. Aynscomb*, 1 Atk. 628. *Morse v. Roach*, 2 Strange, 961, cited there.—*Williams v. Floyer*, Amb. 343. *Lake v. Cansfield*, 3 Bro. Ch. Ca. 263. by which cases such a power seems to have been assumed, [see also *Qualey v. Qualey*, 4 Mad. 213.] ; et vide further on the general head, *Bassett v. Bassett*, 3 Atk. 207. where per Hardwicke, Lord Chancellor, "This Court will not grant an injunction to stay proceedings in the ecclesiastical court for a legacy, as it is the proper jurisdiction for legacies charged on personal estate." And this court has always followed the rules of the ecclesiastical court in respect to personal legacies as the proper jurisdiction, *Reynish v. Martin*, 3 Atk. 333. As to the circumstances where equity has and has not a jurisdiction in respect of the rights and duties of marriage, the leading cases of the first class are *Sealing v. Crawley*, post 386. *Angier v. Angier*, Pre. Ch. 496. *Sidney v. Sidney*, 3 P. Wms. 269. *Fitzer v. Fitzer*, 2 Atk. 511. *Head v. Head*, 3 Atk. 295. *Guth v. Guth*, 3 Bro. Ch. Rep. 615. 18. *Ball v. Montgomery*, 2 Ves. jun. 195. *Shaftoe v. Shaftoe*, 7 Ves. 171. those of the second, *Whorewood v. Whorewood*, 1 Ch. Ca. 250. 1 Ch. Rep. 118. S. C. sed vide remark on that case. *Head v. Head*, ub. sup. *Hincks v. Nelthorpe*, 1 vol. 204. *Ball v. Montgomery*, ub. sup. *Rex v. Blatch*, 5 Ves. 113. *Shaftoe v. Shaftoe*, ub. sup. Case of the ship *Noysomhead*, 7 Ves. 593.



CHOMLEY *versus* CHOMLEY.

CASE 46.  
IN COURT.  
LORD CHAN-  
CELLOR.  
Veneris.  
18 die. Maii.  
Eq. Ca. Ab.  
161. pl. 2. S.C.  
Post. Case 78.

By articles made on the marriage of Mr. *Nath. Chomley*, with the daughter and only child of Sir *Hugh Chomley*; Mr. *Chomley* covenants to lay out *forty thousand pounds* in land, and to settle *one thousand pounds per ann.* thereof in jointure, which was to be in lieu of dower, and all demands out of his personal estate; with a covenant that she would not claim any part thereof, and to settle the whole on the first and other sons of that marriage in tail male: Sir *Hugh* on his part covenants to give in marriage with his daughter *five thousand pounds* down, and 5000*l.* at his death, and to settle his whole estate on the issue male of this marriage, if there should be any; provided, that Sir *Hugh* with the consent of *Nathaniel*, might alter, change and make void the uses, &c. in the articles.

Sir *Hugh* was greatly indebted to the full value of his estate, and unable to perform the articles on his part: but *Nathaniel* in his life-time purchased land of the value of *one thousand and fifty pounds per ann.* and settled a jointure according to the articles, and afterwards died within the province of *York*, being also a freeman of the city of *London*, and possessed of a personal estate of the value of about *twenty thousand pounds*, and left issue two sons and a daughter.

The plaintiff his brother being his executor, brought his bill for the direction of the court, how, and in what manner, the personal estate should be disposed of.

[ 48 ]

The *first question* was touching the proviso for changing and altering the articles; whether that should be intended only as to the estate that Sir *Hugh* was to settle: for if the proviso did not extend to both estates, but should be taken to relate to Sir *Hugh's* only, then the covenant of Mr. *Nathaniel Chomley* for laying out *forty thousand pounds* in land, would swallow up his whole estate, and there would be nothing left for the younger children. (1)

(1) The words of the proviso according to the Register's Book, were "provided that it should be lawful for the said Sir *Hugh Chomley*, with the assent of the said *Nathaniel Chomley* in writing first had, to alter and make void all or any of the conditions, settlements and limitation of estate and estates therein agreed to be made or done, as if those articles had not been made, and that the same power be reserved in all the deeds, settle-

ments and covenants, therein to be made by virtue of the said articles;" and that Sir *Hugh* should have power to make a jointure and to charge portions as therein mentioned, and as to that the Lords Commissioners came to no determination but committed the care of the whole of the personal estate of *Nathaniel Chomley* to his brother the plaintiff *John Chomley*, under the direction of the court to receive and get in the same, and to lay it out in

*Secondly*, admitting that the articles were not binding, but were avoided pursuant to the proviso, then if the custom of the province of *York* was to take place, there being about *fifty pounds per ann.* in possession descended on the heir, he was was thereby excluded from having any part or share of the personal estate.

CHOMLEY v.  
CHOMLEY.

As to this point, the court was clear of opinion, that *Nathaniel Chomley* being a freeman of the city of *London*, the custom of the city for the distribution of his personal estate should prevail and controul the custom of the province of *York*. (1)

A freeman of London dies within the province of York. The custom of London in the distribution of his personal estate, shall controul the custom of the province of York.

[\*49]

\* The *third question* was, whether the widow, who by the articles was to have no part of her husband's personal estate, more than what he should leave her by his will (and he had thereby given her 1000*l.*) should have the jewels, which her husband had presented her with in his life-time; and it was urged there was the less reason to allow her them, in regard her portion was never paid.

The court referred it to a master to state the whole matter specially to the court. (2)

lands and subject to such trusts and dispositions, for the benefit of the children, as the court should from time to time declare and direct, allowing 200*l. per ann.* over and above the value of the lands descended to the heir, and maintenance also allowed to the children, to be increased from time to time as the court should direct; the heir of *Natha-*

*niel Chomley* not to be bound by that order in case of the death of the children, and the widow to have her jointure free from incumbrances, according to the articles. Reg. Lib. 1688. A. fol. 705.

(1) Reg. Lib. 1688. A. fol. 706.

(2) Reg. Lib. 1687. A. fol. 663.

### DULWICH COLLEGE *versus* JOHNSON.

THE plaintiff's bill was for a discovery of a personal estate, that was devised to charities relating to the College. The defendant pleaded that the will was not yet proved, but was controverted in the spiritual court.

The court over-ruled the plea, a discovery of the estate being for the benefit of all persons interested therein, and necessary for the preservation thereof: and discoveries have often been ordered to be made *pendente lite* in the spiritual court. (3)

CASE 47.  
IN COURT.  
LORD CHANCELLOR.  
Jovis,  
17 die Maii.  
Eq. Ca. Ab. 77.  
pl. 12. S. C.  
A bill may be brought against an executor for discovery of the personal estate, before the will is proved, or

during the litigation thereof in the spiritual court.

(3) Vide *Wright v. Bluck*, ante 1 vol. 106. *Phipps v. Steward*, 1 Atk. 285. where demurrer on same ground over-ruled,



## CASE 48.

BUNCE *versus* PHILIPS.

Eodem die.

Eq. Ca. Ab.

167. pl. 2. S. C.

One claiming  
under a volun-  
tary convey-  
ance from  
tenant in tail,  
not compellable

Vid. ante, Ca.  
26.

THE bill was to discover an antient deed of entail alledged to be in the defendant's hands; the defendant pleaded conveyances made to himself of the estate in question; so that, if any such entail there was, the same was discontinued.

by the issue in tail to discover the deed of entail.

The court allowed the plea; and said they would not aid the issue in tail against a discontinuance, though by a voluntary conveyance. (1)

(1) The plea was ordered to stand for an answer, Reg. Lib. 1687. A. fol. 1114.

## CASE 49.

CROOK *versus* BROOKING.

LORD CHAN-

CELLOR.

Sabbati, 18

Maii.

Money be-  
queathed to  
A. for life, and  
if she died in  
the life of her  
husband, to go  
to the children  
of her sister

B. in such shares as A. should advise. Some of the children of B. die leaving issue, and then A. dies in the life of her husband, making no appointment, decreed the money to be distributed amongst the children of B. and their representatives per Stirpes, and not per Capita.

THE case was, that one *Mallock* had devised *one thousand five hundred pounds* by his will to *Simon* and *Joseph Snow*, to be by them disposed of on such secret trust as he had privately revealed to *Simon*; and directed, that the execution of the trust should be left wholly to them, so that in case they should break their trust, yet they should not be questioned for the same either in law, or equity.

*Simon* in a letter wrote by him to *Joseph*, reciting, that the testator had by his will devised such legacy as aforesaid, declares, that the intent of the testator was, that they should out of the profits of the *one thousand five hundred pounds*, maintain the testator's daughter, who was married to one *Crew*; and in case she should survive her husband, she to have the whole money at her own free and absolute disposal; but in case she died in the life-time of her husband, then the *one thousand five hundred pounds* to go to the children of his daughter *Grace Leach*, in such shares and proportions as *Anne Crew* should advise.

[ 51 ]

*Anne Crew* died in the life-time of her husband, and made no appointment.

At the death of *Anne Crew*, many of *Leach*'s children were dead; some with issue, and some without issue.

It was agreed, that the trust was well and sufficiently declared by the letter, which *Simon Snow* wrote to *Joseph*, but the

doubt was, in what shares and proportions the money should be distributed, and who should be let into a share thereof.

CROOK v.  
BROOKING.

*Per Cur.* the money shall be distributed amongst all the children of *Leach* and their representatives *per Stirpes*, and not *per Capita*; and that without regard had to the administrator of any dead child.

It was objected by the counsel, that if *Anne Crew* herself had been living to have made an appointment, she must have distributed it amongst the children then living, and could not have given any part thereof to the child of one that was dead. *Sed non allocat' per Cur'. (1)*

(1) The decree was, " that the said " 1500l. ought to be distributed and " divided amongst the children and " children's children of the said *Grace " Leach, that were living at the death " of the said Anne Crew, and that the " executors or administrators of those*

" children or children's children, that " were dead in the life-time of the said " *Anne Crew*, ought to have no part " or share thereof." Reg. Lib. 1687. A. fol. 688. vide post 106. S. C. on a rehearing.

BADEN & al', Creditors of PHILIP late }  
Earl of PEMBROKE, } Plaintiffs.

The Earl of PEMBROKE, Countess Dowager }  
of PEMBROKE, DOMINA CHAR- }  
LOTTA HERBERT, sole Daughter and } Defendants. (1)  
Heir of PHILIP late Earl of PEMBROKE, }  
and al', }

[ 52 ]  
CASE 50.  
Lunæ.  
21 Maii.  
In Court.  
LORD CHAN-  
CELLOR,  
MASTER of the  
ROLLS,  
Justice  
LUTWICH,  
and Justice  
POWELL.

Post. Case 196.  
A. on his mar-  
riage demises  
lands to B. who

THIS cause coming now before the court upon a case stated by *Dr. Edisbury* for the judgment of the court, how far the redemises them to A. for a lesser term, paying a pepper-corn rent during the life of A. and after his death an annual sum for the life of his wife for her jointure, and a pepper-corn for the remainder of the term. A. dies indebted, the redemised term shall not be assets to pay any debts but what affect the inheritance, the term redemised being raised for a particular purpose.

(1) Sir *Robert Furnesse* being seised in fee of the Manor of *Ellerdon*, and of several other estates in *Kent*, by lease and release dated 21 and 22 of *July*, 1713, between him and Sir *Paul Methuen*, and in order to secure to the said Sir *Paul* an annuity of 300l. *per ann.* for his life, demised the premises to Sir *Paul* for his life, who by indenture dated the day following, redemised the premises to Sir *Robert*, for 99 years, reserving the said rent of 300l. *per ann.* Sir *Robert* continued in possession,

having constantly paid the rent, and afterwards died, upon which the question came to be between the heir of Sir *Robert* and his executor, who should have the benefit of this term, above what would satisfy the annuity of 300l. *per ann.* The executor insisted that he was intitled, it being in law a chattel; but for the heir it was urged and accordingly decreed that this could not be considered as a term in gross, in regard it was taken out of the inheritance for a particular purpose, and Sir

**BADEN v.  
EARL OF PEM-  
BROKE.**

[ 53 ]

several terms for years after mentioned should be assets, and liable to debts by simple contract : the master certified, that *Philip* late Earl of *Pembroke* being seised in fee of the manors and lands after mentioned in consideration of the marriage then intended to be had betwixt him and the now countess Dowager of *Pembroke*, and of *ten thousand pounds*, which he then received as a portion with her, and in pursuance and performance of certain articles of agreement made before the marriage, whereby the said Earl covenanted and agreed to charge his estate in *Glamorganshire* with the payment of a rent or annuity of *one thousand and three hundred pounds per annum*, to the said Countess for her life, and for performance of those articles, became bound to the Earl of *Sunderland*, in a statute staple of the penalty of *twenty thousand pounds* ; and the said late Earl having agreed to make up the *one thousand three hundred pounds, one thousand five hundred pounds per annum*, did, by indenture dated 1 *October* (75.) made between the said late Earl and the said Countess of the one part, and the said Earl of *Sunderland* and Lord *Godolphin* of the other part, grant, bargain, sell, and demise to the said Earl of *Sunderland* and Lord *Godolphin*, their executors and administrators, all his honours, manors, &c. in *Glamorganshire*, for *ninety-nine* years, under the rent of a pepper-corn : but upon trust that they should redemise the premises in manner after mentioned ; and accordingly the said Earl of *Sunderland* and Lord *Godolphin*, by their indenture of redemise bearing date the second day of the said *October*, made between them of the one part, and the said Earl of *Pembroke* of the other part, did in pursuance and performance of their said trust, and for five shillings in money, regrant the said premises so demised, to the said Earl *Philip* : to hold to him, his executors, administrators, and assigns for *ninety-eight* years and *eleven* months, reserving the rent of a pepper-corn only, during the life of the said Earl, and after his decease a rent of *one thousand five hundred pounds per annum* by half yearly payments, during the life of the Countess, as a jointure for her ; and after her death a pepper-corn during the residue of the term, with a covenant for payment of the rent, and a

*Robert* could not intend it should be liable to other purposes than what was in view originally, wherefore it ought to attend the inheritance. *St. John v. Furnesse*, heard before Lord Chancellor *Talbot*, at his house in *Lincoln's Inn Fields*, Monday, Feb. 19, 1735—6. Note, this case of *Bladen v. Lord*

*Pembroke*, was cited, but my Lord said, he was not satisfied that all the creditors as well by simple contract as specialty were not paid their debts, though the same doth not appear by the report [and see the observations in *Scott v. Fenhoulllet*, 1 Bro. C. C. 70.]

BADEN v.  
EARL OF PEM-  
BROKE.

clause of re-entry in case of any default in payment. And the master in like manner stated several other securities that had been made by way of demise and redemise; and certified, that the bond-debts of the late Earl amounted unto *nine thousand pounds*, and that the book-debts, and debts by simple contract amounted unto *eighteen thousand two hundred pounds*; and that the personal estate was not above *six thousand pounds*; and therefore submitted it to the court, whether the terms redemised to the said late Earl should be liable to those debts; which was the single point that came now before the court in judgment.

[ 54 ]

Mr. *Pollexfen* and others of counsel with the plaintiffs, the creditors, argued that the estate and interest, which Earl *Philip* had by the redemise, was purely a chattel interest; it would in law have passed by grant; been forfeited as any other chattel-term would have been, and might have been taken in execution upon a *Fi. fac.* And as to the objection that is made that a term abstracted out of the inheritance for a particular purpose is not to be assets, as other terms for years would be, he said there was no such rule in law; nor that a term should be attendant on the inheritance, or should cease, when a particular purpose was answered: and if a term be raised for a particular purpose, and then to cease, it must be so expressed in the deed itself; and no foreign implication will serve for that purpose; and to that effect cited the case of *Co. 1 Rep. fol. 87*, and to make such construction in this case must be not only by an averment foreign to the deed, but likewise contrary to express statutes, as the statute of *Westm. 2*, and the statute of *Acton Burnel*, by which terms for years are liable to be taken in execution upon a *Fi. fac.* and he saw no reason why the term after the death of the Earl was not as subject to a *Fi. fac.* as it was in his life-time: and there is no question but that in his life-time the term might have been sold by the sheriff by a *Fi. fac.* subject to the payment of *one thousand five hundred pounds per annum*. Was the case here between the heir and executor, there might be some colour for equity to interpose; but equity ought to favour creditors, and the payment of their debts, and has therefore in many cases enlarged assets, and made that assets that would not have been so at law; but never abridged the assets in prejudice of creditors; and cited *Tooke's* case in the Lord *Nottingham's* time; where a man had a lease for three lives to him and his heirs from the

A. having a  
lease for three  
lives, mort-  
gaged it for 99 years, if the three lives lived so long, and died after the mortgage was  
forfeited. The mortgaged term, though not assets at law, decreed to be sold for payment  
of debts.

BADEN v.  
EARL OF PEN-  
BROKE.

[ 55 ]

Vol. I. Case  
188.

2 KEB. 841.

[ 56 ]

church, and mortgaged this lease for *ninety-nine* years, if the three lives should so long live, and died, the mortgage being forfeited : and there the court decreed this mortgaged term which would not have been assets at law, to be sold for the payment of debts. If a man purchases an estate and takes an assignment of a term thereon to himself, and takes the conveyance of the inheritance in the name of trustees, it was never pretended, but that the term should be assets : and so if a man seized in fee makes a mortgage for ninety-nine years, the equity of redemption has always in this court been adjudged assets, and he saw no reason why the altering the security, and making it by way of demise and redemise, should vary the case ; and as to the case of *Lawrence* and *Beverly* (1) upon a special verdict by the direction of the Lord Chief Justice *Hale*, *Pasch.* 23 *Car.* 2, where upon the marriage of *Jane Chaire*, the Sister of *Albion Chaire*, with *Oliver Beverly*, by articles made on the marriage it was recited, that *Albion* stood bound to his sister *Jane* for payment of *one thousand pounds* at her marriage or 21, and reciting that a marriage was then intended, by which the money would become payable to the husband ; *Oliver Beverly* therefore covenants with *Albion Chaire*, that he should have a twelvemonth's time for payment of the money, paying interest in the mean time ; and *Albion Chaire* covenants to pay interest in the mean time, and at the year's end to pay the principal ; to the intent it might be laid out in a purchase, to be settled upon *Oliver* and *Jane*, and the heirs of their two bodies, remainder to the right heirs of *Oliver* : and *Oliver* covenanted that the money within one month after payment of it, should be laid out accordingly. The marriage was had ; *Oliver Beverly* dies, and *Jane* survives ; they had issue *Mary* their daughter, who was also dead without issue. After the death of *Oliver*, *Jane* received *three hundred pounds* for interest, and the *thousand pounds* remained in the hands of *Albion* unpaid. In an action brought by *Samuel Lawrence*, who was creditor by bond to *Oliver Beverly*, against the said *Jane Beverly* as executrix to her husband ; all this matter was found specially by the jury, by the direction of the Lord Chief Justice *Hale* : and whether the *three hundred pounds* received by *Jane* for interest were assets or no, the jury doubted, and *pet' advisament' Cur'*, &c. and after several arguments, judgment was given, *Quod quer' nil capiat per billam*. It was observed,

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(1) Vide this case cited by Lord Chancellor in *Kettleby v. Attwood*, ante 1 vol. p. 471, to prove that money articulated to be laid out in land, is not assets to satisfy a creditor, but is bound by the articles.

BADEN v.  
EARL OF PEN-  
BROKE.

that the original security for the *thousand pounds* portion was a bond to the wife, and so was a *chose in action*, and survived to her; and there was only a mutual covenant between the husband and *Albion Chaire*, that the money should be paid, and laid out in land to be settled to those uses: (1) and insisted that here was no equity against the creditors, and that the court had never in any case taken the benefit from the creditors of that, which was assets at law; and concluded with the rule taken by *Littleton* upon the statute of *Merton*, viz. *That which never was, never ought to be.*

*Mr. Keck* argued for the defendant the *Lady Charlotta Herbert*, the sole daughter and heiress at law to *Earl Philip*, that the articles in this case shewed the intent of the parties was only for securing the *one thousand five hundred pounds per ann.* and suppose the matter had rested upon the articles, and a bill had been brought to compel a performance of those articles, and the court had decreed a security by way of demise and redemise, which had been made accordingly, and then *Earl Philip* had died indebted, as in this case; I take it the court would never have suffered the redemised term to have been made assets, or any advantage to be taken thereof, save only for securing the *one thousand five hundred pounds per ann.* and so it was resolved in the case of *Goodrick and Browne*, (2) where a fine was levied pursuant to a decree of this court for a particular purpose, and the court would not permit any advantage to be taken of that fine, for letting in of other debts and incumbrances. Now in the principal case, the parties had only done that voluntarily which they might by decree have been compelled to have done; and their intent by these articles as fully appeared to be only for securing the *one thousand five hundred pounds per ann.* as it could have done had there been a decree to have governed it. And this court has in some cases abridged even creditors of the advantages they had at law, and made that, not to be assets, which was assets at law: as in the case of *Holt and Holt*, (3) where an executor had entered into a recognizance for the payment of debts and legacies, and the testator's estate, that consisted in houses in *London*, was afterwards destroyed by the fire, the court in that case, by reason of that casual loss, would not suffer that recognizance to run upon the executors, nor any advantage to be taken thereof, further than the executors had assets in

Where a fine is levied for a particular purpose pursuant to a decree, the court will not permit any other use to be made of that fine.

[ 57 ]

(1) *Lister v. Lister*, post 68. *Howman v. Corie*, post 190.

(2) 1 Ch. Ca. 49.

(3) 1 Ch. Ca. 190. vide *Noel v. Robinson*, ante 1 vol. 92.



BADEN v.  
EARL OF PEM-  
BROKE,  
3 Ch. Rep. 2.

Vol. I. Case 92.

their hands ; and the case of *Jones and Bradshaw*, *Pasch.* 1661, where an executor had paid money pursuant to a decree of this court, and upon a *Plene adm'* they would not permit him to give that payment in evidence at law, the court decreed that it should be allowed, and referred the matter to an account in this court : (1) and the case of *Douse and Persivall*, first heard by the Lord *Nottingham*, and reheard by Lord *Guildford*, where a man purchased an estate of inheritance, on which there was a term for years in being, and took the assignment thereof in his own name, in that case the court decreed, that this term though in himself, should not be looked upon as part of his personal estate, so as to be subject or liable to the custom of the city of *London*. Which cases shew, that the court has in all times exercised a jurisdiction, and interposed in cases of this nature ; and the intent of the parties in the principal case by the demise and redemise, which is now become a common conveyance, was only to secure the *one thousand five hundred pounds per ann.* which being done, it was reasonable that the estate should fall again into the inheritance : and the inconvenience would be very great, should this term by the redemise be made personal assets.

[ 58 ]

The Judges, Mr. Justice *Powell* and Mr. Justice *Lutwich*, only declared their opinions, (to wit) that the demise and redemise being made purely for the particular purpose of securing the *one thousand five hundred pounds per ann.* and that end being answered, they thought no further advantage ought to be taken of that conveyance ; and that the redemised term ought not to be liable to debts, save only to debts by bond ; as the inheritance would have been, in case there had been no term for years.

The Master of the *Rolls* agreed with the Judges in opinion, and said, he thought the case of *Lawrence and Beverly* fully governed this case ; and the like judgment has been since given in this court in the case of *Whitwick and Jermin*, where money by a marriage agreement was to be laid out in land, the court would not let that money, as personal assets, be liable to other debts : and said, that all deeds were but in the nature of contracts, and the intention of the parties reduced into writing, and the intention was to be chiefly regarded. In an act of parliament, the intention appearing in the preamble, shall control

(1) So though in debt upon a bond at law, an executor cannot defend himself by pleading he has no assets beyond what would amount to satisfy the de-

creed, yet he may defend himself by bill in this court, which will take care to protect him, sic dict. *Harding v. Edge*, ante 1 vol. 143.

the letter of the law ; and the articles in this case as much shew the intention of the parties, as a preamble can that of an act of parliament ; and from the regard that the law itself gives to the intention of the party, it is, that where there is a fine by way of render, there shall be no dower : and so a rent or recogni-  
 sance shall not be extinguished by levying a fine to the party. That the court did, and often might, controul legal titles ; and instanced in the case of Sir *John Fagg* in the *Exchequer*, who making a title by an old dormant security, the court there directed that if the jury should find the money thereby secured was satisfied, they should find against his title ; though it was a title still in law ; he thought therefore the intention of the parties ought to govern this case, and that there would ensue a great and general inconvenience, should terms by redemise be made personal assets.

BADEN v.  
 EARL OF PEM-  
 BROKE.

[ 59 ]

The *Lord Chancellor* was clear in it, that this term redemised ought not to be made personal assets, nor be otherwise liable to any of the debts of *Earl Philip* than the inheritance was (to wit) to bond-debts, or debts of a superior nature : and therefore he agreed entirely with the *Judges* and the *Master of the Rolls*, and was glad to find them concur so unanimously with him in opinion, and he declared, that Mr. Justice *Thomas Powell*, who had been likewise attended with a case, and was to have delivered his opinion in this matter, (but was removed from being a Judge) had been with his lordship, and had declared his opinion was, that the re-demised term ought not to be any further assets, or liable to debts, than the inheritance would have been. (1)

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(1) Reg. Lib. 1687. A. fol. 1968. the doctrine of assets in general, *Cole* vide post 213. S. C. *Tiffen v. Tiffen*, v. *Warden*, ante 1 vol. 410. and cases ante 1 vol. p. 1. *Finch v. Earl of Win-* cited in not. there.  
*chelsea*, 1 P. Wms. 277. 80. and as to

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### SMITH versus CLEVER & al'.

THE *Master of the Rolls* having heard several arguments in this case, took time to consider thereof, and this day delivered his opinion therein : that he took the question to be, not so much how far a personal chattel might be devised over, (2) as how far the use of money may be limited and devised over. The

CASE 51.  
 MASTER of the  
 ROLLS.  
 21 Maii, 1688.  
 Ant. Case 35.  
 2 Ch. Rep.  
 187. S. C.

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(2) That such a devise over is good, for the first devise or bequest is but as  
 vide *Charges v. Dutchess of Albemarle*, of the use of the thing devised.  
 post 245. *Hide v. Parrot*, post 331.



SMITH v.  
CLEVER.

Fol. 343.

[ 60 ]

An estate by  
implication  
cannot be  
against the  
plain intent  
of the party  
expressed in  
his will.

first authority I meet with in this case, is in *H. 8.*'s time, in *Brook's Cases*, 388. where the occupation of goods is devised to one, the remainder over; the remainder is accounted good. And the case of the *Lord Hastings* versus *Douglass*, *Cro. Car.* and in the case 37 *H. 6.* there cited, by which it appears the law is clear, that the devise of the use and occupation of goods vests not an absolute property thereof in the first devisee, but that a limitation of them over is good. Now by the devise in question, I take it, that the money itself is not devised, but only the interest of it: as to the objection, that the devise of a personal estate in tail remainder over, is a perpetuity, and void; and so was adjudged in the case of *Boucher* and *Antram*, 14 Nov. 23 *Car. 2.* that is not any thing like the principal case: (1) for here money is not devised, but only the use of it. But the case I most principally depend on, is *Rachel's Case*, where chattels were devised to the wife for life, &c. and if she were with child, then to that child; if that child died without issue, the remainder over to the grandson. The wife had no child: and it was in that case resolved, that the remainder over was good; as likewise it would, if there had been a child, and that child had died without issue; and cited the case of *Wood* and *Saunders*, 21 *Car. 2.* And as to the objection that had been made by the plaintiff's counsel, that the interest being given to *Anne Smith* for life, and if she died without issue, then the remainder over, &c. implies an estate-tail both in principal and interest, he said an implication cannot be against the plain intent of the party expressed in his will: (2) and in this case the testatrix had carefully distinguished between principal and interest; and nothing passed, but barely the use, until she comes to the remainder over, and then she devises the principal. And he mentioned the rule taken in *Matthew Manning's Case*, that the intention of the party in his will ought to be observed, as far as may consist with the rules of law; and cited the case of *Oakes* and *Chaffon*, (3) as an authority in point; and declared as this will was penned, the remainder was good; and therefore decreed the money should go according to the will; but with this, that in case there should

(1) As to that point vide *Deering v. Hanbury*, ante 1 vol. 478. and cases cited in not. there, also *Williams v. Williams*, Eq. Ca. Ab. 207. pl. 9. *Maddox v. Staines*, 2 P. Wms. 421. *Butterfield v. Butterfield*, 1 Vez. 133. 154. S. C. by which and the cases referred

to it is clearly settled that such a limitation over is void.

(2) Vide *Bamfield v. Popham*, 1 P. Wms. 54. and cases cited in not. there. *Maddox v. Staines*, 2 P. Wms. 421.

(3) Probably *Chalfont v. Okes*, 1 Ch. Ca. 239. Pollex. 38.

be issue of *Anne Smith*, the issue should have the absolute and entire interest in the money. (1)

SMITH v.  
CLEVER.

*Note.* It was objected that the devise of the use or interest of money passes the money itself, as a devise of the profits of a term carries the term. (2) And as to the main point, the case of *Love* and *Windham* was cited as an authority with the 1 Sid. 450. plaintiffs.

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- (1) Vide *Target v. Gaunt*, 1 P. Wms. fits of land shall pass the land itself, 432. *Forth v. Chapman*, ibid. 663. 1 Inst. 4 b. *South v. Alleine*, Salk. 228.  
(2) So a devise of the rents and pro-

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### BAKER *versus* CHILD.

[ 61 ]

CASE 52.

In Court.

Martis.

22 die Maii.

Eq. Ca. Ab.

25. pl. 6. 62.

pl. 2. S. C.

Where a Feme

Covert agrees

before it is

*PER Cur.* Where a Feme Covert, by agreement made with her husband, is to surrender, or levy a fine; though the husband die before it be done, the court will by decree compel the woman to perform the agreement. (3)

to join with her husband in making a surrender, or levying a fine, and he dies before it is done, equity will compel her to perform the agreement.

- 
- (3) There is an entry of a cause of 150. at the beginning, *Thayer v. Gould*, this name, which was referred to Ser- 1 Atk. 617. *Daniel v. Adams*, Amb. jeant *Rawlinson*, Reg. Lib. 1687. A. 495. et vide 1 Roll. Ab. 375. fol 797. vide *Clark v. Ward*, Pre. Ch.

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### BACHELOR *versus* BEAN.

CASE 53.

Eodem die.

LORD CHAN-  
CELLOR.

Eq. Ca. Ab. 60.

pl. 2. S. C.

A man mar-

ries an exe-

cutrix. He

shall answer

for so much of

the personal

estate, as she

possessed,

though he took

it as a portion

with her.

THE bill was brought by the heir for an account of his father's personal estate, and to have it applied in ease and exoneration of the real estate, and was brought against the second husband, who married the plaintiff's father's widow and executrix.

Upon exceptions to a master's report, the court declared, that the husband, who had married the widow and executrix of her former husband, should be answerable for so much of the former husband's personal estate as she had possessed; and that, although he took it as a portion with the widow: and this in favour of the heir, though there were no creditors concerned in this case. (4)

- 
- (4) The defendant in this case, was the assignee of a mortgagee, and had married the widow and executrix of the mortgagor, and the exception to the master's report was, that he had not charged the defendant amongst others, with the sum of 661*l.* 16*s.* being assets of the said testator, come to his own hands, and more than sufficient to satisfy the mortgage money then due to him, together with the interest, it appearing that the said executrix had sold stock and cattle of the mortgagor for 600*l.* and had taken bond for the same in her own name, and that upon her intermarriage with the defendant, the

defendant possessed the bond, and after the intermarriage, received the money due thereon, which it was insisted ought to go in discharge of the said mortgage money; the defendant insisted that he took the bond and received the money due thereon, as a portion with his wife; and decreed it

should go in satisfaction of the mortgage, and there being more than sufficient for that purpose, that the defendant should reconvey the mortgaged premises, &c. Reg. Lib. 1687. A. fol. 653. vide *Sanderson v. Crouch*, post 118.

## CASE 54.

LORD CHANCELLOR.

Veneris.

25 die Maii.

Eq. Ca. Ab.

275. (H.) pl. 1.

S. C.

An equity of redemption of a mortgage in fee is not assets at law,

but is so in equity;

[\*62]

Legal assets shall be applied in a course of administration; but equitable assets

amongst all the creditors proportionably. After a bill brought by creditors against the executor, and the rest of the creditors, the executor cannot by confessing a judgment, or suffering judgment to go by default, prefer one creditor before another. (4)

Whether an heir being a creditor by bond or judgment may retain, as well as the executor may.

## SOLLEY versus GOWER.

*PER Cur.* The equity of redemption of an inheritance is not assets at law, because the estate is forfeited; (1) but the heir having a right in equity, that \* ought in equity to be liable to satisfy a bond-debt; and if the heir hath aliened or released his equity of redemption to prevent the creditors of the satisfaction of their debts, this court will follow the money in the hands of the heir or his executor.

and if aliened or released by the heir he shall be answerable for the value.

Where creditors are plaintiffs, the usual decree is that the debts shall be paid in course of administration; but that is to be intended of legal assets, and not of assets in equity, that are not assets at law: and in the case of *Parker and Dee*, (2) where creditors come with a bill and make the executor and all the rest of the creditors parties, the executor shall not have power by the confessing of a judgment, or by suffering judgment to pass by default, after the bill exhibited to prefer one creditor before another; but there all the creditors in equal degree shall be paid in proportion. (3)

Where an heir by bond or judgment is a creditor, *Quære*, if he shall not retain: the reason being the same in the case of an heir, as it is of an executor, for neither can sue himself. (5)

Whether an heir being a creditor by bond or judgment may retain, as well as the executor may.

(1) There is an entry of a cause of this name in the Register's Book, 23d May, but the point in the printed report, does not occur, Reg. Lib. 1687. B. fol. 850. vide *Cole v. Warden*, ante 1 vol. 410. *Baden v. Earl of Pembroke*, ante 52.

(2) 2 Ch. Ca. 200.

(3) Vide *Harding v. Edge*, ante 1 vol. 143. and cases cited in not. there.

(4) *Surrey v. Smalley*, ante 1 vol. 457.

(5) Vide *Hopton v. Dryden*, Pre. Ch. 180. but an executor of an executor cannot retain, per *Lord Keeper*, *ibid*.

## CASE 55.

Eodem die.

In Court.

Eq. Ca. Ab.

69. pl. 9, S. C.

## SAUNDERS versus BEALE.

AN inheritrix carves out a term for one thousand years to trustees, the trust whereof was declared by the woman and her in-

tended husband to be for the husband for life, and after his death, to the wife and her heirs: afterwards the husband and wife by *fine sur concess.* grant a term of *twenty-one* years reserving the rent to the husband and wife, and the heirs of the wife; and the bill was now brought by the administrator of the wife to have the benefit of the rent preserved; but the court dismissed the bill. (1)

SAUNDERS v.  
BEALE.

[ 63 ]

Note, My Lord Cook is express, that the disposition of part of the term by the husband, which he hath in right of his wife, is not a disposition of the whole, *Vide Co. Lit. fol. 46. b.* if the husband possessed of a term for forty years in right of his wife, make a lease for twenty years reserving rent, the wife shall have the residue of the term; but the executors of the husband the rent. (2)

(1) Reg. Lib. 1687. B. fol. 501. vide Co. Lit. 351. a. So *Sym's Case*, Cro. Eliz. 33. *Grule v. Locroft*, ibid. 287. *Blaxton v. Heath*, Pop. 145.

a lease by the husband will bind the wife, and if it will who is entitled to the rent, *Druce v. Denison*, 6 Ves. 885.]

(2) [Quære whether an agreement for

### MUSGRAVE *versus* DASHWOOD.

CASE 56.  
Eodem die.  
In Court.  
Ant. Case 41.

THE case was, that a copyholder for life, where there was a widow's estate by custom, agrees to sell his estate, and enters into bond, that the purchaser should enjoy.

The bill was brought by the purchaser against the widow to bind her by this agreement. But the court dismissed the bill with costs, (3) for if such contracts for copyholds should be decreed, all Lords would be defrauded of their fines, (4) &c. and put the case, if a joint tenant agrees to alien and does it not, but dies, it would be a strange decree to compel the survivor to perform the agreement. (5)

Agreement by  
one joint-  
tenant to sell,  
does not bind  
the survivor.

(3) But a Feme may be bound by a settlement of a jointure in lieu of her free bench, though not expressly mentioned to be in lieu thereof, and that though she was infant at the time of the articles, and not a party to them, *Jordan v. Savage*, 2 Eq. Ca. Ab. 102. pl. 8: et vide as to the nature of free

bench, *Walker v. Walker*, 1 Vez. 54. *Hinton v. Hinton*, 2 Vez. 631. Jacob. Law. Dict. Tomlin's Edit. Verb. Free-bench.

(4) Vide 1 Inst. 59. b. *Hinton v. Hinton*, 2 Vez. 633.

(5) Vide *Burnett v. Kinaston*, Pre. Ch. 121. *Bacon's Tracts*, 80.

DE

## TERM. S. TRINITATIS, 1688.

In Court.  
Veneris.  
22 die Junii.

IN CURIA CANCELLARIÆ.

CASE 57.  
Eq. Ca. Ab.  
307. pl. 2. S.C.

THERMAN *versus* ABELL.

A tradesman turns away his apprentice for negligence and misdemeanors. Decreed to refund part of the money he had with him.

THE defendant being an apothecary, the plaintiff put his son to him as an apprentice, and gave with him a sum of money, (1) and allowed the youth ten pounds *per ann.* for his clothes : the defendant having put away his apprentice after he had lived some time with him, by reason of negligence and misdemeanors laid to his charge, the court decreed the master to refund 30*l.* of the money ; (2) and the rather, because the indentures were not inrolled, so as the matter was not properly cognisable before the *Chamberlain of London.*

(1) 45*l.* R. L.

(2) To be paid within a fortnight, and to deliver up the indenture of apprenticeship at the same time, and in

default to pay the costs. Reg. Lib. 1687. B. fol. 568. vide *Newton v. Rouse*, ante 1 vol. 460. *Stephenson v. Houlditch*, post 491.

CASE 58.

In Court.

LORD CHANCELLOR.

Eq. Ca. Ab. 63. pl. 7. S. C.

A *Feme Covert* agrees to sell her inheritance, so as she might have part of the money. The land is sold,

and her part of the money put into trustees hands. This money not liable to the husband's debts, though she afterwards agreed it should be so.

RUTLAND *versus* MOLINEUX.

THE case was, a *Feme Covert* agrees to sell her inheritance, so as she might have two hundred pounds of the money secured to her : the land is sold, and the money\* put out in a trustee's name accordingly. The bill was brought by a creditor of the husband's to subject this money to the payment of his debt ; and charges that the wife promised and agreed it should be liable thereunto.

[\*65 ]

*Per Cur.* This money shall not be liable to the payment of any of the husband's debts, nor shall any promise made by the wife for that purpose subsequent to the first original agreement, be obliging on that behalf. (3)

(3) There is merely an order of dismissal with costs in the Register's Book, except that it appearing that by an execution the money belonging to the

defendant had got into the sheriff's hands, the same was ordered to be paid to the defendant, Reg. Lib. 1687. B. fol. 592.

COATES *versus* NEEDHAM & Al'.

J. S. being seised in fee devises all his lands in *Sutton* to trustees and their heirs, in trust that they should apply the profits thereof until his son (who was then but *two* years old) should attain *twenty-one*, in manner therein after directed, *viz.* as to one-third part thereof to his wife in lieu and satisfaction of dower, the other two-thirds for payment of his debts, and afterwards to and for other uses intents and purposes in his will mentioned. The trustees from time to time receive the profits and pay the widow her thirds; but the proof was various, whether she took it as for her dower, or as devised unto her by the will. The widow dies, and then the son dies. The plaintiff who had married the widow, and was her administrator, preferred this bill to have the benefit of this devise of a third of the profits, until the son might have attained *twenty-one* years. The defendants insisted the widow had never declared her acceptance of the devise, nor done any thing that would bar her of her dower; but on the contrary often declared she would bring her *writ* of *dower*, so that in case she had lived longer than such time, as the son would have attained *twenty-one*, she might have waived the devise, and insisted on her dower.

CASE 59.  
Eodem die.  
LORD CHANCELLOR.  
A. devises lands in trust to pay one-third of the rents to his wife in satisfaction of dower, until his son then two years old, attains 21. The wife receives a third of the rent from the trustees, and dies, and afterwards the son dies during his infancy. The administrator of the wife shall have her third of the rents 'till such time as the son might have attained 21.

[ 66 ]

*Per Cur.* There is no doubt, but it is a good devise of the profits, until such time as the son might have attained his age of *twenty-one* years according to the resolution in *Boraston's* case; (1) and her acceptance of the money from the trustees was a sufficient declaration of her agreement to the will, for it cannot be said she took it as dower; for dower must be of the land itself, into which it is not pretended she ever entered, but accepted of a third of the rents and profits from the trustees: and therefore decreed the plaintiff should have a third part of the profits until such time as the son would have attained his age of *twenty-one* years. (2)

3 Co. 19. a.

(1) Vide *Martin v. Woodgate*, Pre. Ch. 34, 5.

(2) The decree took notice that the widow of the testator had received the third part of the rents of certain lands called *Christhorpe*, which were not subject to the devise, but that *that* made no difference, and so decreed as in the printed report, and also an account amongst other things, of the arrears due to the plaintiff under the said trust. Reg. Lib. 1687. A. fol. 1171.

vide *Levett v. Needham*, post 138. S.C. So devise of lands to a wife who was entitled to dower, no bar unless expressly said to be in satisfaction of dower, *Hitchin v. Hitchin*, Pre. Ch. 133. [*Thompson v. Nelson*, 1 Cox, 447.] Nor where a bond from the husband in trust to secure 400*l.* to the wife in case she survived, was parol evidence admitted to shew that it was in lieu of dower, and that the wife acknowledged it to be so, *Finney v. Finney*, 3 Atk. 8.



So where settlement before marriage of a Feme's fortune on herself, and a covenant on the part of the husband, to pay a sum of money to trustees in trust for his wife, if she survive, she shall have her dower, *Couch v. Stratton*, 4 Ves. 391. Nor will a provision, if precarious, bar, though expressed to be in bar of dower and thirds, *Smith v. Smith*, 5 Ves. 189. [This was the case of an infant; as to their rights see *Drury v. Drury*, and *Buckinghamshire v. Drury*, 2 Eden 39, 60, and note 75.] So in cases of election, the widow shall not be put to elect, but by express declaration or necessary inference arising from the inconsistency of her claim with the disposition of the will, *French*

*v. Davies*, 2 Ves. jun. 572, where the judgment of the *Master of the Rolls* goes very much into the consideration of the cases, *Strahan v. Sutton*, 3 Ves. 249. *Greator v. Cary*, 6 Ves. 615. et vide *Galton v. Hancock*, 2 Atk. 427, and cases cited by Mr. Sanders in note there, *Ayres v. Willis*, 1 Vez. 230. *Broughton v. Errington*, B. 1773. 7 Bro. P. C. 12. *Foster v. Cook*, 3 Bro. Ch. Rep. 347. [And see *Arnold v. Kempstead*, 2 Eden 236, and cases in note there. *Chalmers v. Storil*, 2 V. and B. 222. *Miall v. Brain*, 4 Mad. 119. *Butcher v. Kemp*, 5 Mad. 61. *Dickson v. Robinson*, Jac. 503. *Roberts v. Smith*, 1 S. and S. 513.]

### ASCOUGH *versus* JOHNSON & ux', & al'.

CASE 60.  
Eodem die.  
In Court.  
LORD CHAN-  
CELLOR.  
A purchaser  
or mortgagee  
buying in in-  
cumbrances  
for less than  
is due, shall  
have the bene-  
fit of the whole  
money due  
thereon.

**PER cur.** Where a purchaser, or mortgagee buys in incumbrances to protect his estate at law, on compositions, (to wit) incumbrances on his purchased lands and other lands, he shall be allowed the full money due on such incumbrances, and the same shall not, by the heir or mortgagor, be redeemed without full payment of all the money due on such incumbrances, without regard to the beneficial bargains and compositions made by such purchaser. (1)

(1) Vide *Darcy v. Hall*, ante 1 vol. 49. *Phillips v. Vaughan*, *ibid.* 336, and cases there respectively referred to.

### CLERKSON *versus* BOWYER & e con'.

CASE 61.  
LORD CHAN-  
CELLOR.  
Lunæ.  
2 die Julii.

THERE being a mortgage made of a copyhold in fee for securing an annuity, the heir of the mortgagor is foreclosed, and a release given to the trustee of the mortgagee. The bill after all was to be admitted to the redemption: and it was insisted, that the benefit of the mortgage belonged to the executor or administrator of the mortgagee, and not to his heir; and therefore this foreclosure could not be binding, the administrator being no party to it: and the case of *Gobe and his Wife against the Earl of Carlisle*, was cited, where the heir of the mortgagee had foreclosed the mortgagor, the executor of the mortgagee being no party. Upon a bill by the executor against the heir of the mortgagee and the mortgagor: The land was decreed to the executor.

[ 67 ]

The heir of  
the mortgagee  
forecloses the  
mortgagor,  
the executor  
being no party.  
The land was decreed to the executor.

being no party; and afterwards upon a bill by the executor against the heir of the mortgagee, and against the mortgagor, the land was decreed to the executor. CLERKSON v. BOWYER.

But it was said *per cur.* if the executor or administrator of the mortgagee, should after this foreclosure come against the heir of the mortgagee to have the benefit of the mortgage, the heir might well say, I will pay you the money, and take the benefit of the foreclosure to myself, in case the land be worth more than the money. (1)

But if the executor of the mortgagee, after a foreclosure by the heir, brings a bill to have the benefit of the mortgage, the heir, if he thinks fit, may take the benefit of the foreclosure to himself, paying the executor the mortgage-money and interest.

(1) The bill in this case was by the heir of the mortgagee against the lord of the manor, the administrator and some other parties claiming title to the premises in question, stating to the effect in the printed report, and praying a discovery of their claims that the lord might admit him as tenant, and that the administrator might deliver up to the plaintiff the deeds and writings belonging to the said premises in his hands, which was decreed accordingly, but no reasoning in the decree, Reg. Lib. 1687. A. fol. 913. Vide *Wynn v. Littleton*, ante 1 vol. 4.

### KINGDON *versus* BRIDGES.

CASE 62.

*Eodem die.*  
In Court.  
Eq. Ca. Ab.  
70. pt. 12. 242.  
pt. 6.

THE case was, that the plaintiff's late husband purchased a *Walk in a Chase*, and took the patent thus; *to wit*, to himself and his wife and one *Bridges* for their lives, and the life of the longest liver of them. *Kingdon* died, and made the defendant his executor; the plaintiff's bill was to have the benefit of this purchase, and to have the patent delivered to her. The defendant by answer set forth, that *Kingdon* died greatly indebted, and had not left sufficient assets for payment thereof, and submitted it to the Court, whether this purchase ought not to be liable to the payment of his debts.

A. purchases a walk in a chase, and takes the patent to himself and to his wife and J. S. during their lives and the life of the survivor; the husband dies

indebted. The wife decreed the benefit of the patent during her life, though A. had not left assets to pay his debts, but after her death, J. S. to be a trustee for the executor.

*Per Cur.* It shall be presumed to be intended as an advancement and provision for the wife: the wife cannot be a trustee for the husband: and therefore decreed, that the plaintiff should enjoy the benefit of the patent during her life and after her decease, in case *Bridges* should survive her, to be a trust for the executor of the husband, and applied towards the payment of his debts. (1)

[ 68 ]

(1) The decree on the rehearing (2d July) was, "that the defendant *Bridges* was a trustee for the plaintiff for all the said lodge and walks, and therefore that she ought to hold " and enjoy the same with all its rights, members, perquisites and profits, during her life, and that the said defendant should deliver up the possession of the said premises to the



“ said plaintiff or her assigns, and  
 “ should account with the plaintiff for  
 “ the rents profits and perquisites  
 “ thereof received by him, or raised  
 “ or made out of the same, or that  
 “ might have been received or made  
 “ without his wilful default, and in  
 “ case the said defendant refused so to  
 “ do, then the court would consider of  
 “ costs.” Reg. Lib. 1687. A. fol. 911.

Vide *Back v. Andrews*, Pre. Ch. 1.  
 [post 120.] *Christ's Hospital v. Budgin*  
 & *Ux.* post 683, but in that case there  
 were sufficient assets, *Watts v. Thomas*.  
 2 P. Wms. 364, where husband pur-  
 chased a term for himself and his wife  
 and the survivor, and after mortgages  
 it without his wife, and then dies in-  
 debted, the equity of redemption assets.

CASE 63.  
 LORD CHAN-  
 CELLOR.  
 Martis, 3 die  
 Julii.  
 Eq. Ca. Ab.  
 6. pl. 9. 63.  
 pl. 3. S. C.  
 Whether the  
 wife's portion  
 consisting of  
 choses in  
 action, shall  
 upon the hus-  
 band's death  
 be liable to  
 his debts, the  
 husband be-  
 fore his mar-  
 riage having  
 made an ade-  
 quate jointure  
 on his wife.

### LISTER *versus* LISTER & al'.

THE bill was brought by the creditors of the husband against his widow, and against his sister, who was his executrix, and a friend to the creditors, setting forth, that upon the marriage treaty the defendant's portion was represented to be of the value of *five hundred pounds*, and thereupon the husband expecting to receive such portion as aforesaid with his wife, agreed to settle on her a jointure of *forty-five pounds per ann.* and made a settlement thereof accordingly. That the defendant's fortune being part in monies owing to herself on bond, and the other part in lands of inheritance, the husband died before the bonds were altered, or money received, or before any fine levied of the wife's inheritance, and died greatly indebted, and had little or no personal estate besides the monies to which he was intitled in the right of his wife as aforesaid, and notwithstanding the defendant the widow had a jointure settled adequate to her portion, yet she and the executrix designing to defraud the creditors, insisted that the securities not being altered, and no fine levied of the land, the right remained and survived in her, whereas the same ought in equity to be made liable to the husband's debts.

The defendant, the widow, by answer set forth, that the jointure settled on her fell short in value of what by the marriage-agreement it ought to have been, and insisted on her right to the monies due on the bonds, and to the lands that were her own inheritance.

[ 69 ]

*Per Cur.* The defendant, the widow, has the title in law to the lands: those were her own inheritance; and the securities remained unaltered, and being *choses in action*, the benefit thereof was survived to her; so the law has cast the right upon her, and equity cannot take it from her: and therefore dismissed the bill. *Vide le Case de Twisden & Wild.* (1).

(1) Ante 1 vol. 161. There is merely *B.* fol. 635. Vide *Howman v. Corie*,  
 an order of dismissal Reg. Lib. 1667. post 190. *Burnett v. Kinnaston*, post

401. *Blois & Al. v. Lady Hereford*, and cases cited in note there, et vide post 501. *Adams v. Cole*, Forr. 168. Co. Litt. 351. b.

### ARUNDELL *versus* PHILLPOT.

THE case was that Mrs. *Phillpot* in 1676, conveys and settles part of her estate on the defendant, with a power of revocation on payment or tender of a guinea, the defendant having afterwards much disobliged her, she changes her intentions, and by deed and will settles her estate on the plaintiff, (being the eldest son of the Lord *Arundel*) for payment of some particular charges and appointments. In some of the subsequent deeds there was some provision made for the defendant, which he accepted, and sealed a counter-part thereof, and the bill was to discover whether the first deed was not well and sufficiently revoked, or in case the revocation was not precise according to the power, or was defective, yet to have it supplied in equity, the plaintiff taking the estate charged with several payments, &c. and so was in the nature of a purchaser, and therefore they ought to have the first deed delivered up, and to have the testimony of the witnesses preserved, &c.

CASE 64.  
2 Freem. 10.  
S. C.  
One makes a voluntary settlement with power of revocation on tender of a guinea, and afterwards settles the same lands to different uses, but does not tender the guinea. Whether this is a revocation.

*Per Cur.* This court may supply an informal or defective revocation, but cannot make a revocation where there is none. And therefore either prove a tender of the guinea, or that Mrs. *Phillpot* declared she intended to revoke the former settlement, one or other of them shall be sufficient, though it hath not all the formalities and circumstances mentioned in the power of revocation, so it appear to be a sober solid act, and done *animo revocandi*, but that could not be made out. It was then insisted, that the subsequent deed should be taken as a sufficient revocation, being of the same land, and made to different uses and purposes. *Sed non allocatur.* (1)

[ 70 ]

(1) The plaintiff was directed (24th July) to proceed at law within twelve months, and after trial either party was to be at liberty to resort back to this court as they should be advised, Reg. Lib. 1687. A. fol. 911. The time was afterwards enlarged, and various motions and orders thereon made respecting the said trial at law, and other

proceedings in respect of the suit up to the year 1693, but no further entry in the cause appears afterwards, sed vide Baron *Powell's* argument in *Bath v. Mountague's* case, 3 Ch. Ca. 70, where said there was a trial in the case of *Arundel v. Philpot*, and that the tender of a guinea was there proved.

CASE 65.  
In Court.  
18 Julii.  
Court of  
equity dis-  
courage ex-  
cessive gam-  
ing.

Sir BAZILL FIREBRASS *versus* BRETT.

THE bill was to be relieved touching *one thousand four hundred and fifty guineas*, which the defendant had won of the plaintiff at *Hazard* at his own house, and likewise against an action of trespass brought by the defendant at law, for that the plaintiff and his servants had forcibly taken from him about *two thousand guineas* more, which the defendant had won from the plaintiff the same time at play, and had once in his possession. The bill charged many circumstances of fraud, and that the defendant *Brett* had laid his design to draw in the plaintiff, and had for a considerable time used several arts and contrivances for that purpose, to get into his company, &c.; that the defendant had his wine mixed with water, and plied the plaintiff so with wine, that he knew not what he did, and that the defendant cheated the plaintiff in play, &c. and that the defendant *Brett*, when he began to play, had not above *ten guineas* in his pocket, so there was little hazard of his side, &c.

Court of law  
discouraged  
an action on  
an exorbitant  
wager, by  
granting an  
imparlance  
from time to  
time.

[ 71 ]

The *Chancellor* declared he thought it a very exorbitant sum to be lost at play at one sitting, between persons of their rank, and that he would discourage, as much as in him lay, such extravagant gaming; and cited the case of *Sir Cecil Bishop* and *Sir Thomas Staples*, that came before the Lord Chief Justice *Hale* in the *King's Bench*, upon a wager won at a horse-race, where his Lordship declared he would give the defendant leave to imparl from time to time; and if such discouragement was given to gaming at common law, it ought much more to be done in a court of equity.

The defendant finding that the court inclined so strongly against him, submitted to a proposition made by the counsel, which was afterwards decreed as by consent. (1)

(1) The statement of the pleadings though long is to the effect in the printed report, except that the defendant *Brett* swore that he had taken away with him 816 guineas only: the parties went into evidence, and the decree by consent was, "that all parties

"do retain the said monies in their  
"hands, and that each party do give  
"the other general releases of all  
"actions, suits and demands." Reg.  
Lib. 1687. A. fol. 906. Vide ante 1  
vol. 489. S. C.

CASE 66.  
Eodem die.  
LORD CHAN-  
CELLOR.  
Tradesman  
failing com-  
pounds, but  
makes an underhand agreement with some of his creditors to pay them the whole.

CHILD *versus* DANBRIDGE.

THE plaintiff failing in his trade, compounded with his creditors at so much in the pound, to be paid at the time therein mentioned, and he having failed in payment at the precise time,

some of the creditors refused to stand to the agreement, which being under hand and seal, the bill was to compel a performance thereof.

CHILD v.  
DANBRIDGE.

But it appearing in the cause that the plaintiff to draw in the rest of the creditors, had made an under-hand agreement with some of them, who were seemingly to accept of the composition, to pay them their whole debts, which being a fraud and deceit upon the rest of the creditors, the court would not decree the agreement, nor relieve the plaintiff, but dismissed the bill. (1)

This is a fraud on the other creditors, and on a bill to compel them to perform the agreement,

bill dismissed.

(1) With costs to be taxed in this court, and at law where some proceedings appear to have been had. Reg. Lib. 1687. A. fol. 891. vide *Small v. Brackley*, post. 602. *Middleton v. Lord Onslow*, 1 P. Wms. 768. and cases cited in not. there. *Monger v. Kett*, 12 Mod. 558. *Cecil v. Plaistow*, 1. Anstr. 202. *Eastabrook v. Scott*, 3.

Ves. 456. *Mawson v. Stock*, 6. Ves. 300. *et vide* the cases cited by Mr. Cox in his note to *Lewis v. Chace*, 1 P. Wms. 622. *Jackson v. Duchaire*, 3 T. Rep. 551. *Jackson v. Lomas*, 4 T. Rep. 166. [*Jackman v. Mitchell*, 13 Ves. 581. *Ex parte Sadler*, 15 Ves. 52, and see 6 Geo. IV. c. 16. s. 125.]

THOMAS Earl of RIVERS,

Plaintiff.

WILLIAM GEORGE Earl of DERBY, }  
& al'. } Defendants.

[ 72 ]

CASE 67.  
Eodem die.  
In Court.  
LORD CHAN-  
-CELLOR.  
Eq. Ca. Ab.  
268. pl. 7. S. C.  
On a marriage, lands are limited to the husband for life, remainder to the wife for life, remainder to the first and other sons of the marriage in tail male, remainder to J. S. in fee. Provided, if there be no issue male of the marriage, and there be one or more daughters living at the husband's death, then the trustees

THE case was, that by indenture tripartite, dated 22 Maii, 1678, and by fine and recovery thereupon had, several manors and lands were (on the marriage of the late Lord Colchester with Charlotte Kath. Stanley, sister of the Earl of Derby,) settled to the use of the Lord Colchester for life, remainder as to part, to the said Charlotte his intended wife for her jointure, remainder to her first and other sons in tail male, remainder to the heirs of the body of the Lord Colchester, remainder to the plaintiff in tail, remainder to John and Richard Savage the plaintiff's brothers in fee; provided that, if the said Lord Colchester, and all the issue male, he should get on the Lady Charlotte his wife, should die, and for want of such issue male, the premises should after the death of the said Lord Colchester, or his said lady, descend and come to the use of any other heir male of the said Lord Colchester by any other wife, or to any other person or persons by virtue of any other the uses or appointments therein mentioned to stand seised subject to the jointure, to the intent such daughter or daughters should receive out of the rents 10,000*l.* and 100*l.* per ann. for maintenance; but no time limited for payment of the portions. The husband dies leaving only one daughter, who lives to 17, and by her will disposes of the 10,000*l.* decreed this is a vested interest in the daughter, and well disposed of by her will. Post. Case 88. 193.

EARL RIVERS. tioned ; and if there should be any daughter or daughters of the  
 EARL DERBY. <sup>v.</sup> said Lord *Colchester* on the body of the said Lady *Charlotte*,  
 living at his death, that then the trustees and their heirs should  
 stand seised of the premises, except the lands limited to the  
 Lady *Charlotte* in jointure during her life, and after her death,  
 then of them also, to the intent that such daughter and  
 daughters of the body of the said lady, by the said Lord *Col-*  
*chester* begotten, should receive the sum of *ten thousand pounds*  
 out of the rents, revenues and profits thereof, to the use of such  
 [ 73 ] daughter if but one, if more than one, to be equally distributed  
 among them, together with 100*l.* *per ann.* apiece for their  
 maintenance from the death of their father, till the payment of  
 the *ten thousand pounds*, which is therein mentioned to be  
 intended for their portion or portions respectively.

The Lord *Colchester* died about 1679, leaving issue by the  
 Lady *Charlotte* his wife, one daughter only, (to wit) *Charlotta*  
*Katharina*, who lived to the age of seventeen years, and then  
 made a will, and thereof the Earl of *Derby* executor, and  
 thereby taking notice that she was entitled to this *ten*  
*thousand pounds*, devised legacies, in the whole amounting to  
 about *fifteen thousand pounds*.

The plaintiff's bill was, that this *ten thousand pounds* being  
 intended for a marriage portion, and to be raised out of the  
 rents and profits of the lands, and the daughter dying unmar-  
 ried, and under age, the portion ought to extinguish in the land,  
 for the benefit of the plaintiff, who was the heir at law, and  
 next remainder-man by virtue of the settlement ; and that the  
 said *Charlotta Katharina* had no power to dispose thereof by  
 will ; and the will that was set up was unduly gained, and when  
 she was not *compos mentis* ; and that the plaintiff therefore  
 was intitled to an account of the profits of the trust-estate.

The defendant insisted that the will was duly made and pub-  
 lished, and fairly obtained, and that she was of a sufficient age  
 to make a will ; the will was since proved in the spiritual court,  
 so that matter was not now to be drawn under contest in this  
 court. (1) And as to the *ten thousand pounds*, although it  
 was intended as a portion, yet no time being limited for the  
 payment thereof, it vested in the said daughter, and is become  
 due and payable to her executor, and that the profits of the  
 [ 74 ] trust estate from the time of the death of the Lord *Colchester*,  
 ought to be applied for that purpose.

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(1) *Archer v. Mosse*, ante 9. and cases there cited. *Plume v. Beale*. 1 P.  
 Wms. 388.

The single question was, whether this *ten thousand pounds* being declared to be for a portion, and to be raised out of the rents and profits of land, should go over to the executor of the daughter, who died under age and unmarried, or extinguish in the land for the benefit of the heir. And that it should extinguish for the benefit of the heir, and not to go over to the executor; the case of *Pawlet and Pawlet*, first decreed by the Lord Keeper *North*, and afterwards confirmed upon an appeal to the *Lords*, where the difference was taken between a legacy out of a personal estate, and a portion to be raised out of the rents and profits of land, was strongly insisted upon, as a case in point, saving that in that case the portion was made payable at marriage, or *twenty-one* years of age, and in this case no time is appointed, but the same to be raised by rents and profits.

EARL RIVERS  
v.  
EARL DERBY.

Case 88.  
1 Vol. Case  
201. 320. Post.

Lord *Chancellor* said, he knew not what reasons the lords might go upon in the case of *Pawlet and Pawlet*, but he was to make decrees according to his conscience, and every case was to stand upon its own bottom. That he thought the case before him was very plain and without difficulty; it was clearly an interest vested in the daughter, and ought therefore to go over to her executor, and the rather, because here was no time appointed for payment; (1) and observed that the plaintiff's counsel in speaking to the case, admitted that if she had lived to *twenty-one* years of age, she might have disposed of this portion, or it should have gone to her executor; but that dying before *twenty-one*, it should determine and extinguish, was a fancy, for which there was no ground nor foundation. If they had been to have drawn the deed, they might have worded it so; but the deed being silent in that matter, it may as well go over to the executor, upon the daughter's dying at *seventeen* or *eighteen*, &c. as if she had been *twenty-one*, at the time of her death: and therefore decreed that the trustees should apply the profits received, and to be received, towards discharge of the portion, until the same was raised, and pay the same to the defendant, the Earl of *Derby*, as being executor to the said daughter, to be administered according to law. (2)

[ 75 ]

(1) So *Smith v. Smith*, post 92. et vide *Bruen v. Bruen*, post 439.

(2) Reg. Lib. 1687. B. fol. 637, and decree affirmed in Dom. Proc. 29th April, 1689. Journ. House of Lords,

14 vol. 195. Vide cases cited in note to *Pawlet v. Pawlet*, ante 1 vol. 204. et vide *Godwin v. Munday*, 1 Bro. Ch. Rep. 193.



CASE 68.  
In Court.  
LORD CHAN-  
CELLOR.  
Veneris.  
20 die Julii.  
Eq. Ca. Ab.  
378. pl. 5. S. C.  
A new trial  
granted on an  
issue directed;  
the matter in  
question being

EDWIN *versus* THOMAS.

THE issue directed to be tried touching the custom of the manor of — *quod vid. 1 Part, Case 475*, was found against the plaintiff *Edwin*, and the cause being now set down upon the equity reserved, it being alleged to be a cause of value, and concerning all the copyholds in the manor, a new trial was directed upon payment of costs.

of value, and concerning all the copyholds in the manor.

CASE 69.  
LORD CHAN-  
CELLOR.  
Eodem die.  
An executor  
makes a vo-  
luntary as-  
signment of  
part of the  
assets, whe-  
ther the cre-  
ditor can fol-  
low the assets  
thus assigned.

STIDDOLPH *versus* LEIGH.

THOMAS BOSTOCK, executor of one *Thomas Bostock*, having voluntarily assigned to the defendant *Leigh*, as a reward for service done, the stock in the *East-India Company* which was the testator's, pending a bill in this court by *Stiddolph*, who was a creditor to *Thomas Bostock* the testator.

The question was, whether this assignment should stand good as against the creditor *Stiddolph*, there not being (without this stock should be brought into the account,) sufficient assets of the first testator.

[ 76 ]

The court looked upon this suit as a contrivance to defraud the defendant *Leigh*, and the *Chancellor* declared, he, of his own personal knowledge, was satisfied that *Leigh* well deserved this reward, and that he had that power and influence on *Thomas Bostock*, that he would have given him his whole estate, if *Leigh* had desired it: and forasmuch therefore as *Thomas Bostock*, the executor, had subjected his own real estate to the payment of his debts, the court directed an account thereof to be taken, and declared that if there were sufficient assets of his estate, without bringing this stock into the account, the assignment to the defendant *Leigh* should stand good; though for the plaintiff it was strongly insisted on, that he being a creditor to the first testator might follow the estate in whose hands soever it came, and ought not to be put to the charge and trouble of controverting the account directed *mes o alloc. (1)*

(1) The circumstances of the case are shortly these; one *Thomas Bostock*, a scrivener, as trustee, had received several sums of money belonging to the plaintiff and made his will, whereby he gave his property to trustees for *William* his infant son, and then the present plaintiff in 1678, exhibited his

bill against the executors and the son who had attained his age for relief as to those monies, and a decree was accordingly had which was duly signed and inrolled: *William* the son then died, having first made his will and thereof appointed *Thomas Bostock* his cousin, executor, who proved the same



and became possessed of the estate of *William*, subject to the monies due to the plaintiff under the said decree. Plaintiff then exhibited his bill of revivor against the last named *Thomas Bostock*, the proceedings were thereupon revived, and the *Master* reported 2176*l.* 1*s.* 8*d.* which was on a rehearing decreed to be due to the plaintiff. *Thomas Bostock*, the executor of *William*, then died, having first made his will, whereby he gave to *Penelope* his wife 200*l.* *per ann.* out of his real estate; and after payment thereof, devised his real and personal estate for the payment of his debts, and made the said *Penelope* residuary legatee, and together with one *Raworth* executors thereof; and then the plaintiff revived his decree declaring a sum of 2416*l.* 18*s.* due to the plaintiff against the present defendants. The defendant *Leigh* by his answer swore that he was concerned in the management and conduct of several involved suits for the said *William Bostock*, and which continued to the death of *William*, who offered to leave *Leigh* all his property as a recompence, which *Leigh* refused, and prevailed upon him to make one *Thomas Bostock* his cousin, the executor of his will, and to intrust him to requite him *Leigh* for his services: that this being done, *Bostock* after *William's* death presented the defendant *Leigh* with a bond for 1000*l.* due from certain persons therein named: that defendant knowing *Bostock* was straitened for money proposed to deliver back the bond and to receive in lieu thereof the said 500*l.* India stock, late the property of old *Thomas Bostock* the scrivener, and then worth about 1500*l.* and *Thomas Bostock* the executor of

*William* agreed thereto, and to transfer the same to defendant upon request. Under these circumstances the decree declared (int. al.) that *Thomas Bostock*, the executor of *William*, had received and wasted the estate of old *Thomas Bostock* the scrivener, to an amount greater than the plaintiff's demand; and that he having subjected his real estate to the payment of his debts, had thereby made the plaintiff's debt his own, and the same was decreed to be paid thereout as the *Master* should report, together with interest and costs: and an account was also directed to be taken of the personal estate of *Thomas Bostock* the executor of *William*, and also of the personal estate of old *Thomas Bostock* the scrivener, come to the hands of *Hull* and his Wife unadministered, and particularly of a sum of money therein mentioned, part of such personal estate, and the same was to go so far as it would in satisfaction of the plaintiff's demand; then of the real estate of *Thomas Bostock*, the executor of *William*, and of the rents and profits thereof from his death over and above the 200*l.* *per ann.* to his wife, the same to be also liable to the satisfaction of the plaintiff's demand, and the decree directed such estates to be sold. Reg. Lib. 1687. B. fol. 867. entered *Stidolph v. Thicknesse*. Vide *Noel v. Robinson*, Ante 1 Vol. 92. arg. *Deg v. Deg*, 2 P. Wms. 414. *Crane v. Drake*, post 616. And for the doctrine of the general power of an executor to dispose of the assets of his testator, and of legatees and creditors to follow the assets disposed of by him in the hands of third persons, *Hill v. Simpson*, 7 Ves. 152. [And see *M'Leod v. Drummond*, 17 Ves. 168.]

### NELSON versus OLDFIELD.

THE case was, that Mrs. *Bettinson* travelling into *France* for her health, and there falling into company with the plaintiff, who having the young lady under power, prevailed so far upon her, as to make Mrs. *Bettinson* solemnly swear to make her will, and thereof to make the plaintiff her executor, and to give her all her estate; and when she had made her will accord- not to be controverted in equity. But if a party claiming under such will comes for any aid in equity, he shall not have it.

CASE 70.  
LORD CHAN-  
CELLOR.  
Lunæ,  
23 Julii.

Will of per-  
sonal estate  
only, and  
proved in the  
spiritual court,  
though gained  
by fraud, yet

NELSON v.  
OLDFIELD.

ingly, the plaintiff made her again swear that she would not revoke or alter that, or make any other will.

It appeared by the deposition of Mr. *Wade*, (for whom she had sent to advise withal) and by others examined in the cause, that she in her sickness often complained how she had been circumvented by the plaintiff, and of the injury she had done to her mother and sisters by giving her estate from them, that she heartily repented that she was thus fettered, but durst not, for fear of damnation, revoke or alter her will, and shortly afterwards died, much troubled and afflicted that she could not alter her will.

[ 77 ]

The will was proved in the spiritual court, and the same concerning only a personal estate, the validity thereof could not be controverted in this court, and the bill was brought by the plaintiff as executrix to Mrs. *Bettinson*, to have the performance and execution of the trust of a term for years, for the raising of monies appointed to be paid unto Mrs. *Bettinson* and her sisters.

*Per Cur.* The case where a man, to save his life, is made by a thief to swear that he will give the thief a sum of money, though by the casuists such oath is held to be binding, (1) yet it shall never be carried on in a court of equity; and did not see how this could be allowed and esteemed as a will, *when it was not ambulatory, as a will ought to be*, nor made freely and voluntarily, but gained by restraint and force on the party; but being proved in the spiritual court, that matter was not to be controverted here, the plaintiff might make the best she could of her probate there, but should have no aid from this court, and therefore dismissed the bill. (2)

(1) But see on this head, Puffend. Lib. 4. Cap. 2. Sec. 8.

(2) The bill was for an account of monies stated to be due to the testatrix *Dorothy Bettinson*, and the answer stated to the effect in the printed report, and the decree was, "That his Lordship was fully satisfied that no aid or countenance in a court of equity ought to be given to the said

"pretended will or any of the proceedings thereupon, or the plaintiffs relieved in equity touching any of the matters in and by their said bill complained of," and dismissed the bill but without costs. Reg. Lib. 1687. B. fol. 834. For the learning on the jurisdiction of equity in matters of wills, vide *Bissell v. Artell*, Ante 47. and cases referred to there.

CASE 71.  
LORD CHANCELLOR.

### LAMPLUGH *versus* SMITH.

Martis, 24 die Julii. Vol. I. Case 449.

THE plaintiff, with other young heirs, being drawn in by *Sticestead*, with the concurrence of Sir *William Smith*, to buy An heir who together with other young heirs, is drawn in to buy goods at extravagant prices, and to accept of assignments of bad securities, joined in giving securities for the monies agreed on. He shall be relieved on paying the value of the goods which came to his hand, and shall not be answerable for his companions.

stockings and such like goods at an extravagant price, and to accept of assignments of bad securities, and jointly to enter into securities for the payment of the monies agreed on the bill was to be relieved against those securities. LAMPLUGH v.  
SMITH.

The counsel for the defendant pretended not to maintain the bargain, but would have it, that the plaintiff who had entered into a joint security with others, should be liable to answer the true and real value of all the goods that were sold, and securities that were assigned to him and his companions.

[ 78 ]

But the court declared that the plaintiff should be liable to so much only, as came to his own hands, and should not be answerable for his companions, and therefore referred it to a master, to examine and certify what of the goods came to the plaintiff's own hands, and what was the real value thereof, and on payment thereof, and on re-assigning such of the securities as the plaintiff had, his security was decreed to be delivered up.

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### WITLEY *versus* PRICE.

THE plaintiff was likewise a young heir, and had been drawn in to buy ribbands and braided wares, &c. at an extravagant price, &c. and the case being the same in effect with the case immediately preceding, had the like rule. (1)

CASE 72.  
LORD CHA-  
CELLOR.  
Eodem die.  
1 Vol. Case  
449.

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(1) The plaintiff to be examined upon interrogatories as to what goods he had and the value thereof. Reg. Lib. 1687. *B. fol. 745. Vide Batty v. Lloyd, ante 1 vol. 141. Bill v. Price, ibid. 467. Waller v. Dalt, 1 Ch. Ca. 267.*

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### WALKER *versus* PENRIE.

THIS cause came again this day to be re-heard, and the single question insisted on was, whether a mortgagee having received interest upon an old mortgage after the rate of 8*l. per cent.* after such time as the interest was reduced to 6*l. per cent.* by the statute, should allow or discount the 2*l. per cent.* toward satisfaction of the principal.

CASE 73.  
LORD CHAN-  
CELLOR.  
Mercurii, 25  
Julii (28)  
Ant. Case 37.

The court confirmed the former decree, to wit, that the 8*l. per cent.* paid to the mortgagee for interest should be by him retained as such, and that the 2*l. per cent.* should not be dis- counted, nor applied towards satisfaction of the principal. (2)

[ 79 ]

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(2) Vide post 145. S. C.

CASE 74.  
LORD CHAN-  
CELLOR.  
Eodem die.  
Eq. Ca. Ab. 65.  
pl. 9. S. P.  
A wife not to  
be examined  
as a witness  
against her  
husband.

COLE *versus* GRAY & Al' Infants.

THE plaintiffs were infants and the children of the defendant's wife by a former husband; their bill was to have an account of the estate left them by their father, and of the produce and proceed thereof. Upon the hearing it was referred to an account, and the defendant and his wife were to be examined on interrogatories for discovery of the estate; the wife being at variance with her husband, and living apart from him, upon her examination, made the estate of the plaintiffs (who were her children,) as great as she could, and thereupon to fix the charge upon the husband. The plaintiffs upon a petition to the *Master of the Rolls*, obtained an order to examine the wife as a witness against the husband *de bene esse*, and the Master upon her evidence, had charged the husband with several sums of money, as interest, and produce of the infant's estate: but now upon exceptions to the report, the Lord *Chancellor* disallowed her evidence, and declared the wife could not be a witness against her husband. (1)

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(1) Reg. Lib. 1687. A. fol. 1083. Ab, 225. pl. 13. [a bankrupt's wife cannot be examined touching his bankruptcy though she may for discovery of his effects, *Ex parte James*, 1 P. Wms. 610.]  
1124. Vide *Anon.* 2 Ch. Ca. 39. Hale P. C. 1 vol. 48. 2 vol. 279. neither can the wife be a trustee for her husband. *Kingdon v. Bridges*, Ante 68. Eq. Ca.

CASE 75.  
LORD CHAN-  
CELLOR.  
Eodem die.  
2 Ch. Ca. 39.  
S. C.  
When the  
court on hear-  
ing refers the  
matter in con-  
troversy to  
gentlemen in  
the country,  
no exceptions  
lie to their  
certificate.  
[\*80]

CRESSEY *versus* CARRINGTON.

UPON the hearing of this cause, it was referred by order of court to gentlemen in the country, to certify the matters controverted, who made a certificate accordingly; the defendant conceiving himself aggrieved by the certificate, put in exceptions thereunto. But the court rejected\* the exceptions, and would not enter into the debate thereof, but ordered the certificate to be binding, though it was insisted that the certificate was not, in the form of the court, more binding or peremptory than a master's report, to which the parties have a right to except, if they find themselves aggrieved. *Mes non allocat'. tamen quære.* (2)

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(2) Reg. Lib. 1687. A. fol. 1189. Note the terms of the reference appear to have been, that the referees should determine the whole matter if they could, if not to certify, and upon their certificate of what was resting in the defendant's hands, the court would make such further order therein as should be just: and it further appears that the exceptions were put in by leave of the court, and that they were argued and upon the argument over-ruled, and the award ordered to stand and be performed, vide Ante 1 vol. 469. S. C. *Hyde v. Cooth*, post 109,

THWAYTES *versus* DYE.

*J. S.* having four children, (to wit) two sons and two daughters, settles his estate on trustees to the use of himself for life, remainder to his wife for life, and after their decease, to the use and uses of such child and children, and in such shares and proportions as he should appoint by any writing to be by him signed in the presence of two witnesses, and in default of such appointment, to his eldest son in tail. He by his will by him signed, and attested by several witnesses, devises a rent-charge out of those lands to his youngest son for life, and to the first and other sons of his body successively in tail, and further wills that in case his said son die without issue male, so as the estate should come to his eldest son, then he to pay *five hundred pounds* a-piece to his daughters: the son dies without issue, the bill was brought by the daughters, to have their *five hundred pounds* a-piece according to the will.

The defendant who was the eldest son by way of plea, set forth the deed of settlement and power, *prout*, and insisted that the power was not well pursued nor executed by the will, (to wit) that the testator might have distributed the land amongst his younger children, in what proportions he thought fit, but had not power to grant or devise a rent-charge, or sums of money, as he had taken upon him by his will to do.

But the court disallowed the plea, and ordered the defendant to answer the bill. (1)

CASE 76.  
LORD CHANCELLOR.  
Sabbati, 28 die Julii.  
Eq. Ca. Ab. 343. pl. 6. S. C.  
*A.* settles lands to the use of himself for life, remainder to such of his four children, and in such shares and proportions, as *A.* by any writing shall appoint. *A.* may not only limit the land to any of his children, but may charge the land with any rent-charge or sums of money for any of his children.

(1) There were both a plea and demurrer put in and the order was, "That the word demurrer be struck out, and that the plea do stand for an answer." Reg. Lib. 1687. B. fol. 769. On the 11th May 1689, the cause came on before the Lords Commissioners—no case is stated, but a case was ordered to be made for their Lordship's consideration. Reg. Lib. 1688. B. fol. 386. The will is thus stated in the Register's book "*William Thwaites*, the late father of the plaintiff and the defendants *Thwaites* and *Dye*, being seized in fee of the manor of *Berners Roding*, alias *Varnish Hall*, and of several lands and tenements in the county of *Essex*, on or about the 24th Aug. 1679, by his will in writing under his hand and seal, did give and appoint to his son *Thomas Thwaites*, (who appears to

"have been his youngest son,) after death of *Frances* the wife of the said testator 100*l.* per ann. to be paid him out of the rents of *Varnish Hall*, and to the heirs of his body; and for the want of such issue to return to the said *James Thwaites* (who was the testator's eldest son,) and the heirs of his body, the said *James Thwaites* paying unto the plaintiff and to the defendant *Frances* (who were the two daughters of the testator,) 500*l.* a-piece, within two years after the death of the said *Thomas*."

Afterwards, 10th July, 1689, the cause came on, and according to the statement in the register's book, the words of the power are, "To the use of such child and children of the said *William* and *Frances*, and to and for such estate and estates as the said *William* by any writing under his



“ hand and seal duly executed before  
 “ two credible witnesses at the least  
 “ should direct limit and appoint, and  
 “ for want of appointment to the use  
 “ of *Thomas*, second son of the said  
 “ *William Thwaites* and the defendant  
 “ *Frances Dye* eldest daughter of the  
 “ said *William Thwaites* and her heirs  
 “ for ever,” with a power to the said  
*William* and *Frances* during their joint  
 lives, by any deed under their hands  
 and seals to revoke the uses in the said  
 settlement. The appointment was by  
 devise as before stated, and the decree  
 as to this point was as follows:—Where-  
 upon, &c. “ Their Lordships declared  
 “ they were of opinion, that the said  
 “ *William Thwaites* had well executed  
 “ the power in and by the said settle-  
 “ ment to him reserved, and that he  
 “ being owner of the land, and having  
 “ power by the said settlement to limit  
 “ any estate or use of the land, might  
 “ limit and appoint a rent out of the  
 “ same; and might charge the said  
 “ rent, with the payment of any sum of  
 “ money for his children’s portions, (a)  
 “ and that the said will was a good  
 “ appointment in writing within the  
 “ power, though not a good will, there  
 “ being but two witnesses to it, yet the  
 “ same is a writing under hand and seal:  
 “ And their Lordships also declared, in  
 “ case the said will or writing had been  
 “ only under *the hand* of the said Wil-

*liam Thwaites*, and not sealed, yet it  
 “ is a good appointment in writing pur-  
 “ suant to the power, and especially in  
 “ this court shall be so taken and al-  
 “ lowed, and it has been so adjudged  
 “ here in the like case.” And the de-  
 cree was accordingly for the payment of  
 the 500*l.* with interest, from two years  
 after the death of *Thomas Thwaites*  
 the youngest son, who had died with-  
 out issue. Reg. Lib. 1688. B. fol. 390.  
 [*Browne v. Taylor*, Cro. Car. 38. is in  
 contradiction to this decision, but *Ro-*  
*berts v. Dixwell*, *Sugden* on Powers,  
 App. No. 18. and *Kenworthy v. Bate*,  
 6 Ves. 793. support it; and see *Sugden*  
 on Powers, 2d ed. 439.] So though a  
 will to an heir be void, yet if executed  
 according to the statute of frauds it is  
 a good revocation of a former will.  
*Sic dict.* per *Hardwicke*, Lord Chan-  
 cellor, *Ellis v. Smith*, 1 Ves. jun. 17.  
 et vide *Hervey v. Hervey*, 1 Atk. 561,  
 6. *Langston v. Blackmore*, Amb. 289.  
 and as to power to give to children ex-  
 tending to grand-children, *Alexander*  
*v. Alexander*, 2 Vez. 642. and to confer  
 for life, remainder to his sons in tail,  
*Robinson v. Hardcastle*, 2 Bro. Ch.  
 Rep. 22. *Kenworthy v. Bate*, 6 Ves.  
 793. *Powell* on Powers, 348, et seq.  
 Note. The decree in the principal case  
 was affirmed in *Dom. Proc.* 30th Dec.  
 1689. Journal Ho. Lords, 14 vol.  
 398.

(a) A rent is a tenement, and there-  
 fore cannot pass by will without three  
 witnesses if out of freehold, per *Buller*,

*jus. Habbergham v. Vincent*, 2 Ves. jun.  
 232.

[ 81 ]

CASE 77.

LORD CHAN-  
 CELLOR.

A subsequent  
 incumbrancer,  
 though pen-  
 dente lite, may  
 buy in a prior  
 mortgage,  
 which though  
 satisfied, shall  
 not be taken  
 from him until  
 all the money  
 due to him on  
 the subse-  
 quent incum-  
 brance be  
 paid him.

## TURNER versus RICHMOND.

THERE was a first mortgage which was paid off, but no recon-  
 veyance, and next a judgment-creditor, then the plaintiff a  
 second mortgagee, whose bill was against the first mortgagee,  
 the mortgagor, and judgment-creditor to have a reconveyance  
 from the first mortgagee, he being satisfied; which he acknow-  
 ledged by answer, and (pending the suit) did afterwards as-  
 sign the mortgage to the judgment-creditor, which the Lord  
 Chancellor did declare to be justifiable, both in him and the  
 judgment-creditor, and unless the plaintiff would redeem and  
 pay off the debt by judgment, dismiss the bill, and the like

case was between *Lee* and *Warner*, about a year since, and so adjudged. (1)

TURNER v.  
RICHMOND.

(1) Vide *Edmonds v. Povey*, Ante 1 vol. 187. *Hawkins v. Leigh*, Ante p. 29. *Stanton v. Sadler*, Ante p. 30. *Hitchcock v. Sedgwick*, arg. post 159. *Earl of Bristol v. Creditors of Sir Wil-*

*liam Bassett*, post 524. *Robinson v. Davison and Al'*. 1 Bro. Ch. Rep. 63. [*Brace v. Marlbro'*, 2 P. Wms. 491. and cases there cited.]

DE

[ 82 ]

## TERM S. MICHAELIS, 1688.

## IN CURIA CANCELLARIÆ.

CASE 78.

CHOLMELY *versus* CHOLMELY.

LORD CHAN-  
CELLOR.  
Veneris.  
12 Oct.

THIS cause came before the court again upon a case stated by the master, by which it appeared, that Mr. *Cholmely's* whole estate was scarce sufficient to perform the marriage-articles.

The court again declared, that if there was any personal estate for the custom to work upon, there was no doubt, but that the custom of the city of *London* should be preferred to that of the province of *York*, and that notwithstanding the custom of the province of *York*, the heir should come in for a share of the personal estate; (1) for the custom of the province of *York* is only local, and circumscribed to a certain place; but that of *London* follows the person, though never so remote from the city; and cited the case of *Harwood*, who married *Offley's* heir. (2)

The custom of the province of *York* is only local; but that of *London* follows the person, though

never so re-mote from the city.

And as to the jewels and *paraphernalia*, the court declared that the widow was by the articles to have nothing of the personal estate, but what her husband should devise to her by part of the husband's personal estate, but what he should give her by will. This bars her of her *paraphernalia*.

[ 83 ]  
A feme by her marriage-articles agrees to have no

This bars her of

(1) By the custom of the province of *York*, the eldest son having a settlement of lands made on him, is excluded from a share of his father's personal estate, *Constable v. Constable*, post 375.

(2) Et Vide *Benson v. Bellasis*, ante 1 vol. 15. *Rutter v. Rutter*, ibid. 180. *Webb v. Webb*, post 110. and further as to the custom of *York*, *Pickering v. Lord Stamford*, 3 Ves. 338. *Somerville v. Lord Somerville*, 5 Ves. 790.



**CHOLMELY v. CHOLMELY.** his will; and that this not only bars her of any customary part, but even of any *paraphernalia*, and from jewels given to her by her husband in his life-time: (1) but as to the clause in the articles, that Sir *Hugh*, by consent of *Nathaniel*, may alter, change, or make void, &c. the court took further time to consider, whether that should extend to the settlement on Sir *Hugh's* part only, or unto *Nathaniel's* also. (2)

(1) A case was ordered for the Mayor and Aldermen, and they were to certify the custom as to the jewels. Reg. Lib. 1689. A. fol. 153. No account appears afterwards. (2) Vide Ante p. 48. S. C.

CASE 79.  
LORD CHAN-  
CELLOR.  
Martis, 16 Oct.

### HUNT *versus* HUNT.

THE question was between the heir and executor of a freeman of *London*, which of them had the right to a *Caroome*, (to wit) the benefit of a license from the *Lord Mayor and Aldermen* for the keeping of a cart; the defendant pleaded that the license was a term for years and personalty, and therefore belonged to him as executor.

*Per Cur.* Over-rule the plea, and answer the bill.

CASE 80.  
LORD CHAN-  
CELLOR.  
Eodem die.  
Eq. Ca. Ab. 14.  
pl. 7. S. C.  
Plea of Privi-  
lege ought to  
be upon oath.

### GIBSON *versus* WHITACRE.

THE defendant being the *foreign opposer* in the *Exchequer*, pleaded the privilege of that court, and that he ought not to be sued or impleaded elsewhere, but the court over-ruled the plea, because it was not put in upon oath. (3)

(3) Vide *Parrott v. Bowden*, Ante 37. as to plea of outlawry.

[ 84 ]

CASE 81.  
In Court.  
MASTER of the  
ROLLS.  
Lune, 29 Oct.  
Eq. Ca. Ab.  
313. pl. 15.  
S. C.  
A. for 550l.  
makes an ab-  
solute assign-  
ment of a lease  
for three lives  
to B. and B.  
by a writing  
under his  
hand agrees  
that if A. pays B. 600l. at the end of the year, B. will re-convey; B. dies leaving C. his son and heir, two of the lives die, and the lease is twice renewed; yet redemption decreed on payment of the 550l. and the two fines with interest, and during the life of B. the profits to be set against the interest of the 550l.

### MANLOVE *versus* BALE and BRUTON.

ONE *Bruton* having a church-lease for three lives in 1664, conveyed and assigned it to the defendant *Bale's* father, in consideration of 550l. the conveyance was absolute. But Mr. *Bale* the purchaser by writing under his hand and seal agreed, that if Mr. *Bruton* the vendor should, at the end of one year then next ensuing, pay him *six hundred pounds*, that he would reconvey: the *six hundred pounds* was not paid, and two of the lives died, and the lease was twice renewed by the defendant *Bale* and his father; and now it was near twenty

that if A. pays B. 600l. at the end of the year, B. will re-convey; B. dies leaving C. his son and heir, two of the lives die, and the lease is twice renewed; yet redemption decreed on payment of the 550l. and the two fines with interest, and during the life of B. the profits to be set against the interest of the 550l.

years after the first conveyance. *Bruton* being a prisoner in the *Fleet*, and indebted to the *Warden* for chamber-rent, assigns to him all his right, title, interest, equity and power of redemption; and thereupon the plaintiff *Manlove*, the *Warden* of the *Fleet*, brought his bill to redeem and to have an account of the rents and profits of the premises.

MANLOVE v.  
BALE &  
BRUTON.

The defendant insisted on his title, and that the estate was not now redeemable, nor ought he to account for the profits.

But notwithstanding the *Master of the Rolls* decreed a redemption on payment of the 550*l.* which was the first consideration-money, as also the fines paid upon the renewal of the leases, which monies were to be paid with interest, and the account of profits was to commence but from the death of *Peter Bale*, who was the purchaser, and father of the defendant, and until that time the profits were to be set against the interest of the 550*l.* consideration-money. (1)

(1) The master was to take an account of the profits of the premises from the death of defendant *Bale's* father, but nothing said in the Register's book of setting the profits against the interest. Reg. Lib. 1688. B. fol. 47. Vide as to what shall be considered a redeemable interest, *Newcomb v. Bonham*, ante 1 vol. 7.

### HARRISON & Ux' versus CAGE.

THE case was, that land was charged by deed for the raising of 500*l.* for the portion of the sister, the trustee entered and raised the whole 500*l.* and more, out of the rents and profits of the lands, and afterwards proves insolvent; but before he became insolvent, the sister had taken a judgment from the trustee, that he should pay the 500*l.* when raised.

paying a portion of 500*l.* to A. Trustee enters and gives judgment to A. for paying the 500*l.* to A. when raised; the trustee raises the 500*l.* and more, and becomes insolvent; whether the land is discharged.

It was insisted that the land was discharged, and for that purpose cited the case of *Goddard* and *Bowman*, where the portion being once raised, the land was held to be discharged.

But on the other side it was said, that in the case of *Goddard* and *Bowman*, and in the other cases cited, by the express provision of the deed the term was to cease, when the money was raised: but in the principal case, the term is still continuing, and the profits are still to be received and taken by the same trustees, for the benefit of the heir; and as to the judgment, that was only in effect, that the trustee should perform the trust, being to pay the 500*l.* when raised unto the sister, and to account for and pay the residue of the profits to the heir.

[ 85 ]  
CASE 82.  
Eodem die.  
In Court.  
MASTER of the  
ROLLS.  
5 Mod. 411.  
1 Salk. 24.  
Carth. 467.  
S. C.  
Trustee appointed for raising and

HARRISON v.  
CAGE.

But the words in the deed of trust being that the trustee should raise, and pay 500*l.* to the sister, and though it was raised, it was not paid, therefore the *Master of the Rolls* doubted and took time to consider thereof, and in the mean time would look into the deed of trust and defeazance of the judgment. (1)

(1) The plaintiff was *Henry Harrison* who claimed in right of *Elizabeth* his wife, late *Elizabeth Cage*, and the case in the Register's book is in substance the same with that in the printed report; and the decree on the 11th *May* following, was in effect, that the trust ought to stand charged with 373*l.* that being the sum found due to the plaintiff in respect of the said trust money 73*l.* part whereof was to be paid to the plaintiff *Henry Harrison*, and the remainder settled on the plaintiff *Elizabeth* for her sole and separate use; and the plaintiffs to release and assign the bond and judgment. Reg. Lib. 1688. A. fol. 265, *Harrison v. Style*. And *Smith v. Smith*, post 178, seems to be a similar decision. Sed vide, an anon. case in Salk. 153, which seems S. C. in which it is reported to

have been resolved in the House of Lords, Mich. 1689, that the heir should have the land discharged, and that the legatees should take their remedy against the trustees, for that the estate was debtor for the debts and legacies, but not for the faults of the trustees; and when the land has once borne its burden, and the money is raised, it is discharged, and the trustees are liable; and so is *Juxon v. Brian*, Hil. 1700. Pre. Ch. 143. But this seemed doubtful afterwards, and *Lord Chancellor* rather inclined contrary to the last two cases, *Tompkins v. Tompkins*, ibid. 397. But the principle of them appears to be recognised in *Carter v. Barnardiston*, 1 P. Wms. 518. Et vide *Gugleman v. Dupont*, in Ch. Hil. 1738. [*Hutchinson v. Massareene*, 2 Ba. & Be. 49.]

[ 86 ]

PAWLET & Ux' versus DOGGET.

CASE 83.

Mercurii,

31 Oct.

In Court.

MASTER of the  
ROLLS.

Devise of  
1300*l.* to tes-  
tator's grand-  
daughter, pro-  
vided if she  
died before 21,  
and without  
issue, then the  
legacy should  
go over to A.  
Decreed the  
devise over in  
case of the  
grand-daugh-  
ter's dying  
without issue,  
under 21, is good, the contingency being to happen before the legatee attains 21.

*J. S.* by his will, devises 1300*l.* to the plaintiff's now wife, (his grandchild) provided that if she died before twenty-one without issue, then he willed that the said legacy of 1300*l.* should go over to A. (2) and provided if she married before twenty-one without the consent of her grandmother, that the said legacy of 1300*l.* should go over to the now plaintiff *Pawlet*. The now plaintiff married the legatee his now wife before she was twenty-one years of age, and that not only without the consent, but to the express dislike of the grandmother, who endeavoured all she could to prevent their intermarriage; and the now plaintiffs apprehending that the forfeiture, if any, was to the plaintiff, the husband and wife exhibited their bill (the wife not being yet twenty-one years of age, and not under 21, is good, the contingency being to happen before the legatee attains 21.

(2) The words are, "To be paid her  
" with the increase thereof at her age  
" of 21, or three months after; and if

" she died without issue before that  
" time, then to S. D." R, L,

having any issue) against the executor, and against *A.* to whom the legacy was limited over, in case the wife died before twenty-one without issue, to have the said legacy of 1300*l.* paid unto them.

The defendants by answer confessed the will, and prayed the judgment of the court, whether the plaintiff, his wife not being as yet twenty-one years of age, and not having issue, was entitled to the legacy, the same, in case the plaintiff's wife died before twenty-one without issue, being by the will limited to the defendant *A.*

For the plaintiff it was insisted that the limitation over to *A.* in case the plaintiff's wife died without issue before her age of twenty-one years, was an implicit estate-tail in her, which gave her the entire property in this pecuniary legacy, and that therefore the limitation over was void ; and also that the proviso of forfeiture upon her marrying without the consent of her grandmother, though placed in the will after the other proviso, yet was first in point of construction ; for *that* forfeiture in point of time might, (as in this case it did,) happen before her age of twenty-one years, and until she attained that age, the other contingency could not happen, and therefore if there was any forfeiture, it was to the plaintiff.

[ 87 ]

For the defendants it was insisted that both the provisos were consistent, and therefore both were to have their force, so that if she died without issue before twenty-one *A.* was to have the benefit of the first proviso, and yet that would not wholly enervate the second proviso ; for although she should survive the age of twenty-one, and have issue, yet if she married without the consent of her grandmother, the legacy was forfeited by the second proviso to the now plaintiff's husband ; and therefore the plaintiffs came too soon for a decree, the plaintiff's wife not having issue, nor being twenty-one years of age, and that a contrivance of this nature to defeat the will ought not to be countenanced.

*Per Cur.* Both provisos are consistent, and ought to be so construed ; and as to the first limitation over, that if she die without issue before twenty-one years of age, that *A.* should have the 1300*l.* it was a good limitation over, for though it was upon dying without issue, yet the time for the happening of that contingency was circumscribed and limited to fall before her age of twenty-one years ; and therefore decreed that if the legatee, the now wife of the plaintiff, should die before twenty-one years of age without issue, that *A.* should have the benefit of the first proviso ; and declared that the proviso of

**PAWLET v. DOGGET.** forfeiture by marriage without consent of the grandmother, could not take place, nor have any force, until the plaintiff's wife had attained her age of twenty-one years. (1)

(1) The words of the decree as to this 1300*l.* are, "That the contingency in will of the plaintiff's marriage without consent, hath not destroyed the said first contingency of her dying before 21 without issue; and that in such case it ought to go over to the said Sarah Disney, and the same, or what shall appear on the account to remain thereof, together with the interest, is to be brought before the master, and put out at interest to answer the contingencies according to the testator's will, and after the plaintiff's attaining the age of 21 years, and before the money paid, the said master is to certify what provision is fit to be made for the plaintiff, Martha, for the future." Reg. Lib. 1688. B. fol. 132. So *Martin v. Long*, post 151. Pre. Ch. 15. where devise of a term to J. S. and his assigns for ever, but if he dies without issue before 21, then over, *Thrustout v. Denny*, 1 Wils. 270. So where devise of a term to T. F. and if it shall happen that T. F. die before the expiration of the said term, not having issue of his body then living, then over.—*Fletcher's case*, Eq. Ca. Ab. 193. pl. 10. *Sheffield v. Lord Orrery*, 3 Atk. 282. in which, the cases and doctrine on this subject are stated and considered: and in respect to executory devises of terms for years and other personal estates, the court has gone upon this principle: a limitation, after dying without issue generally, is void, as being too remote, but if there are any words in the will, by which it

appears that the testator intended a dying without issue living at the death of the first taker, then it is good. *Nichols v. Hooper*, 1 P. Wms. 198. *Target v. Gaunt*, ibid. 432. Sed vide Mr. Cox's note to *Nichols and Hooper*, ibid. 199. *Beauclerk v. Dormer*, 3 Atk. 308. *Bigge v. Bensley*, 1 Bro. Ch. Rep. 187. [And see *Atkinson v. Hutchinson*, 3 P. Wms. 258. 6th ed. and cases cited in notes there.] But there must appear something restrictive, for the law appears now to be completely settled, that if one possessed of a term, devise it to A. for life, remainder to B. for life, and if B. die without issue, (and nothing more,) then to C. the remainder to C. is void as too remote. Vide *Beauclerk v. Dormer*. *Bigge v. Bensley*, ub. sup. — *Woodford v. Thellusson*, 4 Ves. 227. Et vide *Brown v. Higgs*, ibid. 707, 717, since which, it has been determined, that wherever the period allowed by law is exceeded, although an executory devise is void for the whole, and not good for the time allowed by law, yet, that the contrary is the doctrine with respect to accumulation of dividends of funded property, *Griffiths v. Vere*, 9 Ves. 127. And it also appears, that an executory devise, exceeding the prescribed limits, cannot be supported upon the possibility that the estate may vest sooner, ibid. 134. S. C. Note. Courts of equity will not carry the limitation of a personal chattel or trust of it, any further than has been done in the case of legal limitations of terms for years. *Beauclerk v. Dormer*, 2 Atk. 312.

## CASE 84.

In Court.

LORD CHANCELLOR.

Sabbati 24,  
Nov.

Eq. Ca. Ab.

332. pl. 4. S.C.

An adminis-

trator pays a

debt by bond before a debt due by a decree, having no notice of the decree; this is a mis-payment, and the administrator must pay the debt by the decree.

## SEARLE versus LANE.

ON a rehearing the case was, that the defendant being administrator to one Hayman, as being principal creditor, had paid debts by bond and simple contract, without notice of a decree, which the plaintiff had obtained against the intestate for a sum of money.

SEARLE v.  
LANE.

Upon the former hearing, the court had decreed the defendant, though he had fully administered the assets, to pay the plaintiff the debt decreed to him against the intestate.

Now upon the rehearing, it was by Mr. *Pollexfen*, and Mr. *Keck* of counsel with the plaintiff, insisted, amongst other things, that it was the rigour of the law, and *summum jus*, that charged an administrator for payment of debts of an inferior nature, when he had not notice of any debts of a higher degree, and *that* rigour of the law, ought not to be carried on against conscience, in a court of equity; and what ground was there for a court of conscience to charge a defendant that had been in no default? He had no notice of this decree, and could not divine, that there was any debt owing of a superior nature, and if he should have refused to pay a debt of an inferior nature, expecting to hear of what he knew nothing of, he must have paid costs for such delay and neglect of payment of the monies, out of his own purse; and besides the defendant here was administrator only, as being principal creditor, and so stands not in the same degree of privity as an executor, or other relation might have been, and therefore not having notice of the plaintiff's demand, it would be against conscience to charge him with it, and contrary to regular equity, and the measures which the court takes in other cases; as in the case of a trust, though the court will support it, and compel an execution of it, as far as may be done with equity, yet the court would never charge a purchaser, that had no notice of the trust; and it was considerable also in this case, that the decree which the plaintiff obtained against *Hayman* the intestate was by default, when *Huyman* absconded, and was gone, so that the plaintiff's debt was never contested, and was matter of account, and there was little if any thing really due.

[ 89 ]

*Per Cur.* There is nothing more frequent in practice or better known, than that a decree of this court is equal to a judgment at law; (1) and the filing of a bill in this court, equal to the filing of an original at law, to prevent the alienation of assets. And therefore the defendant has done as much wrong in this case by payment of a bond debt, when there was a decree, as if he had done it where there had been a judgment at law: and the having notice or not notice, is not material in either case; and were notice to be an ingredient in the case, it were less requisite in the case of a decree, than in the case of a judgment; for that there are but few courts of equity, but

A debt by decree in equity, is equal to a judgment.

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(1) *Harding v. Edge*, ante 1 vol. 143. *Martin v. Martin*, 1 Vez. 212.



SEARLE v.  
LANE.

[ 90 ]

very many courts of law ; and yet a judgment even in a court of *pie-powder*, will be binding in such case, so that it is much easier to discover whether there be a decree against a man, than whether there be a judgment against him or not. But if the decree in this case passed by default, there may be some colour to have the reality of the plaintiff's debt examined, as at law in an escape against the marshal, the goaler shall have the prisoner's equity, and may give in evidence the poverty of the prisoner, &c. and therefore the court inclined to let the administrator in this case contest the reality of the plaintiff's debt ; but it appearing that the original suit between the defendant and the intestate had long depended, and had been contested, and did not pass by default ; the court therefore confirmed the former decree. (1)

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(1) Reg. Lib. 1688. B. fol. 48. Vide ante 37. S. C.

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COMER *versus* HOLLINGSHEAD, and Al'.

CASE 85.  
In Court.  
LORD CHAN-  
CELLOR.  
Eodem die.

The Master allows a security, which proves defective. Master is not liable ; otherwise if the Master had by bribery or corruption allowed the security.

By a decree of this court, money was to be put out at interest, on a security to be allowed by Sir *Samuel Clerke*, one of the Masters of this court, for the benefit of husband and wife and their issue ; the Master allowed of a security, that afterwards proved defective, and the plaintiff by his bill amongst other things, endeavoured to charge the executor of Sir *Samuel Clerke*, to make good the defect of this security.

*Per Cur.* The Masters would have uneasy places of it, if they were to answer for all defective securities, nor is that so much their business ; but it concerns each side to have counsel to peruse the title, (as it appeared there were in this case,) the Master principally is to take care that the limitations and uses are drawn according to the direction of the court, and unless there had been either bribery or corruption, it was not reasonable to charge a *Master* for allowing a defective security, and therefore dismissed the bill as against him. (2)

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(2) Reg. Lib. 1688. A. fol. 153. out in the funds in pursuance of Stat. But this matter is not mentioned. 12 Geo. I. c. 32. Vide *Oldfield v. Oldfield*, ante 1 vol. 338. The money of the suitors is now laid



POWELL *versus* MORGAN.

By a marriage-settlement, lands were settled on the husband and wife, and their first and other sons in tail male, and for want of such issue a term for years\* was limited to the daughters for raising portions, remainder to the issue male of the father, remainder to his right heirs. The husband dies leaving issue one daughter only, who is also heir at law to the father; she dies an infant, and indebted, but made a will, and devised away the portion charged on the estate, and gave the plaintiff who was her heir at law, a legacy, upon condition that he did not disturb or interrupt her will. The plaintiff afterwards contested the validity of the will, and insisted that the term was merged in the daughter, as being also heir at law. (1)

The husband dies, leaving only a daughter, upon whom the inheritance descends. The daughter dies an infant and indebted, and disposes of her portion by her will. Equity relieves against the merger of the portion. Post. Case 193.

CASE 86.  
MASTER of the  
ROLLS.

In Court.  
20 Novemb.  
Eq. Ca. Ab. 85,  
pl. 1. 269.

pl. 11. S. C.  
By a marriage  
settlement,  
lands are li-  
mited to the  
husband and  
wife, with re-  
mainder to  
their first, &c.  
son, and then  
a term for  
years to secure  
portions for  
daughters.

The husband  
dies, leaving only  
a daughter, upon  
whom the inheritance  
descends. The daughter  
dies an infant and  
indebted, and disposes  
of her portion by her  
will. Equity relieves  
against the merger  
of the portion. Post.  
Case 193.  
[ \*91 ]

The court upon the hearing relieved against the merger, and decreed the portion to go according to the will of the daughter. The point now before the court was, whether the plaintiff had forfeited the legacy, by contesting the validity of the will.

contests the validity of the will, yet no forfeiture of the legacy, if there was *probabilis causa litigandi*.

Legacy given  
on condition  
the legatee  
shall not dis-  
pute the will.  
Legatee com-  
mences a suit  
whereby he

*Probabilis causa*

*Per Cur.* There was *probabilis causa litigandi*, and it was not a forfeiture of the legacy. (2)

(1) Vide *Norfolk v. Gifford*, post 208. *Chester v. Willes*, Amb. 246. [*Thomas v. Kemys*, post 354.]

(2) Reg. Lib. 1688. B. fol. 44. A condition that legatee shall not dispute the will, has been in several cases considered as merely in terrorem, *Lloyd v. Spillett*, 3 P. Wms. 344. 2 Atk. 148. S.C. *Morris v. Burroughs*, 1 Atk. 404. So under circumstances, a release of all demands on the estate of testator, *Popham v. Taylor*, 1 Bro. Ch. Rep. 167. Secus, it seems, if the legacy be given over, *Cleaver v. Spurling*, 2 P. Wms. 526. Et vide the other cases cited in note (1) to *Webb v. Webb*, 1 P. Wms. 136. But there is a class of cases where legacies given upon condition

that legatee shall release the executors and all claim on the testator's estate, or that he shall not disturb the trusts of the will, in which, under circumstances, the condition has been enforced, *Hawes v. Warner*, post 478, *Lord Mohun v. Duke of Hamilton*, 1 Bro. P. C. 64. *Earl of Northumberland v. Lord Egremont*, Amb. 657. *Popham v. Taylor*, ubi sup. The principle of these conditions was compared to the principle of condition that legatee should marry with consent, per Master of the Rolls, *Cleaver v. Spurling*, ubi sup. [As to which see *Peyton v. Bury*, 2 P. Wms. 626. 6th edition, and cases cited in note there.]

## CASE 87.

Eodem die.  
MASTER of the  
ROLLS.  
Eq. Ca. Ab.  
166. pl. 3. S. C.  
Upon a decree  
for payment of  
money after  
a writ of exe-  
cution and an  
attachment  
returned;  
court refuses  
to give leave  
to defendant to  
be examined,  
unless he gives  
security to  
abide the de-  
cree.

[ 92 ]

ROPER *versus* ROPER.

THE court had decreed, that either the defendant should pay a sum of money by a time therein, for that purpose, limited, or in default thereof, that the plaintiff should hold and enjoy the lands charged therewith; a writ of execution of the decree had issued, and an attachment for non-performance thereof, and now upon the return of the attachment, the defendant moved he might appear and be examined; (1) and it was insisted he ought to be admitted thereto, for that he might show that the process issued not regularly, or that he had paid the money, or had a release, and that it was against common sense that a man should be attached for a supposed contempt, and yet should not be heard to make his defence. And the case of the Duke of Norfolk was cited, were there was a writ of execution, then an attachment, and then an injunction for possession; and afterwards, when a writ of assistance was moved for, upon debate he was admitted to appear and be examined.

But in this case the *Master of the Rolls* ordered the process to go on, and would not admit the defendant to appear and be examined, unless he would give security to perform the decree.

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(1) Vide *Danby v. Lawson*, Pre. Ch. 110.

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## CASE 88.

At the Rolls.  
MASTER of the  
ROLLS.

December 1.

One devises  
1000*l.* to his  
daughter for  
her portion,  
charged upon  
a real estate,  
and payable at  
21. Daughter  
dies before 21.  
The portion  
shall sink in  
the land;  
otherwise, if  
no time had  
been limited  
for the pay-  
ment of the  
portion, for in  
that case it  
goes to the  
executors of  
the daughter.

SARAH SMITH, Widow, Plaintiff.

JOHN SMITH, Defendant. Et à contra.

THE case was, that one *Thomas Smith* being seised in fee of several lands in the county of *Suffolk*, and having issue one son and one daughter, the 10th of *July*, 1683, made his will in writing, and thereby amongst other things devised part to his wife, the now plaintiff, for her jointure, and devised the rents and profits of all other his lands, until his son attained his age of twenty-one years, unto his executors therein named, to be applied in such manner as he had directed, and gave the whole to his son, when he should attain the age of twenty-one years, charged with so much of his daughter's portion, as should not before that time be raised by his executors and trustees, and gave unto his daughter the sum of *one thousand* pounds to be paid by his executor at her age of *twenty-one* or marriage, No difference where the portion is secured by a settlement or a will, if secured out of a real estate, and the party dies before it is payable. In either case it sinks in the lands.

SMITH v.  
SMITH.

[ 93 ]

which should first happen, willing the same to be raised out of the rents and profits of the said lands; and further willed, that in case his son should die before he accomplished his age of *twenty-one* years, or without heirs of his body lawfully begotten, then from and after the death of his said son, he gave all and every the said messuages, lands, tenements and hereditaments to *John Smith* his uncle, the now defendant, and his heirs, he making up his daughter's portion *two thousand pounds*; and of his said will made the defendant *Smith* and one *Dey*, who renounced, executors, and shortly afterwards died, leaving his said son and daughter both infants, and the eldest not *three* years old. The daughter died soon after the death of the said testator, an infant unmarried, and shortly afterwards the son also died without issue; the plaintiff the widow, took letters of administration to her daughter, and the principal question insisted on was, whether the plaintiff as being administratrix to her daughter, was intitled to all, or any part of the said portion.

For the defendant it was insisted, that the plaintiff was not intitled to all or any part of this portion; but that the daughter dying before *twenty-one* and unmarried, it extinguished in the land for the benefit of the heir, and that it was so resolved in the case of my Lord *Pawlet* and the Lady *Pawlet*, which was afterwards confirmed upon an appeal to the House of *Lords*; and likewise in the case of *Brown* and *Bond*, and the difference there taken was between a personal legacy, (which was admitted should in such case, being *debitum in presenti*, and payable *in futuro*, go to the executor or administrator,) and a sum of money appointed to be raised out of the rents and profits of lands, and designed for a particular purpose, (to wit) a portion for a daughter, for which there was no occasion, she dying unmarried, and under age. That if any part of the *two thousand pounds* was payable, it could be only the first *thousand pounds*, for the portion was not to be made up *two thousand pounds*, but upon the son's dying without issue, which never happened in the lifetime of the daughter, she dying before her brother; and so that last *thousand pounds* never vested in her, and consequently could not go to her administratrix; and if the plaintiff was intitled as administrator, yet she could not have it until such time as the daughter would have attained her age of *twenty-one* years, as was resolved in the case of *Earl* and *Earl*, even in a personal legacy: but though these other matters were mentioned for argument's

Vol. 1.  
Case 201.2 Ch. Cases  
165.

[ 94 ]

SMITH v.  
SMITH.

sake, the defendant's counsel relied upon it, that the plaintiff was not intitled to any part of the *two thousand pounds*.

For the plaintiff it was insisted, that the legacy was an interest vested, and attached in the daughter, and ought to go to the plaintiff her administratrix; and that it had been so lately resolved by the Lord *Chancellor*, in the case of the *Ante Case 67. Earl of Rivers* and the *Earl of Derby*, which was long since the case of *Pawlet* and *Pawlet*, and that the principal case was not exactly the same with the case last mentioned; for there was a settlement as well as a will, but here the case depended purely upon a will: but seemed to admit that the plaintiff could not have the portion, until such time as the daughter would have attained her age of *twenty-one years*.

[ 95 ] *Per Cur.* I take it that the plaintiff is not intitled to any part of the *two thousand pounds*, and that the judgment in my Lord *Pawlet's* case governs this case. It appears that the intention of the testator was, that it should be for a portion, and it is expressly called a portion in the will, and then it is no personal legacy, but money to be raised out of the rents and profits of land, and the case of the *Earl of Rivers* and the *Earl of Derby*, differs from this; in that case there was no time limited for the payment of the money: but here the payment is expressly to be at *twenty-one years* or marriage, and therefore dismissed the bill, as to so much as concerned the *two thousand pounds* portion. (1)

*Memorandum*, That on *Thursday* morning being the 28th day of *February*, 1688-9. Mr. Serjeant *Maynard*, Mr. *Keck*, and Mr. Serjeant *Rawlinson*, were sent for to *Whitehall*, and Mr. *Keck* and Mr. Serjeant *Rawlinson* attended accordingly, Mr. Serjeant *Maynard* not being able to attend, by reason of his indisposition by the gout: Mr. *Keck* and Mr. Serjeant *Rawlinson* kissed the king's hand, and the *Great Seal of England* was delivered to Mr. *Keck*, in the presence of the Marquis of *Hallifax*, the *Earl of Shrewsbury*, Lord *Mordant*, and several other noblemen then present.

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(1) This cause was reheard the 8th *July* following, before the Lords Commissioners, who ordered a case. Reg. Lib. 1688. B. fol. 379. There appears to have been afterwards an order referring the cause to Sir *John Trevor* and Serjeant *Powell*. Reg. Lib. 1689.

B. fol. 295. But of the first hearing, or of the award, the editor has not been able to find any entry. Vide *Poulet v. Poulet*, ante 1 vol. 204. and cases cited in not. there. *Hodgson v. Rawson*, 1 Vez. 44.

DE  
TERMINO PASCHÆ, 1689.

IN CURIA CANCELLARIÆ.

VANDENANKER *versus* DESBROUGH.

CASE 89.

THE defendant's testator by his will devised 800*l.* to be paid within *six* months after his death to one Mr. *Ruffine*, in trust that he should lay it out and invest it in a purchase for the benefit of the wife of *J. S.* and to settle it so, as after the death of the wife, it might come to her children, and the interest in the mean time to be paid to such person as ought to receive the profits. *J. S.* becomes a bankrupt, and the plaintiff as assignee under the statute of bankrupts, would have the interest of this money decreed to him, during the joint lives of Baron and Feme. and afterwards to her children, and the interest of the money to go as the profits of the lands, if bought. *J. S.* becomes a bankrupt; the interest of the 800*l.* shall not be liable to the bankruptcy. This not being a trust created by the bankrupt, and being intended for the maintenance of the wife, and given by her relation.

In Court.  
Sir JOHN  
MAYNARD,  
Sir ANDREW  
KECK, Sir  
WM. RAWLIN-  
SON, die Jovis,  
18 Aprilis.  
Eq. Ca. Ab.  
53. pl. 3. S. C.  
Devise of 800*l.*  
to be invested  
in land for the  
benefit of the  
wife of *J. S.*  
for her life,

*Per Cur.* This not being any trust created by the husband, nor any thing carved out of his estate, but given by a relation of the wife's, and intended for her support and maintenance; it is not liable to the creditors of the husband; and the plaintiff hath no title thereunto as assignee of the commission of bankrupt, and therefore decreed it should be paid to *Ruffine* the trustee, to be laid out in land and settled according to the will. (1) The case of *Drake* and the Mayor of *Exeter* was cited, where there was a lease for *twenty-one* years, with a covenant for renewal of the lease; at the end of the term, the lessee became a bankrupt. Adjudged the assignee under the statute should have no benefit of that covenant, and it was for some time doubted whether the assignee under a statute of bankruptcy, should have the benefit of an equity of redemption, (2) the clause in the statute being that the assignee may perform conditions not broken, and conditions performable.

[ 97 ]

A lease for 21  
years to *A.*  
with a cove-  
nant for re-  
newal at the  
end of the  
term. The  
lessee be-  
comes bank-  
rupt, the as-

signee under the commission is not entitled to the benefit of renewal.

(1) Reg. Lib. 1688. B. fol. 166. (2) Vide *Hitchcock v. Sedgwick*, post  
*Moses v. Little*, post 194. *Ex parte* 161. *Pope v. Onslow*, post 286.  
*Coysegame*, 1 Atk. 192.

TOOKE *versus* HASTINGS & A<sup>r</sup>.

CASE 90.

Eodem die.

Eq. Ca. Ab. 27.  
pl. 3. 31. pl. 3.

S. C.

One covenants  
to settle land  
of such a  
value, or an  
annuity out of  
land, and he  
afterwards  
purchases  
land (having  
no land be-  
fore) and de-  
vises it, and  
dies, this land  
shall be liable  
to the cove-  
nant. (1)

NOTE. *Per Cur.* If a man covenants, or enters into bond to settle land of such a value, or an annuity out of land of such a value, and has no land at the time of the settlement; but afterwards purchases land, *that* land shall be liable, and that against a voluntary devisee, as the defendant *Hastings* in this case was, and accordingly decreed, that *Backwell* as well as *Churchill* should be liable to the plaintiff's annuity, notwithstanding that *Backwell* was devised to *Hastings*, the testator having entered into bond to charge lands of the value of *one hundred pounds per ann.* with the payment of this annuity, and not having any other lands of that value: but withal declared, that *Hastings* the devisee of *Backwell*, should be reimbursed out of *Churchill*, *that* not being devised, but left to descend on the daughters. (2)

(1) Vide *Speake v. Speake*, ante 1 vol. 217. Eq. Ca. Ab. 31. pl. 4. *Roundell & Ur' v. Breary*, post 482. And the principle seems to be recognised in the class of cases on the head of satisfaction, *Wilcocks v. Wilcocks*, post 558. [*Blandy v. Widmore*, 1 P. Wms. 324. *Goldsmid v. Goldsmid*, 1 Swan. 221.]

(2) The points of the after purchase, and the particular value of *Backwell* as stated in the printed report, do not appear—the case that appears is, that Sir *John Churchill* in consideration of 500*l.* agreed that he would settle one annuity of 80*l. per annum* on *Margaret* the wife of the plaintiff *Tooke*, for her life, and after her decease, another annuity of 40*l.* to her eldest issue male, and in default thereof, then to her eldest issue female, during the life of such issue, to be paid at quarterly payments, and to be issuing out of lands of 100*l. per ann.* and that in *March*, 1684, upon the receipt of the said 500*l.* he entered into a bond of 1000*l.* penalty, conditioned for settling such annuity on or before the first day of *June*, then next, by such conveyance as should be tendered to or required of him. Sir *John* paid the annuity of 80*l.* during his life, but never made the settlement of the annuities pursuant to the said bond; that in *October*, 1685, he died, seized in fee of the manor and lands of *Churchill*, and of the manor of *Backwell*, worth 1000*l.* having by his will given his said manor of *Backwell* to

trustees to sell to pay the debts thereon charged by any legal conveyance, and the residue of the money to arise by such sale to *Charlotte* the wife of the defendant *Hastings*, and by the same will he devised his said manor of *Churchill* to his daughter *Mary Scroggs*, the wife of another of the defendants *William Scroggs*, and the *Woods* in *Lincombe* and *New Park* in *Churchill*, to pay out of the profits his debts that his personal estate would not pay, and otherwise as therein mentioned: and it further appears, that on the marriage of his said daughter *Mary* with the said defendant *Scroggs*, the said Sir *John Churchill*, on the 11th *Dec.* 1683, entered into articles under hand and seal and a bond for performance thereof, to secure to the defendant *Scroggs* 2500*l.* on his said manor of *Backwell*, but made his will and died as before mentioned, before the same was effectually performed; as to all which, the decree (somewhat confused in the statement), was in the first place, as to the said annuities of 80*l.* and 40*l.*: “that  
“both the manors of *Churchill* and  
“*Backwell*, together with the other  
“lands of the said Sir *John Churchill*  
“in *Backwell*, are liable to the pay-  
“ment thereof, and of the arrears and  
“interest thereof, from the respective  
“times the same became payable:” and in the second place, as to the said sum of 2500*l.*: “That the said manors  
“of *Churchill* and *Backwell* should



“ both be sold for payment of the said  
 “ 2500*l.* and interest to the said defen-  
 “ dant *William Scroggs*, and the ar-  
 “ rears of the said annuities of 80*l.* and  
 “ 40*l.* together with interest thereon  
 “ as aforesaid; and that the said an-  
 “ nuities for the future do stand charged  
 “ upon the said manors of *Backwell*  
 “ and *Churchill*; and that upon pay-  
 “ ment of the said sum of 2500*l.* and  
 “ of the arrears of the said annuity of  
 “ 80*l.* the said trustees named in the  
 “ said will of the said *Sir John Churchill*  
 “ are to convey the said manor of *Back-*  
 “ *well* and the other lands of the said

“ *Sir John Churchill* in *Backwell*, as  
 “ the defendant *Hastings* and his wife  
 “ should appoint, subject nevertheless  
 “ to the payment of the said annuities.  
 “ And in case the said defendant *Has-*  
 “ *tings* shall at any time hereafter  
 “ settle and subject lands to the annual  
 “ value of 100*l.* beyond reprises to the  
 “ payment of the said annuities, the said  
 “ manor of *Backwell* is to be discharg-  
 “ ed thereof.” Reg. Lib. 1688. B. fol.  
 516. Vide this case cited in *Deacon v.*  
*Smith*, 3 Atk. 329. *Attorney-General*  
*v. Whorwood*, 1 Vez. 540.

### CLERKE versus LEATHERLAND.

[ 98 ]

CASE 91.

Sabbati, 20  
 Aprilis, Sir  
 JOHN MAY-  
 NARD, Sir WM.  
 RAWLINSON.  
 Eq. Ca. Ab.  
 152. pl. 3. S. C.  
 Freeman of  
 London pos-  
 sessed of a  
 term for years,  
 assigns it in  
 trust for him-  
 self for life,

A CITIZEN of *London* being possessed of a term for years,  
 assigns the same in trust for himself for life, then to his wife  
 for life, paying *twenty pounds per ann.* to his son by his first  
 wife, remainder to his said son during the residue of the term.  
 And it was now made a doubt, whether this assignment was  
 good, within the custom of the city of *London*, so as to bind  
 the other children, and it was referred to the *Recorder* of the  
 city of *London*, to certify. (1)

then for his wife for life, and afterwards for his son by a first venter: whether this shall  
 stand against the custom of *London*. 2 Lev. 130.

(1) Reg. Lib. 1688. A. fol. 258. No further mention appears. Vide *Frederick v. Frederick*, 1 P. Wms. 720. arg. *Hall v. Hall*, post 277. *Turner v. Jennings*, post 612.

### TOWERS versus MOOR.

CASE 92.

Lunæ, 22 die  
 Aprilis.  
 Devise of land  
 not to be ex-  
 plained by  
 parol proof  
 for the making  
 his will.

THE plaintiff endeavouring to have the will explained by depo-  
 sitions of witnesses touching what the testator declared, and  
 the instructions he gave for the drawing of his will. (1)  
 touching the declaration of the testator, or the instructions given by testator

*Per Cur.* Devises concerning land must be in writing, and  
 we cannot go against the act of parliament. But in case of a  
 surrender made by a steward of a copyhold, if there be any  
 mistake there, that is only matter of fact, and the courts at law  
 will in that case admit an averment, that there was a mistake,  
 &c. either as to the lands or uses. (2)

Parol proof  
 shall be ad-  
 mitted to ex-  
 plain a surren-  
 der of copy-  
 hold land, to  
 shew a mis-  
 take either in  
 the land or  
 uses.

(1) Vide *Fane v. Fane*, ante 1 vol. p. 31. and cases there referred to; and even before the Stat. of Frauds, where a will was in writing, no collateral proof

by papers or words could be admitted.  
 (2) *Hill & Ux' v. Wiggett*, post 547. *Bertie v. Falkland*, Salk. 232. *Wade v. Bache*, 1 Saund. 151.



**TOWERS v. MOOR.** Where a demise is made of lands rendering rent, though the lease be lost or mislaid, the landlord may sue \* for the rent, and declare on a demise in general, without saying it was a lease in writing; and so you may in all cases, where it is not a thing that lies in grant, &c.

Lease by deed of land rendering rent, the lease is lost, lessor may declare on a demise in general, without saying it was by deed; otherwise of a thing that lies in grant.

[\*99] Where two are bound jointly, and one dies, you must sue the survivor, and cannot maintain an action against the executor or administrator of him that is dead; but if bound jointly and severally, it is otherwise. Where two employ workmen to build and one dies, *Quære*, whether this be such a joint contract, that you cannot sue the executor or administrator of him that is dead. (1)

(1) There is merely an entry of dismissal without costs. Reg. Lib. 1688. B. fol. 200.

### ROLL *versus* ROLL.

**CASE 96.** Mercurii, 24 Aprilis. Eq. Ca. Ab. 265. pl. 2. S. C. LANDS settled on trustees for raising of maintenances and portions for daughters, the bill was to have a sale, and that the heir might join.

Land settled on trustees for raising portions for daughters, on bill for a sale, court will decree the heir to join in the sale, though he has no legal interest.

It was objected, that the estate in fee being in the trustees, and the heir having no estate in him, he ought not to be compelled to join in a sale.

Ch. Ca. 176. 2 Freem. 134. Decreed that the heir should join, and the case of *Pit and Pelham* in *Parliament* cited, *cum multis aliis*. (2)

(2) Vide *Crew v. Jolliff*, Pre. Ch. 98. *Welby v. Thornagh & Ux.* ibid. 123.

### PRING *versus* PRING. (3)

**CASE 94.** Die Mercurii, 24 Aprilis. One by will makes *A. B.* and *C.* executors in trust, and gives them a legacy of 20s. a-piece for a remembrance above their charges. Parol proof admitted, that this was in trust for the wife only. Post. Case 144.

THE case was, a man makes his will, and *A. B.* and *C.* executors thereof in trust, and for a remembrance and over and above their costs and charges, he gives them *twenty* shillings a-piece.

(3) Note. This case cited *Lady Gainsborough v. Lord Gainsborough*, post. 254. to shew that though all the executors answered as above, yet that the executors (said one executor there by mistake), who confessed the trust were examined, and their examination read against the other executor who denied it. Et vide as to a defendant being examined as a witness for plaintiff, *Nightingale v. Dodd*, Amb. 583.

The bill was brought by the wife, alledging that her husband designed, and often declared, that she should have the benefit of his personal estate, but she being aged and infirm, he made the defendants executors in trust for her ; one of the defendants denied the trust, the other two confessed it, and it was insisted by the defendant who was adversary, that though the will did call them executors in trust, and though it might be collected from the will that the executors were not to have more than twenty shillings a-piece, yet it is not said for whom the trust is, and therefore it shall be taken to be a trust for all, who might come in and have benefit by the statute for distribution of intestate's estates, and not for the wife alone.

PRING v.  
PRING.

*Per. Cur.* The will declaring, that the executors are only in trust, and not declaring for whom, the person may be averred, and two of the executors having by their answer confessed the trust, and it being likewise fully proved, that it was the intent of the testator, and that he declared it a trust for his wife, decreed the trust for the plaintiff, with costs against the adversary defendant. (1)

(1) "Because his defence, denying  
"the trust, and insisting on the statute  
"of frauds, was untrue as well as un-  
"just." The will so far as the same is  
stated in the Register's Book, is as fol-  
lows :—"John Pring, the plaintiff's late  
"husband, being in his life-time pos-  
"sessed of a considerable personal  
"estate, did, on or about the 3d day  
"of Oct. 1686, make his last will in  
"writing ; and taking notice that he  
"had not in his life-time made any  
"competent provision for the plaintiff,  
"his wife, and that he had an estate  
"and term in a house and tenement,  
"called *Clayland House*, and of and  
"in divers closes of land particularly  
"mentioned in the will, did bequeath  
"and declare, that in case the plain-  
"tiff should survive him, that she and  
"her assigns should enjoy the rents  
"and profits of the premises for so

"long time as she should live, in  
"case the terms continued, and then  
"to his nephews ; and bequeathed to  
"the plaintiff the use benefit and  
"profit of his household goods, and  
"particularly bequeathed, that the  
"closes called *Priest's Woods*, and the  
"tenements called *Gibson's Blacklands*,  
"or *Glanvill's Ground*, in *Honiton*,  
"should be sold by his executors in  
"trust, towards payment of his debts  
"that he should owe at the time of  
"his death, with provision, that in  
"case he paid his debts in his life-  
"time, then the plaintiff was to en-  
"joy the lands during her life, and  
"gave his executors 20s. a-piece." Reg. Lib. 1688. B. fol. 184. Vide *Fane v. Fane*, ante 1 vol. 31. *Foster v. Munt*, ante 1 vol. 473. and cases there cited.

THE submission to an award being that the arbitrators should at or upon the 27th day of *March* then next make their award, and in default of their making their award, that the umpire should at or upon the said 27th day of *March* make his um-  
tors make their award at or upon the 27th of *March* then next, and if the arbitrators make no award, then if the umpire make his umpirage on the same day. Umpire cannot make his umpirage on 27 *March*, the arbitrators having all that day to make their award.

CASE 95.

Sabbati,  
27 Aprilis.

Submission to  
an award, so  
as the arbitra-

pirage. The arbitrators disagreeing, the umpire made his award on the said day.

[ 101 ] *Per Cur.* This award is void in law, for the arbitrators had all the 27th day allowed them to make their award, so that there was no time for the umpire to make an award; and in this case the servant of the umpire having, before the award made, given out, that he was sure his Master would award *one hundred and fifty pounds*; and the arbitrators differing, one yielding to give *thirty-five pounds*, and the other insisting for *ninety-five pounds*; and the umpire coming and giving *one hundred and fifty pounds*, the court looked upon this as an evidence of fraud and corruption, and therefore decreed the arbitration-bond to be delivered up. (1)

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(1) Vide on the general doctrine of 159. et vide Eq. Ca. Ab. 49. pl. 1. and awards, *Brown v. Brown*, ante 1 vol. references there.

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CASE 96.

LANCY *versus* FAIRECHILD.

Mer',  
8 die Maii,  
1689.

By marriage  
articles money  
is to be laid  
out in land,  
and settled on

husband and wife, and their issue, remainder to the heirs of the wife; husband and wife die. The heir, and not the executor or administrator of the wife, shall have the money.

MONEY by marriage-articles being to be laid out in land, and settled on the husband and wife, and their issue, remainder to the heirs of the wife, the wife dying in the life-time of the husband. (1)

Decreed for the heir of the wife against the administrator, the money being bound by the articles (2) according to the resolution in the case of *Kettleby* and *Atwood*. (3)

A contingent  
security shall  
not stand in  
the way of  
debt by simple  
contract.

*Note.* It was resolved in the case of *Eeles* and *Lambert*, that a contingent security should not stand in the way of a debt by simple contract, as to the administration of assets by the executors. *Vide Corbet's* case (4) as touching a trust upon land for raising of portions, and when the land shall be discharged having born its own burthen, and as to construction when raised and paid.

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(1) And in case the plaintiff should happen to die before the making of the said purchase, or should not make any such purchase at all, then the executors of the plaintiff should pay to the said *Mary* the intended wife, her executors or administrators, the sum of 500*l.* the amount of the said intended purchase-money. R. L.

(2) So decreed on a rehearing, the money by the first decree having been ordered to be retained by the plaintiff, as administrator of his wife, against her heir, as not being bound by the articles. Reg. Lib. 1688. B. fol. 251.

(3) Quod vide ante 1 vol. 298.

(4) [Post 640. 655.]

DE

## TERM. S. TRINITATIS, 1689.

IN CURIA CANCELLARIÆ.

KEY *versus* BRADSHAW.

CASE 97.

LORDS COM-  
MISSIONERS.Martis,  
30 Aprilis.Eq. Ca. Ab.  
89. pl. 6. S. C.  
Bond in com-  
mon form for  
payment of

THE bill was to be relieved against a bond drawn in common form, for payment of money; but proved to be made on an agreement, that the plaintiff should either marry her servant, or should by way of forfeiture pay him the sum of money mentioned in the condition of the bond.

money; but proved that the agreement was, that the obligor should marry such a man, or should pay the money due on the bond: court relieved against the bond; marriage ought to be free and without compulsion. Post. Case 197.

The court decreed this bond on debate to be delivered up to be cancelled, it being contrary to the nature and design of marriage, which ought to proceed from a free choice, and not from any compulsion. (1)

(1) The case in the Register's Book, states the defendant not as the servant of the plaintiff, but as a person representing himself to the plaintiff as possessed of a considerable estate, whereas he afterwards appeared to be a very poor man, and that in consequence

thereof the match broke off. The defendant had obtained judgment on the bond, on which he was also decreed to acknowledge satisfaction. Reg. Lib. 1688. A. fol. 293. [*Cock v. Richards*, 10 Ves. 429.]

DELABEERE *versus* BEDDINGFIELD.

[ 103 ]

CASE 98.

Eodem die.

Eq. Ca. Ab.

104. pl. 6. S. C.

An agreement  
betwixt lord  
and tenants

THERE having in 1670, an agreement been made between the lord and tenants touching the stint of the common, the bill was to have that agreement decreed.

to stint a common, more favoured than an agreement to inclose a common; and one or two humoursome tenants opposing, shall not hinder the agreement for stinting a common, from being decreed to be performed.

There is a great difference between an agreement for an enclosure, and an agreement only for a stint of common. It is a proper and natural equity to have a stint decreed; and though one or two humoursome tenants stand out and will not agree, yet the court will decree it; but it is otherwise as to an

**DELABÈRE v. BEDDING-FIELD.** enclosure. And in the principal case the court decreed the agreement to be performed. (1)

(1) The decree was, that the said agreement and all the matters and things therein contained, do stand ratified and confirmed, and the defendants be bound thereby; and that the respective owners and occupiers of land lying in the said fields, shall *for ever hereafter* stint and stock the same according to the said agreement and not otherwise. Reg. Lib. 1688. A. fol. 252. Vide *Colchester v. Arnott*, Pre. Ch. 124.

Dict. per. *Lord Keeper*, if bill for inclosing a common and one will stand out, it cannot be decreed; and contra the principal case on a stint, *Bruges v. Curwin & Al'*. post 575. Sed vide *Thirveton v. Collier*, 1 Ch. Ca. 48. And a decree against the Lord of a Manor will not bind copyholders in fee, or freeholders for life, when they are not parties, *Poore v. Clarke*, 2 Atk. 516.

### WEBBER *versus* SMITH.

**CASE 99.**  
**LORDS COMMISSIONERS.**  
**Merc'**,  
15 Maii, 1689.  
Eq. Ca. Ab.  
115. pl. 14.  
S. C.  
One makes a lease, and the lessee covenants to pay

A LESSOR for years by lease from my Lord *Salisbury* under a certain rent, and covenants to repair, makes a *hundred* under leases: the premises not being repaired, nor the rent paid, a re-entry is made, and the original lease avoided. Six of the under lessees were plaintiffs against the head landlord and first lessee & Al'.

the rent and to repair. The lessee makes 100 under lessees. The rent is behind, and the premises out of repair; the original lease is avoided for non-payment of rent. Some of the under lessees bring a bill to be relieved against the forfeiture. Equity will not apportion the rent; but the plaintiffs must pay the whole rent in arrear; and repair all the houses, and may compel the other under lessees to contribute.

[ 104 ] *Per Cur.* Cannot make any decree to apportion the head landlord's rents, nor relieve the plaintiffs, but on their payment of the whole rent in arrear, and repairing all the premises. (2) But having so done, they might compel the rest of the under-tenants to contribute.

(2) [Equity will not interfere to relieve against a forfeiture of lease for breach of covenant, except in the case of non-payment of money, *Hill v. Barclay*, 16 Ves. 402. 18 Ves. 56.]

### HILLS *versus* BREWER.

**CASE 100.**  
**LORDS COMMISSIONERS.**  
**Sabbati,**  
**1 Junii.**  
One by will gives several legacies, and makes executors, who are not related to him. Testator afterwards has several children, and increases his estate, and dies; equity will not make the executors trustees for the children, as to the surplus of the estate.

A MAN possessed of a considerable personal estate, devised some particular legacies, and made two persons no way related to him executors, he happened to live many years afterwards, and increased his estate, and had many children, and died without new publishing, revoking or altering his will, whereby the executors became in law entitled to the surplus of his estate, which was of considerable value.

several children, and increases his estate, and dies; equity will not make the executors trustees for the children, as to the surplus of the estate.

The bill was to make the executors trustees for the children as to the surplus of the estate, and the plaintiff's counsel cited the case in *Fitzherbert*, Tit. *Subpœna*, where a man appoints his trustees after his death to convey to his daughter, and afterwards happened to have a son, the opinion there is, that the conveyance should be made to the son; *sed non allocat'*, and the court dismissed the bill. (1)

HILLS v.  
BREWER.

One appoints his trustees to convey his lands to his daughter after his death. He afterwards has a son; the conveyance shall be made to the son.

(1) There is merely an entry of dismissal without costs. Reg. Lib. 1688. A. fol. 413. Vide *Foster v. Munt*, ante 1 vol. 473.

### COUNTESS OF PORTLAND *versus* PRODGERS.

THE question was touching the validity of the will of the Lady *Sandys*, her husband being by act of parliament banished during life, she made a will and bequeathed several legacies, and whether she might so do or not was the question.

act of parliament banished for his life,) may make a will, and in every thing Sole, and as if the husband was dead.

CASE 101.  
LORDS COM-  
MISSIONERS.  
Sabbati,  
1 Junii.  
Eq. Ca. Ab.  
171. pl. 1. S. C.  
A wife (whose husband is by act as a Feme

In arguing of the case were cited the case of the *King* and the Lady *Matraverse*, Ed. 3. fol. *Weyland's Case*, Lady *Bellnap's Case*, and the Lady *Shannon's Case*.

[ 105 ]  
1 Inst. 132. b.  
133. a.

The court were of opinion that the husband being by act of parliament banished for life, the wife might in all things act as a Feme Sole, and as if her husband was dead, and that the necessity of the case required she should have such power, and therefore decreed for the plaintiff. (2)

(2) Reg. Lib. 1688. A. fol. 432. So where the husband an alien enemy, *Deerley v. Dutchess of Mazarine*. Salk. 116. So where husband transported beyond the Seas, *Newsome v. Bowyer*, 3 P. Wms. 37. et vide *Dubois v. Hole*, and ux. post 613. *Sparrow v. Carruthers*, 2 Bl. Rep. 1197.

### ATTORNEY GENERAL *versus* HUGHES.

THIS cause concerning the devise to Mr. *Baxter* of monies to be by him distributed amongst poor ejected non-conformist ministers, coming to be reheard, the former decree was discharged, and the information dismissed, and the money then remaining in court ordered to be paid out to Mr. *Baxter*, to be by him distributed according to the will. (3)

CASE 102.  
Die Sabbati,  
8 Junii.  
Eq. Ca. Ab. 96.  
pl. 9. S. C.  
1 Vol.  
Case 243.

(3) Reg. Lib. 1688. A. fol. 433. Vide ante 1 vol. 248. S. C.



**CROOKE v.  
BROOKEING.**

Devise of  
1500*l.* in trust  
for the chil-  
dren of *A.*  
*A.* has only  
one child and  
several grand-  
children, the  
child only shall take, and not the grandchildren; but if there had been no child of *A.* living, the grandchildren might have taken.

without giving any advice or directions touching the disposing of the *one thousand and five hundred pounds*; *Grace* had only one child living at the death of *Anne Crewe*, but had five other children living at the death of the testator *Mallock*, who all died intestate, and their administrators were before the court, as also such of the children of the dead children as were living.

The questions that were made were,

The questions that were made were,

1. Whether the plaintiff *Gratious*, being the only child living of *Grace Leach* at *Anne Crewe*'s death, should have the whole *one thousand five hundred pounds*.

2. If not, whether the administrators of the dead children should come in for an equal share with the plaintiff.

3. Or whether the grandchildren, to wit, the children of the dead children should come in for an equal share with the plaintiff.

[ 108 ] The cause was heard before the Lord Chancellor *Jefferies* in *May* 88, who declared the trust was well declared by *Simon Snow*'s letter, (1) and decreed that the *one thousand five hundred pounds* should be divided between the plaintiff *Gratious*, the only child living at the death of *Anne Crewe*, and the children's children as were living at the death of *Anne Crewe*, from which decree the plaintiffs appealed.

And now upon a rehearing decreed by the *Lords Commissioners*, that the plaintiff *Gratious*, being the only child living at the death of *Anne Crewe*, (2) should have the whole *one thousand five hundred pounds*; (3) and said, the only difficulty in this case was the word (children) and here was but one child, and yet notwithstanding decreed it for the plaintiff, and were clear of opinion where the devise is to children, the grandchildren cannot come in to take with the children; and turn it into *latin*, and children and grandchildren are exprest by distinct and different words: but all admitted that if there had been no child, the grandchildren might have taken by the devise to his children.

(1) [*Smith v. Attersoll*, 1 Russ. 266.]

(2) [*Brown v. Higgs*, 4 Ves. 708. 5 Ves. 495. 8 Ves. 561. 18 Ves. 192.]

(3) Together with such interest as the trustees, defendants *Brookeing* and *Pengelley*, or either of them had made or received in respect thereof, to be ascertained by the said defendants own oaths, they respectively to make such affidavit as the Master shall direct;

and the other defendants the grandchildren, to have their costs, Reg. Lib. 1688. *A.* fol. 476. As to the words under which grandchildren may come in, it is held that a devise or bequest to descendants will comprehend grandchildren, *Crosley v. Clare*, Amb. 397. So the word issue, *Cook v. Cook*, post 545. *Davenport v. Hanbury*, 3 Ves. 257. *Freeman v. Parsley*, *ibid.* 421.



But the word issue may be qualified and restrained, *Horsepool v. Watson*, *ibid.* 383. And upon the construction *grand-children* may come in under the description of *children*, it appearing to be the intention of testator they should do so, *Royle v. Hamilton*, 4 Ves. 437. in which however the decision turned upon the word *issue*. So in the case of a settlement, the intention of the settlor shall carry the word *children* to the extent to let in *grand-children* and great-grandchildren, *Wythe v. Blackman*, 1 Vez. 196. Amb. 555. S. C. Note, it is so in the printed report, but there is only the word *issue* in the Register's Book. Vide *Davenport v. Hanbury*, *ub. sup.* But the word *children* shall not be taken to mean *grand-children*, when there can be any other construction, per *Master of the Rolls*, in *Reeves v. Brymer*, 4 Ves. 698. et vide *Weld's case*. 6. Co. Rep. [*Shelley v. Bryer. Jacob*, 207.]

DE

[ 109 ]

## TERM. S. MICHAELIS, 1689.

## IN CURIA CANCELLARIÆ.

HIDE *versus* COOTH.

**SUBMISSION** by order of court to a reference, and the award to be made to be confirmed by the decree of the court, without appeal or exception; yet upon debate, exceptions to the award admitted.

a reference, and the award to be confirmed by decree of the court without appeal or exception; yet exceptions to the award admitted.

*Note, Per Lord Maynard*, if the submission to an award be conditional, *ita quod* an award be made *de & super præmissis*, &c. there if the award be not of the whole it is void: but if the submission be not conditional as aforesaid, then, though the award be but of part of the matters referred, it is good for so much as it settles, though it leaves other things at large. (1)

is void. But if the submission be not conditional, then the award, though made but of part of the premisses submitted, is good *pro tanto*.

CASE 106.  
Die Jovis,  
17 Oct.  
In Court.  
Lord MAY-  
NARD, Lord  
KECK, Lord  
RAWLINSON.  
Eq. Ca. Ab.  
48. pl. 3. 51.  
pl. 3. S. P.  
Submission to

If a submis-  
sion to an  
award be  
made condi-  
tional, *ita  
quod* the award  
be made *de  
præmissis*, if  
the award be  
be not made  
of the whole it

(1) Vide on the general doctrine of awards in reference to the interference of this court, *Brown v. Brown*, ante 1 vol. 157. *Carter v. Carter*, *ibid.* 259. *Cresley, v. Carrington*, *ibid.* 469. and cases respectively cited in not. there. *Norton v. Mascal*, ante 24.

CASE 107.  
In Court.  
22 die Oct.  
Eq. Ca. Ab.  
156. pl. 2. 362.  
pl. 15. S. C.  
Though a free-  
man of Lon-  
don leaves  
London, and  
resides in the  
Country, yet  
on his death,  
his personal  
estate shall be  
subject to the  
custom.

ELIZ. WEBB, Widow,

Plaintiff.

JOHN WEBB & Al', è contra,

Defendants.

**JOHN WEBB**, the plaintiff's late husband, being a freeman of *London*, but having left the town and living many years at *Winchester*, in *June* 1684, made his will, and thereby devised a chattel lease to the defendant *Nicholas Webb*, and all his books to the defendant *John Webb*, and as to all the rest of his estate, consisting in money, goods, mortgages, and credits he gave the yearly profits and benefit thereof to the plaintiff his wife for life, by quarterly payments; and directed his executors out of his estate to pay the plaintiff's funeral charges after her death, and devised to her the use of his plate, &c. during her life, and directed that his stock and estate in the hands of the defendant *Cranmer*, should remain there during his wife's life, and the product paid to her for her maintenance, and devised several particular legacies, and after the death of his wife devised over the residue and surplus of his estate to the children of his brother *Nicholas Webb*, &c. and made *John Webb*, *William Cranmer*, & Al', executors.

Freeman of  
London hav-  
ing a wife and  
no child, de-  
vises a lease  
for years to A.  
and his books  
to B. and the  
use of the rest  
of his personal  
estate to his  
wife for life,  
decreed the  
wife shall have  
the moiety of  
the lease, and  
of the books,  
though speci-  
fically devised  
to other per-  
sons. Also  
the wife shall  
have a moiety  
of the whole  
personal estate

This cause was first heard at the *Rolls* on the 8th of *Feb.* 1681, and decreed that the plaintiff by the custom of the city of *London*, should have her widow's chamber, and one entire moiety of the personal estate, after debts paid, as well of the lease, and books, which were specifically devised away, as of all the rest and residue of his estate by the custom of the city of *London*, and should have the benefit of the other moiety for life by the will, and decreed an account accordingly; \* which decree was confirmed upon an appeal to the *Lords Commis- sioners*. And the case of *North* and *North* was cited, where an inhabitant in the province of *York* made a will, and devised a moiety of his estate to his wife; adjudged that the widow should have *three-fourths*: and *Ryder's* case, where the widow had a moiety by the custom, and a legacy of *one thou- sand five hundred pounds* out of the other moiety. (1)

[ \*111 ]

A man by  
marriage-  
settlement  
provides 4000*l.*  
for daughters,  
and having two daughters, by will gives them 2000*l.* apiece for their portions, without taking notice of the settlement; the 2000*l.* apiece by the will, shall be in satisfaction of the portion by the settlement.

But on the contrary were cited the cases of *Bloyes* and *Bloyes*, (2) where *four thousand pounds* was provided as por- tions for daughters by marriage-settlement, and there being

(1) Vide *Caldwell v. Bradshaw*, at the *Rolls*, 18th *June*, 1765.

(2) Ch. Rep. 85.

two daughters, the father by his will gives them *two thousand pounds* apiece for their portions, without taking notice of the settlement; and decreed that the *two thousand pounds* by the will, should be in satisfaction of the portion by the settlement; and *Chadwick* and *Love's* case. (3)

WEBB v.  
WEBB.

In the principal case a question was made, whether the specific legatees of the lease, and of the books, being as to a moiety evicted by the widow by the custom of the city of *London*, should have satisfaction made for what was so evicted as against the legatees at large, or against the legatee of the surplus.

A Freeman of London devises a lease for years to J. S. who is evicted of a moiety thereof by the widow claiming it by the custom.

The specific legatee shall have no satisfaction for this eviction out of the surplus: the testator having power to dispose only of a moiety.

Adjudged they should not; for though a specific legatee has a preference, and is not to abate in proportion with other legatees, where the estate falls short, as to the payment of debts; yet in any case he cannot have more than what the testator devised to him. Now the testator's widow, by the custom of the city of *London*, there being no child, was intitled to a moiety, so the testator could devise but one moiety, nothing more passed by his will, and therefore the specific legatees must be contented with a moiety. (4)

Specific legatee is not to abate in proportion with other legatees, where there is a deficiency to pay the debts.

(3) Ante 1 vol. 6.

vide Stat. 11 Geo. I. Cap. 18. Sect. 17.

(4) Reg. Lib. 1689. B. fol. 99. Sed Et vide *Brown v. Allen*, ante 1 vol. 31.

### JOHNSON *versus* MILKSOPP.

[ 112 ]

THE defendant's testator having made a mortgage of his lands for a considerable sum of money, by his will appoints them to be sold for payment of the mortgage-money, and afterwards in another part of his will, devises the lands so in mortgage, as to one moiety thereof to the plaintiff, &c. and makes the defendant executor, and devises his personal estate to his executor for payment of his debts.

CASE 108.  
Die Sabbati,  
26 Octob'.  
In Court.  
LORDS COM-  
MISSIONERS.

One mort-  
gages his  
lands, and by  
will appoints  
them to be  
sold for pay-

ment of the mortgage-money, and afterwards in another part of his will devises a moiety of the mortgaged premises to A. B. The personal estate shall be applied to pay off the mortgage in favour of the devisee.

The single question was, whether the personal estate should be applied to discharge the mortgage, for the benefit of the legatee.

The cause was first heard at the *Rolls*, and decreed, there, that the personal estate should be so applied for the advantage

JOHNSON v. MILKSOPP. of the legatee ; and the decree upon an appeal was confirmed by the Lords Commissioners. (1)

(1) Reg. Lib. 1689. A. fol. 53. But p. 4. *Pockley v. Pockley*, *ibid.* 36. the question does not appear there. *Meud v. Hyde*, post 120. [See *Howel Vide Wynne v. Littleton*, ante 1 vol. v. *Price*, 1 P. Wms. 291 and note.]

## CASE 109.

Lunæ,  
28 Octob.  
In court.  
LORDS COM-  
MISSIONERS.  
Lessee for  
years having  
agreed with  
the lessor to  
surrender his  
lease, delivers  
up the key,  
which the  
lessor accepts,  
but afterwards  
refuses to take  
the surrender  
of the lease.  
Decreed the  
lessee should  
be discharged  
of the rent.

[\*113]

Lessee for  
years decreed  
to admit an  
attornment.

NATCHBOLT *versus* PORTER.

SIR George Moore being lessee of a house in *Hatton Garden*, under 60*l.* per ann. rent, assigns his term to *Porter*, who covenants in the assignment, to indemnify him against the covenants in the original lease. Sir *Charles Rich* buys the reversionary interest of the lessor, and treated with *Porter* to surrender the term, and an assignment was made betwixt them for that purpose, and the key delivered and accepted: but afterwards Sir *Charles Rich* altering his purpose of living\* in the house, it stood empty for some years, and then he brings a bill against Sir *George Moore*, who was the original lessee, to compel him to admit an attornment, in order to his bringing his action at law for the rent: but *Porter* was made no party to that suit; however Sir *George Moore* in his defence did insist upon the agreement made between Sir *Charles Rich* and *Porter* for the surrendering of the lease, and that the key was delivered pursuant thereunto, &c. But he was overruled in that matter at the hearing, and decreed he should go to a trial at law, and admit an attornment. (1) But Sir *George Moore's* attorney pleading that Sir *George* never attorned, upon the plaintiff's coming back into this court, it was decreed Sir *George* should pay the rent arrear, amounting to about four hundred pounds.

Now *Natchbolt*, the executor of Sir *George Moore*, brought his bill to be reimbursed against *Porter*, according to his covenant on the assignment, upon which he could not recover at law, by reason that Sir *Charles Rich* could not at law have recovered of Sir *George Moore* for want of an attornment.

Mr. *Porter* by answer, set forth the agreement made with Sir *Charles Rich* for surrendering his term, and delivery of the key, and his acceptance of it, &c. and therefore insisted he ought not to be charged, and the court now upon the

(1) Note. All grants and conveyances are now made good without attornment, Stat. 4 Ann. Cap. 16, Geo. II. Cap. 19, Sect. 11. And attornments by tenants to strangers claiming title to the estates are made void, by Stat. 11 Geo. II. Cap. 19, Sect. 11.

hearing of the cause was of opinion that the agreement was well proved, and a good discharge, and *Porter* not liable to answer any rent after that time: and though the court had decreed otherwise against *Sir George Moore*, yet *Porter* being no party to that suit, was not bound thereby, and therefore without any regard to that decree, they were to judge upon the case then before them, and saw no reason to relieve the plaintiff. (2)

NATCHBOLT  
v. PORTER.

None but parties to the suit are bound by it.

The court upon this case observed the inconveniency of going on with a cause without proper parties, and it was *Sir George Moore's* fault that he did not plead, he had assigned to *Porter*, and insist that he ought to have been made a party to the suit.

[ 114 ]

(2) Vide on this point, *Harvey, v. Mountague*, ante 1 vol. 122. and cases cited in note there.

### FISH *versus* JESSON & Ux.

THE defendant *Jesson*, being servant to one *Mr. Mayo*, he by his will devises to the defendant a legacy of 50*l.* and 20*l.* per ann. for his life, and by his will mentions to acquit, exonerate, and discharge the defendant of all debts, accounts, reckonings and demands whatsoever.

demands, will transfer the property of goods which defendant then had in his hands belonging to plaintiff's testator.

CASE 110.  
Die Martis,  
29 Octobris.  
In Court.  
LORDS COM-  
MISSIONERS.  
Whether a re-  
lease by will  
of all debts,  
accounts and  
hands belong-

Now the defendant at the time of the will and death of the testator, having in his hands a trunk of the testator's, in which were medals, jewels, &c. alledged to be of great value; the question was, whether the release or discharge should be taken to go as to that trunk, &c.

For the plaintiff it was insisted that the property, as to that trunk, &c. continued always in the testator, and a release even of all demands, would not translate the property; and cited *Southcott's Case*, Co. 4. Rep. If the bailor keep the key and the goods are lost, the bailee is not answerable: and besides the word (*demand*) being in this case, in company with the words *debts, accounts, and reckonings*, it ought to be restrained and taken in that sense, and to matters only of that sort and kind, and not to be taken so as to pass the property of goods, that were not in controversy nor questioned.

But for the defendant it was insisted, the plaintiff's bill contained no equity; that the plaintiff was a stranger to the testator, no way related in blood, and yet had by the devise

[ 115 ]

FISH v.  
JESSON.

*three hundred pounds per ann.* of lands of inheritance, and was executor; and if he had any right to the trunk and goods in demand, it was a matter purely triable at law.

*Per Cur.* Forasmuch as the defendant has not by answer, discovered any of the particulars in the trunk, but prayed the judgment of the court, whether he should be obliged so to do; The court therefore ordered that the defendant should admit part of the goods come to his hands, in order to enable the plaintiff to bring his action at law, and if the plaintiff recovered there, he might resort back, and the court would order the defendant to be examined on interrogatories for discovery of particulars, &c. (1)

(1) And in the mean time the defendant to bring the said trunk, and also a bag or purse belonging to the said testator before the Master, who was to open the same, and make a schedule of the contents thereof. Reg. Lib. 1689. A. fol. 33. A verdict was obtained on the trial by the plaintiff, and then the

matter was referred to a Mr. Hunter, and on application to the court, the Master was ordered to deliver the trunk, &c. to the plaintiff by consent. Reg. Lib. 1689. A. fol. 640. Vide *Countess Plymouth v. Bladen*, ante p. 32. *Roberts v. Bennett*, post 136.

#### CASE III.

#### JENKINS versus POWELL.

Die Lunæ,  
11 Novembris.  
In Court.  
LORDS COM-  
MISSIONERS.  
Eq. Ca. Ab.  
301. pl. 1. S. C.  
A. by will  
gives his  
daughter 200l.  
paying his daughter her portion in his life-time, is a satisfaction of the legacy.

THE testator devised to his daughter *two hundred pounds*; *Item, I also give her my household goods, if she shall not be married in my life-time*; and afterwards in his life-time, he gives with his daughter in marriage above *two hundred pounds*, and dies, having not revoked nor altered his will. and afterwards gives with his daughter in marriage above 200l. The testator paying his daughter her portion in his life-time, is a satisfaction of the legacy.

*Per Cur.* The legacy is extinguished by the portion after given: and *Elken Head's* case was cited, where payment in the testator's life-time was adjudged a satisfaction of the like sum devised. (2)

(2) The case was, that one *Alexander Hosea*, not the father of the plaintiff, but being related to and the executor of the mother of the plaintiff's wife, took the plaintiff's wife at the death of her said mother, and maintained her, but was indebted to her in a sum of money as such executor of her said mother, and being so indebted, he made his will, and left her thereby a legacy of 200l. Afterwards he paid the plaintiff's wife the sum of 200l. and on her marriage with the plaintiff, gave her a

further sum of 250l. and died, and it was in proof that the said *Alexander Hosea* had taken from the plaintiff's wife a receipt for the 450l. and that he had also made an entry in his book of accounts whereby he had expressed that he paid the 450l. in full, of the legacies given by his will, and of all debts and demands of the plaintiff. Reg. Lib. 1689. A. fol. 392. On the head of ademption and satisfaction of legacy. Vide *Husbands v. Husbands*, ante 1 vol. p. 95.



BIRKHEAD *versus* COWARD.

THE testator devised to his sister *Dixon* three hundred and fifty pounds, upon condition, that she at or before her death, shall give to her children two hundred pounds thereof; his sister *Dixon* dies in the life-time of the testator. Now, upon a demurrer to the plaintiff's bill, the question was, whether the whole three hundred and fifty pounds were lapsed, or that two hundred pounds thereof should remain to the daughters.

thereof to her children. The sister dies in the life of the testator. The whole legacy is lapsed.

CASE 112.  
Die Jovis,  
Novembris.  
In Court.  
LORDS COM-  
MISSIONERS.  
Eq. Ca. Ab.  
297. pl. 4. S. C.  
One devises to  
his sister 350l.  
on condition  
that at or be-  
fore her death,  
she gives 200l.  
The whole legacy is lapsed.

For the plaintiff it was insisted, that if the devise had been only of the interest of the two hundred pounds to the testator's sister for life, and the principal to the children, that had been a good devise to the children, as to the two hundred pounds, and it would not have been lost by the mother's dying in the testator's life-time, and the intention of the testator in this case amounted to as much; *sed non allocatur per Cur.* but allowed the demurrer, for it being a devise of money, the absolute property vested in the first legatee. (1)

(1) *Miller v. Faure*, 1 Vez. 85. But *Miller v. Warren*, post 207, *Eeles v. England*, post 466. Pre. Ch. 200. S. C. *Elliot v. Davenport*, post 521. 1 P. Wms. 83. S. C. and better reported there, seem contra. As to the words *desire*, *recommend*, &c. creating such a condition, and the nature of it, vide the cases in note by Mr. Finch to *Eeles v. England*, Pre. Ch. ub. sup. and the cases cited by Mr. Saunders in his note

to *Harding v. Glyn*, 1 Atk. 470, and in addition, *Walker v. Dennes*, 3 Ves. jun. 176, and particularly *Malim v. Keighley*, ibid. 333, 529, on appeal, where the leading cases are cited, and the doctrine considered in analogy to the Roman law. Note. The case of *Harding v. Glyn*, ub. sup. is stated from the Register's Book, by the Master of the Rolls, in his judgment in *Brown v. Higgs*, 5 Ves. 501.

FINES *versus* COBB.

A MAN having granted to J. S. common in his down for one hundred sheep and five rams; the bill complained the grantor over-stocked the common, so that the plaintiff the grantee could have no benefit of the grant, and prayed the grantor might be enjoined not to over-stock, &c. Upon debate the court dismissed the bill. (1)

brought, for that the defendant had over-stocked the common.

CASE 113.  
Die Lunæ,  
25 Novembris.  
In Court.  
LORDS COM-  
MISSIONERS.  
Eq. Ca. Ab.  
103. pl. 3. S. C.  
One grants to  
A. common in  
dale for 100  
sheep. Bill  
dismissed.

(1) It should seem he has an action at law, F. N. B. 125. *Robert Mary's* case, 9 Rep. 112.



CHAPMAN *versus* DERBY.

CASE 114.  
Eodem die.  
In Court.  
LORDS COM-  
MISSIONERS.  
Eq. Ca. Ab.  
370. pl. 4.  
Carth. 232.  
S. C.

Administrator  
of a clothier  
brings an

action against the factor for cloths sent by the clothier to the factor. The factor cannot in equity deduct out of the value of the cloth, the money owing to him from the clothier.

THE plaintiff being a factor in *Blackwell Hall*, advanced money to his principal, relying, as surmised, in the bill on the credit of the cloths resting in his hands, to reimburse himself. The clothier died, the administrator sues at law for the cloth, the factor comes in equity, and prays he may on account be allowed the monies he advanced.

*Per. Cur. non allocat'*, for if there be debts of a higher nature, it will be a *devastavit* in the administrator, to pay or discount the plaintiff's debt. (1)

Where there  
are mutual  
dealings be-  
tween a bank-  
rupt and *J. S.*  
only the ba-  
lance is to be  
paid to the  
bankrupt's  
estate.

But in the case of a bankrupt, adjudged by the Lord Chief Justice *Hale*, that where there were dealings on account that a man should not be charged with the account on the credit side, and be put to come in as a creditor for the debt owing to himself, but should only answer to the bankrupt's estate the balance of the account.

(1) But it appears clear, that if *A.* factor to *B.* effect an insurance for *B.* and *B.* be indebted to him on balance of account, *A.* may retain the policy; and that he has a lien on the policy whilst in his possession, *Godin & Al'. v. London Assurance Company*, 1 Burr. 494. and cases cited there. So as to goods purchased by him for his principal. *Ex parte Emery*, 2 Vez. 674. *Ex parte Dumas*, 1 Atk. 234. *Kruger v. Wilcox*, Amb. 252. Et vide *Ex parte Deeze*, 1 Atk. 228. Contra where factor has notice of a special agreement between the owner of the goods and the vendor, as to the application of the money, *Weymouth v. Boyer*, 1 Vez. 416. Et vide *Ex parte Sayers*, 5 Ves. 169. determined on particular

circumstances. But the goods of the principal in the hands of the factor, being a bankrupt, not subject to the bankrupt's creditors, *Godfrey v. Furzo*, 3 P. Wms. 186. and cases cited in not. (2) there. And the general principle seems to be, that all persons having a specific lien or a special property in goods, which is clear and plain, it shall be reserved to him as against general creditors. *Kruger v. Wilcox*, *Ex parte Deeze*, ub. sup. But in the case of a factor, where he delivers up the goods to his principal the lien is gone, *Kruger v. Wilcox*, ub. sup. But in equity, the lien would remain, though the goods were turned into money, *ibid.* 27. Quære how it would be in that case in trover at law, *ibid.*

CASE 115.  
Die Martis,  
26 Novembris.  
In Court.  
LORDS COM-  
MISSIONERS.

THYNN *versus* DUVALL.

THE bill was to redeem or foreclose. It was objected, that the defendant was only tenant for life of the equity of redemption, and the remainder-men over were not made parties.

Court directed a bill to be brought by the defendant *Duvall*, to have a sale made, the mortgage-debt paid, and the surplus distributed amongst the tenants for life, and remainder-men in proportion, according to their respective interests.

SAUL *versus* WILSON.

DECREE made by the *Chancellor* on exceptions to a decree of charitable uses came on the exceptant's petition, to be reheard.

It was objected that the decree on hearing exceptions being once confirmed by the *Chancellor*, that was final by the act of parliament, (1) and there could be no rehearing; and the court seemed to be of that opinion, and mentioned, that there lies no appeal to the house of lords from a sentence in the *delegates*, nor from a decree on the statute of charitable uses, (2) for they cannot have any original jurisdiction, because these matters are grounded upon acts of parliament, and the acts give them none. (3)

CASE 116.  
Die Jovis,  
5 Decembris.  
In Court.  
LORDS COM-  
MISSIONERS.  
No appeal lies  
to the House  
of Lords, from  
a sentence by  
the delegates,  
nor from a de-  
cree upon the  
statute of cha-  
ritable uses.

(1) 43 *Eliz.* Cap. 4. Sect. 10.

(2) Vide contra, as to decree on cha-  
ritable uses, 3 Bl. Comm. 428.

(3) On the 12th *February*, there is an order nisi, and on the 20th *February* following another order, fixing the day for rehearing; the enrollment of the decrees, (there were two causes) to be in the mean time suspended, Reg. Lib.

1689. B. fol. 386, 387, entered *Saule v. Otway*. And by another order of the 27th *June*, (not material) the cause appears to have been reheard on the 14th of *May* preceding, but the entry does not appear. Reg. Lib. 1689. A. fol. 849. entered *Saule v. Otway*. Vide *Mallett v. Trigg*, ante 1 vol. p. 42.

SANDERSON *versus* CROUCH.

ON exceptions to a Master's report, a man marries an administratrix (who before their intermarriage had wasted great part of the estate,) after their intermarriage a suit is commenced against them, for distribution according to the act of parliament, (4) and a decree is had for that purpose; then the wife dies.

*Per Cur.* The husband is not to be charged further than with what was possessed, or came to his, or his wife's hands after their intermarriage. (5)

CASE 117.  
Eq. Ca. Ab. 60.  
pl. 3. S. C.  
Feme admi-  
nistratrix  
wastes the as-  
sets, then  
marries and  
dies, husband  
liable to no  
more than the  
value of what  
came to his or  
his wife's  
hands after  
the inter-  
marriage.

(4) Stat. 22 and 23. Car. 2. Cap. 10.

(5) Vide *Norton v. Sprigg*, ante  
1 vol. 309. *Toller's Law of Executors*,

281, 342. *Pagett v. Hoskins*, arg. Pre.  
Ch. 433.

DE

## TERM. S. HILLARII, 1690.

IN CURIA CANCELLARIÆ.

WOODWARD *versus* GYLES.

CASE 118.  
Die Sabbati,  
11 Jan'.  
LORDS COM-  
MISSIONERS  
MAYNARD,  
KECK, and  
RAWLINSON.  
In a lease for  
years of land,  
lessee cove-  
nants not to

plow pasture land, and if he does, then to pay after the rate of 20s. per ann. for every acre plowed. The court will not grant injunction against the tenant's plowing; for the parties themselves have agreed the damage, and set a price for plowing.

Nor will the  
court relieve  
the lessee  
against the  
penalty, if he  
plows.

MR. *Helier* moved for an injunction to stay waste in plowing. The case was, that the plaintiff let a farm to the defendant at an annual rent, and part of it being pasture land, the defendant covenants amongst other things, not to break up or plow any part of it, and if he did plow any part of it, that he would pay after the rate of *twenty shillings per acre per ann.*

*Per Cur.* The parties themselves have here agreed the damage, and have set a price for plowing, and therefore will not grant any injunction, and declared if the defendant was plaintiff against paying *twenty shillings per acre* for plowing, they would not relieve him. (1)

(1) Et vide *Rolfe v. Peterson*, 6 Bro. Parl. Ca. 470. But injunction granted to restrain the breach of a restrictive covenant secured by the forfeiture of the lease and a penalty, *Barret v. Blagrave*, 5 Ves. 555. Note, It is said the whole *nomine pænæ* reserved on such a covenant, shall be paid, and not 5*l. per cent.* on the rent reserved only, *Aylet v. Dodd*, 2 Atk. 239. And for the distinc-

tion between a bond for services only, and a *nomine pænæ* in leases, to prevent a tenant from plowing, *Benson v. Gibson*, 3 Atk. 396. The principal case does not appear in the Register's Book; but in the Afternoon Minute Book, Mich. 1689, there is an entry of it, which mentions the land in question to be meadow land, and worth 30s. per acre.

[ 120 ]

CASE 119.  
Die Veneris,  
17 Januarii.  
LORDS COM-  
MISSIONERS.  
Eq. Ca. Ab. 22.  
pl. 8. S. C.

WOOTS *versus* TUCKER.

Where a demurrer to a bill of review is allowed, it may be enrolled, otherwise if the demurrer is disallowed.

*PER Cur.* Where a demurrer to a bill of review is allowed, it may be enrolled; but if over-ruled, that cannot be enrolled, so as to prevent the demurrer's being re-argued.

BACK *versus* ANDREW.

PURCHASE made of a copyhold estate by *John Andrew* the husband, and the surrender taken to *John Andrew* and his wife, and *Elizabeth* his daughter, and their heirs. The said *John Andrew*, as being visible owner of the estate, takes upon him to make a conditional surrender by way of mortgage to the plaintiff, and afterwards dies; the plaintiff's bill was against the mother and daughter to discover their title, and to set aside their estates as fraudulent against the plaintiff, who was a purchaser; *sed non allocat'*. Bill dismissed but without costs; for *per Cur.* the husband and wife take one moiety by *intireties*, so that the husband cannot alien, nor dispose of it, so as to bind the wife, (1) and the other moiety is well vested in the daughter.

24 Januarii.  
In Court.  
LORDS COM-  
MISSIONERS.  
Pre. Ch. 1.  
S. C.

*A.* purchases a copyhold estate, and takes the surrender to himself and his wife and daughter, and their heirs. The husband and wife (as one person) take a moiety by *intireties*, and the daughter the other moiety.

The husband mortgages it, and dies; void for the whole, and no relief in equity.

(1) Vide Co. Lit. 187. a. b. Anon. vol. 933. *Green* on dem. of *Crew* v. *Skin*. 182. *Bricker* v. *Whatley*, ante 1 *King*, 2 Bl. Rep. 212.

MEAD *versus* HIDE. (2)

ONE *Davis* by will devises several legacies & *inter al'*, twenty pounds to *John Hide* (the defendant) and makes him executor, and devises his real estate to the plaintiff, \* paying his debts and legacies, (3) and if he did not pay the legacies in *three* months, and the debts in *two* months, the legatees and creditors might enter and hold 'till satisfied.

paying his debts and legacies, and in default of payment within such a time, the legatees and creditors to enter and to hold 'till paid, and makes no express disposition of the surplus of the personal estate. The personal estate shall be applied in case of the real.

CASE 121.  
Sabbati,  
1 Feb'.  
In Court.  
LORDS COM-  
MISSIONERS.  
*A.* by will gives 20*l.* to *B.* and makes him executor, and gives his real estate to *C.*

[\*121]

The question was, whether the personal estate should be applied in case of the real estate. The court decreed the personal estate should go in ease of the real estate, and observed that the devise amounts but to a charge upon the real estate, and extends not to avoid the estate, in case of non-payment; and observed that in this case the defendant has a particular legacy, and there is no devise to him of the *residuum bonorum*. And in case there had

(2) *Gower* v. *Mead*, Pre. Ch. 2. probably, S. C.

(3) The words of the devise are, that said testator did "give and bequeath unto the said *Elizabeth Mead*, (the plaintiff,) all his lands, tenements, messuages, houses, and bullaries of "Salt Water, whatsoever and where-

"soever, to hold to her, her heirs and "assigns for ever, upon condition she "paid all his debts owing and legacies "bequeathed in his will." Reg. Lib. 1689. B. fol. 308. Vide *Johnson* v. *Milksopp*, ante p. 112. *Lovel* v. *Lancaster*, post 183.

MEAD *v.*  
HIDE.

been no executor, can any one doubt, but that the personal estate in the hands of the administrator, should be applied in ease of the real estate, though the real estate were made likewise liable *ut supra*: and besides, here the creditors have a bill, and no one can question but they have a right to be satisfied out of the personal estate, if they think fit to pursue it.

The Lord *Maynard* observing upon the evidence, that *Hide* had drawn the will, said it was a rule in the *civil* law, that *Qui sibi constituit nihil capit*.

CASE 122.  
Die Ven.  
7 Februarii.  
In Court.  
LORDS COM-  
MISSIONERS.  
Eq. Ca. Ab.  
91, pl. 4.—2  
Freem. 111.  
S. C.

### WISEMAN *versus* BEAKE.

*A.* tenant for  
life, remain-  
der to his first,  
&c. son, in  
tail, remain-  
der to his  
nephew *B.*

THE plaintiff had entered into several statutes of great penalties to the defendant's testator, defeasanced for payment of *ten* for *one*, upon the death of his uncle, who was only tenant for life, of a considerable real estate, remainder to his first and other sons in tail, remainder to the plaintiff, in case the uncle died without issue male, and the plaintiff survived him: and \* the plaintiff's uncle dying some years since without issue, the bill was to be relieved against this bargain, and to have up the securities on payment of what was really due with interest.

*B.* enters into several statutes to *C.* for payment of *ten* for *one* upon the death of *A.* in case he died without issue male in the life of *B.*; *C.* in the life of *A.* brings a bill to compel *B.* either to pay principal and interest, or to be foreclosed of any relief against the bargain. *B.* by answer declares the bargain fairly made, and intends to abide by it, and that he would seek no relief against it. *A.* dies, and *B.* brings a bill against the executor of *C.* and notwithstanding *B.*'s former answer, he is relieved against the bargain, on payment of principal and interest without costs.

[\*122 ]

For the defendant it was insisted, that this was not the ordinary case of surprising a young heir into a hard bargain, but Mr. *Wiseman* was above *thirty*, near *forty* years old, when this bargain was made, had long been a man in employment, (to wit) a *Proctor* at *Doctor's Commons*, and of experience in the world: and besides, the defendant's testator, several years after this bargain made, understanding that the *Chancery* began to relieve against such bargains, came to advise with Mr. Serjeant *Philips*, what was fit to be done in the case, and thereupon a bill was exhibited by the testator against the defendant, to compel him either to repay the money with interest, or to be foreclosed of any relief against this bargain; and that in answer thereunto in the life-time of his uncle, he elected to stand to the bargain, and that it was fairly and duly made, and that he would not seek any relief against the same, and therefore ought not now to be relieved against his own election and oath.

*Per Cur.* When he had spent the money, then a specious offer was made to relinquish the bargain on payment of the

money lent with interest, which at that time was impossible for him to do: and though such bill was exhibited, it was not prosecuted, but was a contrivance only to double hatch the cheat; and therefore thought fit to relieve the plaintiff on payment of principal and interest only, without costs, and decreed it accordingly. (1)

WISEMAN v.  
BEAKE.

(1) 24th *January*, there is an entry of an order for production of deeds, and that the plaintiff should attend personally at the hearing. Reg. Lib. 1689. B. fol. 205. And also 16th *June*, of an order for signing and inrolling a decree therein mentioned to have been made on the 7th *February* preceding, on the petition of the plaintiff, same book, fol. 788. but no entry of the decree appears. *Batty v. Lloyd*, ante 1 vol. 141. and cases in not. there.

### DYER *versus* TYMEWELL.\*

CASE 123.

THE bill was to be relieved against a bill of exchange for *fifty* pounds, mentioned to be for value received, which was in truth extorted from the plaintiff by the defendant in the time of *Monmouth's* rebellion, the defendant being then a justice of the peace, and taking upon him to send for whom he pleased, &c. a bill of exchange said to be for value received, but gained by fraud, and for a consideration.

Eodem die.  
In Court.  
LORDS COM-  
MISSIONERS.  
Eq. Ca. Ab.  
126. pl. 10.  
2 Freem. 112.  
S. C.  
Relief against  
a fictitious con-

The court could not well relieve against this bill of exchange, upon pretence that it was gained by threats or menaces, for that was proper at law, and *Duresse* a good plea there; (2) but inasmuch as the defendant by his answer having admitted, that although the bill was drawn for value received, that there was not any money paid; but insisted that he had intrusted one *Andrews* many years ago to sell some clothes for him, and that the plaintiff attached those clothes in the hands of *Andrews*, and for the debt of *Andrews*; whereas they were the defendant's proper goods; and that the plaintiff had often promised to make him satisfaction, and at last gave him the bill of exchange in question in satisfaction thereof: and the plaintiff having proved in the cause that *Andrews* was no factor, nor was indebted to the defendant, and falsified his answer as to that pretence;

[\*123]

The court declared the bill of exchange to be gained by fraud and practice, upon the pretence of a demand that was fictitious, and had nothing of reality in it, and therefore decreed

In case of a  
gross fraud,  
the court will  
give costs to  
be ascertained  
by the party's own oath.

(2) In cases of fraud, equity has a concurrent jurisdiction with law, *Colt v. Woollaston*, 2 P. Wms. 156. *Stent v. Bailis*, *ibid*, 220. and often contrary to and beyond the rules of law, per *Hardwicke*, Lord Chancellor, *Garth v. Cotton*, 3 Atk. 755. [*Sowerby v. Warder*, 2 Cox, 268.]



**DYER v.  
-TYMEWELL.**

the plaintiff to repay the *fifty* pounds with interest, and costs to be ascertained by the plaintiff's own oath. (3)

(3) 'The interest was to be computed from the time of the indorsement of the bill for the receipt of the money, up to the day of making the decree, and the plaintiff was to carry in a bill of particulars of his costs out of purse, by reason of the suit, and to make affidavit of the truth thereof, to be settled by the master. Reg. Lib. 1689. A. fol. 228. Vide *Childrens v. Saxby*, ante 1 vol. 207. *Dorrington v. Jackson*, *ibid.* 450.

**[ 124 ]**  
**CASE 124.**  
**11 Die Feb.**  
**In Court.**  
**LORDS COM-**  
**MISSIONERS.**  
**Eq. Ca. Ab.**  
**249. pl. 8. S. C.**  
**2 Vent. 317.**  
**S. P.**

**PETER CROOKE and ELIZABETH his**  
**Wife, Sister of the half Blood to GEO.**  
**WATT deceased,** } **Plaintiffs.**

**JOHN WATT, Administrator of GEORGE  
WATT, FRANCIS CAMFIELD and  
ELIZABETH his Wife, the said JOHN  
and ELIZABETH being Brother and  
Sister of the whole Blood to the intestate  
GEORGE WATT,**

**The sister of the half blood shall come in for an equal share, upon the statute of distribution, with the brother or sister.**

**THE single point was, whether the sister of the half blood, should come in with the brother and sister of the whole blood, for an equal share of the intestate's estate, or whether the half blood should have only half a share, or should be wholly excluded.**

**brother or sister of the whole blood. 1 Vol. p. 437.**

For the plaintiffs it was insisted, that there were very many precedents in this court, where the half blood had been admitted to an equal share ; that it was almost endless to cite them, and cited the case of *Hill* and *Birds*, where a prohibition had been moved for and denied, and administration thereupon granted to the sister of the whole blood : and a case in the *Modern Reports* to the same effect.

**1 Mod. Rep.  
209.**

[ 125 ]

For the defendants it was insisted by Mr. *Attorney General*, and Mr. Serjeant *Levinz*, that in case of descent, and in all cases where the common law takes notice of blood, the whole blood is preferred, and instanced in many cases ; as where a remainder is limited *proximo de sanguine*, it will go to the whole blood, and the act for distribution of intestate's estates must be expounded according to the common law ; in some cases it directs distribution to be made according to former laws, which must be intended common law. That the courts of common law had always controlled the spiritual courts in these matters, and cited the *Lady Butler's* case, in the Lord



Chief Justice *Hale's* time, where by the statute of *H. 8.* the ordinary is to grant administration to the wife or next of kin, if there be a wife, the spiritual court shall not be suffered to grant the administration from her to the next of kin; that it was not meant by the statute, the ordinary should have that latitude, but that where there was a wife, she should have it; if no wife, the next of kin. (1)

CROOKER v.  
WATT.

1 Salk. 36.

If there be a grandfather, father, and son, and the father dies intestate, the son shall have the administration, and not the grandfather, though they be both in equal degree as to nearness of kindred, and so is the opinion in *Godolphin*, that the child or children shall in that case be preferred as to administration. And cited *Palmer's Reports*, 416. *Latch's Reports*, 67. and *Brown's Case*, 8 Car. that the whole blood is not to be preferred.

If there be grandfather, father and son, and the father dies intestate, the son shall have the administration, and not the grandfather.

As to the case of *Smith and Tracy* in *B. R.* there was a prohibition moved for, because the spiritual court took upon them to distribute to the half blood, and the court ordered a demurrer to be put in, that all might come before the court; but before any judgment in that case, the Lord Chief Justice *Hale* went off the bench, and he and *Twisden* seemed all along to incline in opinion against the half blood, and afterwards the Lord Chief Justice *Rainsford* informing the court, that in the spiritual court they distributed but half a share to the half blood, there was no further proceedings had in the said cause: but then soon afterwards came Doctor *Story's Case* before Doctor *Raynes*, then Judge of the Prerogative Court, and he let in the half blood to a whole share.

1 Mod. Rep. 209. 1 Vent. 307. 316. 323. 2 Mod. 204. 2 Lev. 173. Sir Thomas Jones, 93.

[ 126 ]

*Per Lord Maynard*, there is no doubt, but the half blood is capable of having the administration; even an alien of the half blood is capable, and cited *Hink's Case*, who, he said, died a martyr for the common law, because in the court of wards, he would not swear a lease for one thousand years to be a fee simple, and cited the case in *Dyer*, where administration was granted to the residuary legatees, for that administration is in respect of interest: and said, that the words in the statute for distribution *pro suo cuique jure*, according to law, cannot be interpreted as to former laws; for then there were no former laws in being, and so must be intended according to the common law. (2) And it was observed that in *Scotland*, they

(1) Vide *Stapleton v. Sherrard*, ante 1 vol. p. 315. where *North*, Lord Keeper, of opinion, that the ordinary has a discretionary power to grant administration either to the wife or next of kin.

(2) Vide *Beeton v. Darkin*, post. 170.

CROOKER v.  
WATT.

give but half a share to the half blood: and they hold there, that distribution ought to be, not so much according to the order of nature, but according to the will of the owner. And it could not be presumed, that a man had as great a kindness for those of the half blood, as he had for those of the whole blood.

The court, after long debate, said, this case had been so often adjudged and settled here, that the half blood should have an equal share with the whole blood, that to give a new rule in it now, would make great confusion and disturbance in very many families, &c. and therefore thought fit to decree it, as it had been, to wit, a whole share to the half blood, and an account to be taken accordingly. (1)

[ 127 ]

*Note.* Upon an appeal to the House of Lords, this decree, after civilians and common lawyers had been heard on both sides at the bar of the House of Lords, was confirmed about the beginning of *Easter Term* last, in last sessions of *parliament*. (2)

(1) Reg. Lib. 1689. A. fol. 260.

*chelsea v. Norcliff & Al'*. ante 1 vol.

(2) 15 May, 1690. Journ. Ho. of 403. 4. 437. Show. Parl. Ca. 108.  
Lords, 14 vol. 499. vide Earl of Win-

### SCOLEFIELD *versus* WHITEHEAD.

CASE 125.  
Die Jovis,  
20 Feb.  
LORDS COM-  
MISSIONERS.  
Bill for a spe-  
cific perform-  
ance of a  
covenant,  
whereby the  
plaintiff was to have a pit in the defendant's ground, for digging black stones. Proved that the defendant had for above sixty years been in quiet possession of this pit, for digging black stones. Bill dismissed.

THE bill was to have a covenant decreed in specie, whereby the plaintiff was to have a pit in the defendant's ground for digging of black stone, and that when the old one failed, he might sink a new pit, and with a further covenant that there should be no other pit there for the digging of black stone.

But it appearing in the cause that the defendant, and those other under whom he claims, had been in the possession of a pit there, and had used the same for above *sixty* years past; the court instead of decreeing the covenant in specie, dismissed the plaintiff's bill. (1)

(1) Without costs. Reg. Lib. 1689. B. fol. 260;

RICHARD PARROT,

Plaintiff.

JOHN WELLS and ELIZABETH ux'  
*ejus nuper* ELIZABETH WILSON and  
 HENRY CLERKE,

CASE 126.  
 Eodem die.  
 LORDS COM-  
 MISSIONERS.

Defendants.

THE plaintiff's father applied himself to the defendant *Henry Clerke*, a scrivener, to borrow money, and in (81) took up two hundred pounds, and the plaintiff and one *How* became bound as sureties with the plaintiff's father in two bonds to the defendant *Elizabeth*,\* (then *Elizabeth Wilson*) and one Mrs. *Abdy*. The defendant *Clerke* the scrivener, had the ordering and disposing of the monies, and from time to time received the interest due upon the bonds. In 1687, the plaintiff's father failed, and the plaintiff likewise, by reason of the debts for which he stood engaged for his father, failed, and the other surety was dead insolvent, so that the plaintiff's father compounded his debts with his creditors at seven shillings in the pound, and he applied to the defendant *Clerke*, to know where his clients (to wit) the said Mrs. *Wilson* and Mrs. *Abdy* lived; but the defendant told the plaintiff and his father, they need not trouble themselves to go to them, for they would be governed by him, and would make no agreement without him, but what agreement he made, they would stand by; hereupon they treat with *Clerke*, the scrivener, and agree for seventy pounds to be paid down, and thirty pounds to be secured to be paid in a short time, that the bonds should be delivered up to be cancelled; so he had ten shillings in the pound composition where other creditors had but seven shillings. The seventy pounds were paid pursuant to the agreement, and the 30*l.* tendered. The defendant *Clerke* refused to deliver up the bonds according to his agreement, and pretended his clients had the bonds, and that they would not part with them without payment of the whole debt, and threatened to put the bonds in suit; the bill was therefore to compel the defendant *Clerke* either to perform the agreement, and deliver up the bonds to be cancelled, or otherwise be decreed to save harmless and indemnify the plaintiff against the same.

Where an agreement made by a scrivener on behalf of his client, to compound his client's debt, shall bind the scrivener, though not the client.

[ \*128 ]

The defendant *Clerke*, by answer, confessed the making of the agreement, and said he did it in expectation that his clients would have been governed by him, as they had in other matters; but they refused to stand to the agreement, and hoped that as he acted only as their agent, and was not to get or lose by the matter, he should not be compelled to make good the agreement.

PARROT v.  
WELLS.

After long debate the court decreed the plaintiff to pay what was due to the defendant *Wells* and his wife, for principal, interest and costs, on the bond in question, and the defendant *Clerke* to repay, what the plaintiff should so pay to *Wells*, and to indemnify the plaintiff according to the agreement. (1)

(1) Vide *Roberts and Al'. v. Matthews and Al'*. ante 1 vol. 150. [*Johnson v. Ogilby*, 3. P. Wms. 277.]

CASE 127.  
Eodem die.  
In Court.  
LORDS COM-  
MISSIONERS.

### AYNESLEY versus VAUGHAN.

THE plaintiff's bill was to have the benefit of an agreement by which she surmised that one *Dalton Shaftoe* agreed, in case of failure of issue of his own body, the lands should remain to the plaintiff, and that he and his heirs should stand seised of the premises, upon such trust as aforesaid.

The court supposed the deeds produced by the plaintiff purporting such agreement to be forged: but in case there was any such real agreement, yet it was well barred by the subsequent agreement.

CASE 128.  
9 die Feb.  
LORDS COM-  
MISSIONERS.  
2 Vent. 50. 3.  
Lev. 260. 2  
Lutw. 1161.  
Pre. Ch. 7.  
S. C.  
A grazier driving a flock of sheep to London, is encouraged by an innkeeper to put his sheep into pasture grounds belonging to the inn. The landlord seeing the sheep, consents they shall stay there one night, and then distrains them for rent. Grazier relieved against this distress.  
[ \*130 ]

RICHARD FOWKES, BRIAN SATER- } Plaintiffs.  
THWAITE and THOMAS FOWLER, }

THOMAS JOYCE, JOHN WILLS and } Defendants.  
GEORGE LAWRENCE & Al'.

THE defendant *Joyce* being owner of the *George* inn in *Chipping Barnet*, in which inn several closes of pasture lay near adjoining, and had been always used and occupied \* with the inn. The defendant *Wills* was his tenant at a great annual rent, and was run *one hundred and thirty-two* pounds in arrear of rent. The plaintiffs being graziers, their servant was driving *one hundred twenty-three* fat sheep to sell at *Smithfield*, and at *Barnet* were met by one *Matthews* a servant of *Wills* the inn-keeper, who tells them, that they had good grass in the grounds belonging to the inn, and that they should be there at the usual rate of *eight* pence *per score per night*: before they were *levant* and *couchant*, the defendant *Joyce* comes to the ground, demands whose sheep they were, and seeming to be in a passion, the drovers offered to take out their sheep, but at last *Joyce* said, being they were in they might stay in; yet afterwards when the men were gone to the inn, *Joyce* caused the sheep to be drove into the pound, where they were kept *four or five* days, and the plaintiffs were forced to replevy them,

and *Joyce* avowed for rent-arrear, and obtained judgment at law on a demurrer: the bill was to be relieved against this judgment.

FOWKES v.  
JOYCE.

Upon the hearing of the cause, it being fully proved that *Joyce* was privy to the putting in the sheep there, and that when the plaintiff's servants were, upon *Joyce's* seeming to be in a passion, about to take them out, *Joyce* told them they might stay there for that night; the court looked upon this as a fraud and contrivance in *Joyce*, to subject the plaintiff's sheep to his distress; and they seemed to think that the grounds lying to the inn, and used therewith, ought to have the same privilege as the inn hath, and passengers cattle not to be distrainable there. But however said, there was sufficient cause to decree against *Joyce* for a fraud; and decreed *Joyce* to answer to the plaintiffs the value of their sheep with costs, both at law, and in this court. (1)

The case of *Brodon* and *Pierce* was cited, where there being twenty years arrear of a rent-charge, and cattle came by escape out of the next ground, and were distrained, &c. the Lord *Nottingham* relieved against it in this court. (2)

[ 131 ]  
If cattle escape  
into the next  
ground, and  
are distrained  
there for rent,  
equity will relieve against such distress.

(1) Reg. Lib. 1689. A. fol. 234.

(2) Vide *Anon.* Dy. 317. b. pl. 9.  
*Kempe v. Crewes*, 1 Ray. 167. *Button*  
*v. Cole*, Carth. 442. where adjudged  
that the cattle of a stranger, levant and

couchant extended upon an outlawry  
may be taken upon a *levari facias* for  
the King.—Sed quære, if fraud in the  
case as here.

### BEVERLEY versus BEVERLEY & Al'.

ONE point in this case was, that old Sir *James Beverley* having by his will devised the lands in question to his then eldest son *Thomas Beverley*, for the term of sixty years, if he should so long live, and from and after his decease to his grandson *James*, eldest son of the said *Thomas* in tail male, remainder in tail male to the defendant *Thomas Beverley* his next brother, *James* the grandson intermarried with the plaintiff; and upon the marriage a settlement was made, and a common recovery suffered by *Thomas* the father, and *James* the son.

CASE 129.  
22 die Feb.  
LORDS COM-  
MISSIONERS.  
Devise of land  
to A. for 60  
years if he so  
long live, and  
from and after  
the death of  
A. to his eldest  
son B. in tail,  
whether this  
be a vested or  
contingent re-  
mainder.

The objection was, that the devise to *Thomas* being only of a term of sixty years, if he should so long live, and then from and after his decease to *James*: that the freehold during the life of *Thomas* was in abeyance, (3) and no good tenant

(3) Vide *Fearne*, Cont. Rem. p. 513. on the doctrine of abeyance.

BEVERLEY v.  
BEVERLEY.

could be to the *præcipe*, and by consequence *James* the grandson, being dead without issue male, the lands belonged to the defendant *Thomas*, as next brother of the said *James*, by virtue of the entail which was not well docked. (1)

Hutt. 119.  
Pollexf. c. 67.  
[ 132 ]

Mr. *Finch* argued for the plaintiff, that the recovery was well suffered, and that the limitation of the entail was good expectant on the term for *sixty* years: and that it was so resolved in the Lord *Derby's* Case, in *Hutton's Reports*, and that judgment was confirmed again upon a *sci. fac.* That ours is a much stronger case being a limitation in a will, where the intent of the party ought to be regarded, and no advantage to be taken for want of the precise and nice penning of it, by reason that testators are presumed to be *inopes concilii*; and therefore in a will a devise unto a man and his heirs, with a remainder, is good; so here the devise to *Thomas* for *sixty* years, if he shall so long live, and from and immediately after his decease, that ought to be intended of his dying within the term, which was highly presumable, *Thomas* being then above *forty* years of age; the possibility that *Thomas* might over-live, was a very remote and foreign conjecture; so that there is not any gap or *Hiatus* in the settlement as they would pretend; but by this construction the freehold vested immediately in *James*, and *Thomas* had only a term for *sixty* years, if he should so long live. But besides the testator at the time of the devise had only an equitable estate in him, the estate in law at the time of his purchase remaining in one *Biggs* an infant, who had not to this day made any conveyance, so that the common recovery, though it was defective as to a tenant to the *præcipe*, yet it was sufficient and formal enough to bar an equity.

A defective common recovery as to a tenant to the *præcipe* will bar an estate tail in a trust only.

*Per Cur.* It would be hard to make such construction on the words of the will, as to say where a term is limited to a man for *sixty* years if he shall so long live, and from and after his decease, to *A. B.* that it must be meant, from and after his decease within the term; for suppose he should out-live the term, should the remainder-man take in the life-time of *Thomas*, that were a construction contrary to the words and intention of the testator. And as in this case, it is of a term for *sixty* years; suppose it had been of *six*, *seven*, or *eight* years, could there be any room then for such construction; and at what number of years is such construction to begin;

[ 133 ]

but in regard the testator had only an equitable title in him-



self, and the estate in law stood out in an infant, the court held the recovery sufficient, and that even a bargain and sale would have done it; and decreed it accordingly. (1)

tail of a trust.

BEVERLEY v. BEVERLEY. Bargain and sale only will bar an estate-Post Ca. 501.

In this case the widow of the testator having given a release of her dower upon a pretence that *three thousand five hundred pounds* was given to her by her husband's will in lieu thereof; and this release being on the plaintiff's marriage produced and shewed to the plaintiff and her relations, and in confidence thereof the marriage having taken effect, and a settlement made and portion paid; whether now the widow, who had recovered her dower at common law, should be concluded by this release, and obliged to part with her dower to make good the plaintiff's settlement.

A mother having a right of dower, to encourage a marriage of her son to A. B. releases her dower, and shews the release to the wife and her relations. It shall bind the mother, though the release was

obtained by a fraudulent suggestion.

The court decreed it for the plaintiff, though it was strongly insisted that this release was gained by an ill practice, soon after the death of her husband, and upon a pretence that she had *three thousand five hundred pounds* given her in the will, in lieu of dower, whereas such sum was given her by the will, but not meant or intended to be in lieu of dower; and that her son who surprised her into that release, had also defrauded her of that *three thousand five hundred pounds*. (2)

(1) Vide *North v. Way*, ante 1 vol. 13. and cases cited in not. there.

(2) The decree was, that as the estates were equitable, the plaintiffs were entitled, viz.: The mother to

her jointure, and three infant daughters to a portion of 2000*l*. Reg. Lib. 1689. A. fol. 440. Vide *Hunsden v. Cheyney*, post 150.

### ANONYMOUS.

THE case was, that one *John Saunders* by his will, dated the 14th of *October* (86) devised *inter alia*, as follows, viz. my nephew *William Beng*, I make my sole executor, and to him and his heirs, I give and devise\* all my messuages, lands, tenements and hereditaments, upon trust to sell the same, and with the monies to be raised by sale, and personal estate, to pay my debts, and portions to my children; and gave to each of his *nine* children *one hundred pounds* a-piece.

his childrens portions, and gave to his children 100*l*. apiece. The money arising by this sale is not legal assets, and the debts and childrens portions are to be paid in equal proportions.

CASE 130. Die Jovis, 27 Feb'. In Court.

LORDS COMMISSIONERS.

One makes his nephew executor, and devises to him and his heirs all his lands in trust, to sell and to pay all his debts, and

[ \*134 ]

The question was, whether the money raised by sale should be legal assets.



**ANONYMOUS.** *Per Cur.* The devise being to him and his heirs, the lands must go in a course of descent, and he must take as a trustee, and not as an executor; and therefore decreed debts and portions to be paid in proportion. (1)

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(1) Vide *Girling v. Lee*, ante 1 vol. 64, 5.

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## CASE 131.

MARQUIS of HALLIFAX *versus* HIGGENS.

Eodem die.

Eq. Ca. Ab. 28.  
pl. 4. S. C.Mortgage at  
5l. per cent.  
with covenant  
to pay 6l. on default of paying the interest within 60 days after due.

MONEY lent on a mortgage at *five pounds per cent.* the mortgagor covenants to pay *six pounds per cent.* if he made default for the space of *sixty* days after the time of payment.

If the interest  
is behind 60  
days, the  
mortgage  
shall carry  
interest at 6l. per cent.

The court decreed that from default made, he should pay *six pounds per cent.* and that this covenant was the agreement of the parties, and not to be relieved against as a penalty. (2)

and the court will not relieve against it.

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(2) Reg. Lib. 1689. B. fol. 265.

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## CASE 132.

FORTREY *versus* FORTREY.

1 Show. pl.

351. Salk. 36.  
Holt. 42.

Eq. Ca. Ab.

275. H. pl. 2.  
S. C.In case of  
judgment  
recovered

WHERE a man obtains judgment against an heir, who has a reversion in fee descended to him, the judgment is only of assets *quando acciderint*; and the creditor cannot by a bill in equity compel the heir to sell the reversion, but must expect until it falls. (3)

against an heir, who has a reversion in fee, which is only assets *cum acciderit*; court will not decree a sale of the reversion, but the creditor must wait till it falls.

(3) It is a gross inaccurate expression in the Law Books, where it is said, that a reversion in fee is not assets, for though in such case the heir may plead *riens per descent*, yet when the reversion falls, a *Sci. Fa.* may issue on the judgment, *quando*, &c. per *Hardwicke*, Lord Chan. M. S. *Kinaston v. Clarke*, 2 Atk. 204.

## [ 135 ]

## CASE 133.

GLADWYN *versus* HITCHMAN.

Die Lunæ,

3 Mar.

LORDS COM-

MISSIONERS.

Eq. Ca. Ab.

287. pl. 3. S. C.

THE mortgage was made in *June*, 1678, for 450l. principal money, payable at the end of *five* years, and interest in the mean time half yearly; no interest being paid, about *two* A mortgage made for 450l. payable at the end of five years, with interest at 5 per cent. in the mean time. About two months before the end of the five years, the mortgagee assigned over the mortgage for 560l. being the principal and interest then due. The 560l. shall carry interest, though the five years were not elapsed; the mortgage being forfeited by the non-payment of the interest.

~~months~~ before the *five* years were expired, the mortgagee assigned to the defendant in consideration of 560*l.* being so much due for principal and interest.

GLADWYN v.  
HITCHMAN.

The question was, whether the interest then due, should carry interest. It was objected, that he ought not to have assigned until the *five* years were quite expired; *sed non allocatur*; for the mortgage was forfeited long before by non-payment of the interest; and the court decreed the 560*l.* to be paid with interest from the time of the assignment. (1)

(1) The plaintiff in this case, was the assignee of the mortgagee, and he was decreed to hold the lands until payment, as ordered by the decree, and to take the rents and profits in lieu of interest, from the time of the

settlement of the account by the Master, without rendering any account for the same. Reg. Lib. 1689. A. fol. 275. Vide on the head of interest, on interest, Earl of *Macclesfield* v. *Fitton*, ante 1 vol. 169.

DE

[ 136 ]

## TERMINO PASCHÆ, 1690.

### IN CURIA CANCELLARIÆ.

#### BENTHAM *versus* ALSTON.

THE plaintiff was successor to a parson, who had made a lease to the defendant of his tithe and glebe for *three* years; *two* years and an half expired in the life-time of the lessor, and the lessee had taken the profits of the whole year in the parson's life-time, who died before the last rent-day, the plaintiff's bill was to have that half year's rent. *Vide* Statute 28 *H. 8. cap. 11*. The plaintiff had not made the executor of his predecessor a party. *Per Cur. dismiss the bill.* (2)

CASE 134.  
MAYNARD,  
KECK, AND  
RAWLINSON,  
Lords Com-  
missioners.  
Die Martis,  
13 Maii.  
Post. Ca. 188.

(2) Without costs. Reg. Lib. 1689. A. fol. 521. Vide post 204. S. C.

#### ROBERTS *versus* BENNET, & é contra.

BENNET devised to the plaintiff a legacy of *one hundred pounds*, and by his will releases her of all debts and demands, *lemes* to *B.* all debts and demands, and afterwards *A.* lends *B.* 100*l.* whether this 100*l.* is released by the will.

CASE 135.  
Eodem die.  
*A.* devises  
100*l.* to *B.* and  
by will re-  
leases *B.* 100*l.* whether this 100*l.* is re-

ROBERTS v.  
BENNET.

and after the date of the will, lends her *one hundred pounds*. The plaintiff's bill was for her legacy. The defendant had a cross bill to be satisfied this *hundred pounds*.

The question was, whether the will should discharge this last *hundred pounds* without any new publication: and the case of *Northcot* and *Northcot* was cited for that purpose; if a man *devises all* his personal estate; *that is a fluctuating thing*; and though the estate after the publishing the will *encreases*, all passes: and so is *Bret* and *Rigden's* case. (1)

*Per Cur.* If the executor can recover it at law, he may; we will not take away his remedy, if any he hath; nor will give him any aid in equity; and therefore decreed payment of the legacy, and dismissed the cross bill. (2)

(1) So *Gayre v. Gayre*, post 538. *Masters v. Masters*, 1 P. Wms. 424. *Wind v. Jekyll*, ibid. 574. *All Souls Coll. v. Codrington*, ibid. 598. Sed quære as to chattel real, *Bunter v. Cook*, Salk. 237.

(2) The decree is not correctly stated. It appears from the answer of the plaintiff in the original bill to the cross bill, that the testator had been in the habit of maintaining, or giving sums for the maintenance of the plaintiff from her cradle, and the answer denied that 100*l.* had been lent to her by the testator as above stated, but it admitted, that between the date of the will and the death of the testator, he had at various times, during that interval, paid or given to

her divers sums of money, amounting in the whole to upwards of 100*l.* and the decree was, (int. al.) that the 100*l.* legacy, together with interest, from the time appointed by the will for payment thereof, should be forthwith paid to the plaintiff, and dismissed the executors cross bill without costs, "unless the said executors or either of them do or shall sue or molest the plaintiff for the said 100*l.* pretended to be lent her by the said testator as aforesaid, and in such case the said *Robert* and *Richard Bennet*, (the executors) do and shall pay unto the plaintiff her costs to be taxed." Reg. Lib. 1689. B. fol. 460. vide *Fish v. Jesson*, ante 114.

#### CASE 136.

Mercurii,  
14 Maii.  
Eq. Ca. Ab.  
398. pl. 5. S. C.  
100*l.* devised  
to an infant  
payable at 21,  
and if he dies  
before, then it  
is devised  
over, and the  
interest of the  
100*l.* is for the  
child's main-  
tenance. The  
trustee lays  
out 20*l.* of the  
100*l.* for placing  
out the child an  
apprentice, and  
the child died  
under 21, this  
20*l.* shall be  
allowed.

#### FRANKLIN versus GREEN.

LEGACIES of *one hundred pounds* a-piece devised to four children, payable at twenty-one or marriage, and a maintenance not exceeding the interest in the meantime, (3) and the plaintiff is appointed to receive the profits of the trust-estate during their infancy; the plaintiff paid *twenty pounds* for the placing out one of the children an apprentice, who died an infant; and the *hundred pounds* being limited over in case of death before *twenty-one* or marriage; it was objected, the plaintiff could not have an allowance of that *twenty pounds* out of the dead child's *hundred pounds*.

100*l.* for placing out the child an apprentice, and the child died under 21, this 20*l.* shall be allowed.

(3) The words of the bequest as to the maintenance were, "to be maintained as far as the interest of their several legacies will extend." R. L.

*Per Cur.* It being paid to place the child out an apprentice, it was well bestowed, and might have been of better advantage to him than all the rest of his portion, and therefore decreed it to be allowed upon the account. (1)

FRANKLIN v.  
GREEN.  
[ 138 ]

(1) Together with two several sums of 11*l.* and 16*l.* for clothes and charges of her funeral, notwithstanding the survivorship. Reg. Lib. 1689. A. fol. 1033. As to allowances made on account of money laid out by executor, for maintenance and placing out infant legatee, vide *Barlow v. Grant*, ante 1 vol. 255. and cases there referred to.

### LEVET *versus* NEEDHAM.

CASE 137.

*WILLIAM CLERKE*, by will in writing, devises to *Sherwin* and *Turpin* and their heirs, his lands in *Sutton*, upon trust that they shall receive the rents and profits until his son *William* attain his age of *twenty-one* years, and pay a *third* part thereof to his wife *Anne*, in lieu of dower, and out of the other *two-thirds* raise portions for his daughters, and devises all to his son *William*, when *twenty-one*, in tail, and for want of such issue, distributes the estate in several shares amongst his relations, to wit, *Blowe's* farm to his sister *Mary*, other part to his brother *Peter*, and the tithes in *Sutton* to his sisters, *Ann*, *Martha*, and *Deborah Needham*. *Anne* the widow married Mr. *Coates*, and died before such time as her son *William*, who died before her, would have been *twenty-one*.

One devises lands to trustees and their heirs in trust to receive the rents, until his son shall come to 21, and to pay one-third thereof to the testator's wife in lieu of dower, and out of the other two-thirds to raise portions for his daughters; and devises all to his son William, when 21, in

tail, remainder to *B.* and *C.* The wife dies. The son dies before 21, and without issue. Resolved, the wife's interest determines by her death, and her third shall not go to her executors, until her son would have attained 21. Resolved, the remainder over to *A.* *B.* and *C.* are good, though the son died before 21. Resolved, the daughters portions being raised, the residue of the term shall go to the heir, as an interest undisposed of by the will. But it will vest in the heir as a chattel, and on his death go to his executor, until testator's son should have come to 21.

Upon the former hearing, (2) the question being, whether the executors, or administrators of *Anne* the widow, should have a third part of the profits, until such time as the son would have been *twenty-one*, or whether by her death the devise to her ceased; and it being adjudged, that the bequest as to her was determined, the question now was, who should have that *third* part of the profits until the son would have been *twenty-one*, for that the inheritance is not disposed of by the will until such time as the son would have been *twenty-one*. (3)

It was insisted that the heir ought to have these profits, the same not being devised away from him; and the cases of

[ 139 ]

(2) *Coates v. Needham*, ante 65. S.C.

(3) Vide *Phillips v. Phillips*, post 430.

LEVET v.  
NEEDHAM.  
Hob. 29.

Term raised  
for a particu-  
lar purpose,  
when that pur-  
pose is an-  
swered, the  
term shall be  
in trust for the  
heir.

*Counden and Clerk, Fawkner and Fawkner, Tryan and Thornbury* were cited by Mr. *Bowes*, as cases where the heir should have the benefit of any thing not disposed of, and Lord *Maynard* said, here is a *Chasm, Hiatus*, a gap in the limitation of the estate, no provision or disposition being made in case of the widow's death before the heir came of age: but I take it that the inheritance is nevertheless well disposed of, and that this is not such a contingent remainder, as though the particular estate fail, the remainder should be void. (1) In case of a devise to a Monk, the remainder over is good; (2) and in this case, the fee is devised unto and lodged in trustees, and no absolute term carved out, but only a declaration of trust, and direction to them how to apply the profits until his son came to *twenty-one*; and Lord *Keck* cited the case of *Gore and Black*, where a term for years being created for payment of *five hundred pounds*, when *that* was raised, the heir had the term. (3)

*Per Cur.* As to *Needham's* pretence that this third part of the profits should follow the inheritance, and so accrue to the devisees according to their respective interest in the inheritance, the case would not bear such construction; because there is nothing devised to them, until after the heir attain *twenty-one*, and die without issue: nor had the executor of the testator, as executor, a right to this term, for that it is not a term absolutely raised, and taken out of the inheritance, but rather a direction to the trustees, who have the whole fee in them, how they should dispose of the profits until his son attain *twenty-one*: but in case it had been a term absolutely raised out of the inheritance, yet being raised for a particular purpose, which is satisfied, the heir should have the benefit of the surplus of the term. But now though the heir is favoured thus to have the surplus of a term that is carved out of the inheritance, for a particular purpose; yet he must have it as a term which must go in a course of administration, and not in a course of descent:

[ 140 ]

(1) Vide *Beverley v. Beverley*, ante p. 131. *Chapman v. Blissett*, Forr. 145.

(2) In all cases it seems that if the devise is void, the remainder shall take place as if no such devise had been made, *Hutton v. Simpson*, post 723. So where A. devised a term for years to his wife for life, and after her death, to the child she was then ensient with, but if such child died before 21, then as to two-thirds of the term over, and

as to the remaining one-third, to the wife; the wife happened not to be ensient. The devise of the one-third to the wife good, *Jones v. Westcomb*, Pre. Ch. 316.

(3) On the head of resulting trusts as to real and personal estate, vide *Mumma v. Mumma*, ante p. 19, and the cases cited in not. there, particularly *Ackroyd v. Smithson*, 1 Bro. Ch. Rep. 503.

and decreed accordingly for the administrator of the heir, and not to his heir. (1)

LEVEY v.  
NEEDHAM.

*Memorandum*, That a new commission passed for the custody of the Great Seal, on—and Sir *John Trevor* and Serjeant *Hutchins* put in the places of Sir *John Maynard* and Sir *Anthony Keck*.

(1) There appear entries in the Register's Book, 1689. B. fol. 421. " of an order dated 14th Oct. that the 1st of an order dated 27th May, " that " cause be set down to be reheard 7th " the cause do stand in the paper of " Nov. next." But the editor has not " to-morrow for their lordship's opi- been able to find any other entry.

DE

[ 141 ]

## TERM. S. TRINITATIS, 1690.

IN CURIA CANCELLARIÆ.

GOFTON *versus* MILL.

CASE 138.

THE Lord *Sandys* by his will devised *four hundred pounds* in full satisfaction of all the monies he owed *J. S.* and subjected his real estate to the payment of his debts, the debt owed *J. S.* was *eight hundred pounds*, but the remedy was barred by the statute of *limitations*. The bill was for the whole *eight hundred pounds*.

TREVOR,  
RAWLINSON,  
HUTCHINS,  
Lords Com-  
missioners.  
Die Sabbati,  
21 Junii.  
Eq. Ca. Ab.  
139. pl. 4. 305.  
pl. 14. S. P.

vises to *B.* 400*l.* in full satisfaction of all the monies which he owed *B.* and subjects his real estate to the payment of his debts. The debt which *A.* owed *B.* was in all 800*l.* but was barred by the statute of limitations. Court will suppose the testator mistaken in his computation, and the whole debt of 800*l.* shall be paid.

*A.* by will de-

For the defendant it was insisted, that the testator by his will had declared how far he intended to give the plaintiff a remedy, *viz.* for *four hundred pounds* and no more.

*Sed per Cur.* We will rather suppose him mistaken in his computation; and there being a provision here for payment of debts, a debt upon which the statute of *limitations* has run, is nevertheless within the provision \*equally with any other debt, (2) and decreed the whole debt to be satisfied out of the trust, and the *four hundred pounds* to go only in part. (3)

A devise for  
payment of  
debts, shall  
include debts,  
the remedy  
whereof is  
barred by the  
statute of  
limitations.

The duty re-  
maining, though the remedy be gone.

[ \*142 ]

(2) [But debts barred by the statute are not revived by a general devise of real estates for payment of debts. *Jones v. Strafford*, 3 P. Wms. 90. *Legastick v. Cowne*, Mos. 391. *Burke v. Jones*, 2 V. & B. 275.]

(3) Together with interest on the debt reported due by the Master, which



amounted to 801*l.* 6*s.* 8*d.* being the original debt of 400*l.* and interest from the time of confirming the said report, up to the time at which it was decreed to be paid, and if not paid at the time, then the lands of the testator to stand charged therewith, and so much thereof to be sold, as would be necessary to pay the same. Reg. Lib. 1689. A. fol. 704. Vide this case better reported, Pre. Ch. 9. *Hawes v. Warner*, post 477.

CASE 139.  
Eq. Ca. Ab.  
146. pl. 8. S. C.  
The mortgagee on her marriage settled the mortgaged estate on herself for life, remainder to the issue of that marriage. The mortgagor brings a bill to redeem; defendant omits setting forth the settlement in her answer; the mortgagor has a decree to redeem and pays the mortgage money. Afterwards the issue of the mortgagee brings an ejectment on the settlement, and recovers the mortgaged premises. The mortgagor relieved, having paid his money pursuant to the decree, and having been in no fault.

### CHAPMAN *versus* DUNCOMBE.

THE case was, that a mortgagee, to wit (*Ralph Stint's* daughter) to her third marriage, with one *Duncombe*, settles the mortgaged premises on herself for life, remainder on the heirs of her body; and after having issue levied a fine, and made herself barely tenant for life, remainder to the issue of that marriage. The mortgagor afterwards brings a bill to redeem against the mortgagee, who answered, and mentioned nothing of this settlement, and thereupon the cause was heard, and a redemption decreed, and the money paid to the Lady *Duncombe*, daughter of *Ralph Stint*, the mortgagee, and mother of the now defendant. And now after all, the said defendant, Sir *William Duncombe*, being the issue of the said marriage, had by virtue of the settlement recovered at law. The bill was to be relieved against that recovery at law, and to have the estate in law reconveyed, and to be quieted in possession.

For the defendant it was insisted, he was in the nature of a purchaser, and claimed by the marriage-settlement, and though the estate were subject to a redemption, yet then he ought to have had his proportion of the money in lieu of the land, and that he ought not to lose both.

[ 143 ]

For the plaintiff it was said, that he having paid the money for which he pawned his land, he ought to enjoy it; that he brought his bill, and had a decree for redemption, and the defendant's mother was a party and if the defendant was cheated, it was by his own mother, who made the settlement, and afterwards concealed it.

*Per Cur.* Decree the defendant to convey, and the plaintiff in the mean time to enjoy against him, and all claiming from, by or under him, and a perpetual injunction against the judgment. (1)

(1) Reg. Lib. 1689. A. fol. 890. Vide *Legriel v. Barker*, ante p. 40. 1.



JOHN ELLIOT,

Plaintiff.

THOMAS HANCOCK and JANE his Wife, }  
 JAMES ELLIOT and THOMAS CRIPPS, } Defendants.

CASE 140.  
 25 die Junii.  
 In Court.  
 LORDS COM-  
 MISSIONERS.  
 Eq. Ca. Ab.  
 33. pl. 8. S. C.

**JOHN ELLIOT** the plaintiff's late father, being seised of a little messuage in *Marlborough*, of *eight pounds per ann.* and possessed of a personal estate to the value of *two hundred and fifty pounds* or thereabouts, 14 Oct. 1663, made his will in writing, and thereby devised several legacies, and gave to the plaintiff his eldest son, *five pounds yearly for forty years*, if the plaintiff should so long live, and made *James* his second son executor, and residuary legatee; and also devised unto him the said messuage in tail, with several other remainders over. *James* proved the will, possessed the personal estate, and entered on the real estate, and paid the plaintiff's annuity to the time of his death, and in Nov. 1681, died and left an infant heir, and other children, and made his wife executrix, who proved the will, and after married the defendant *Hancock*; and they pretend that *James Elliot* in his life-time, had fully administered the estate of the first testator; or however, if he had wasted any part of it, yet he left no assets to answer it, and therefore refused to pay the plaintiff's annuity, and insisted the real estate was not liable to the payment thereof, being never subjected thereunto by the will; and *James* having by fine docked the entail, he borrowed *fifty pounds* of the plaintiff, and for securing the same, as also the *five pounds per ann.* for *three years*, *James* conveyed the messuage, &c. in fee to one *Plasted* in trust for the plaintiff, redeemable at three years end on payment of the *fifty pounds* and interest, and the *three five pounds*, and that money was repaid, and the plaintiff reconveyed, and so had extinguished what right, if any, he had upon the real estate.

Real estate de-  
 creed to be  
 charged with  
 an annuity  
 given by the  
 will, though  
 no express  
 words to  
 charge the  
 land, the exe-  
 cutor being  
 devisee of the  
 land.

[ 144 ]

*Per Cur.* The court took it that the devisee of the land, being also executor, the land should be liable to the *five pounds per ann.* according to the judgment in the case of *Clowdesley* and *Pelham*, and the rather, because it was all the provision that was made for the heir, who was disinherited, and the executor and devisee had, during all his life-time, which was above *twenty years*, duly paid the same. And as to the pretence of extinguishing his right by the accepting of a mortgage, that was not a good defence, nor to be regarded in equity, and therefore decreed to the plaintiff his arrears, and growing annuity for the

1 Vol. Case  
 386.

ELLIOT v.  
HANCOCK.

time to come, and an account of profits of the real estate for that purpose, &c. (1)

(1) Reg. Lib. 1689. A. fol. 710. So upon evidence that the devisee had promised the testator to pay the annuity, or otherwise that the testator would have charged the land with it, *Oldham v. Litchford*, post 506. But where testator devised his lands to *Charles* his son and heir in tail, remainder to three other of his sons successively in tail, and gave his daughter 30*l.* a year

till she attained 21, and then 50*l.* a year till she married; and gave her 1500*l.* for a marriage portion, but did not expressly charge the land therewith, and made *Charles* his executor, the court strongly inclined the land should not be charged with that 1500*l.* *Lord Pawlet v. Parry*, Pre. Ch. 449. Vide on this head the cases cited in not. to *Clowdesley v. Pelham*, ante 1 vol. 411.

[ 145 ]

CASE 141.

Die Martis,  
1 Julii.

In Court.  
LORDS COM-  
MISSIONERS.

Ante 42, 78.

Eq. Ca. Ab.

288. D. pl. 1.

Pre. Ch. 50.

S. C.

In 1650, *A.*  
makes a mort-  
gage to *B.* at  
8*l.* per cent.  
interest. In

1660, interest

is reduced to 6*l.* per cent by act of parliament, *A.* for several years after continues to pay 8*l.* per cent. whether the interest paid after 1660, above 6*l.* per cent. shall go to sink the principal.

WALTER & Al', Plaintiffs.

PENRY & Al', Defendants.

UPON a demurrer to a bill of review, the original bill was for the redemption of a mortgage, made so long since as in 1650, when money was at *eight pounds per cent.* in Sept. 1660, interest by the statute is reduced to *six pounds per cent.* but the money is still continued on this security, and interest paid after the rate of *eight pounds per cent.* and now the question was, whether *eight per cent.* should be allowed as paid for interest since 1660, or whether the *two per cent.* over the statutable interest should not go to sink the principal.

The cause was first brought to hearing before the Lord Chancellor *Nottingham*, on the mortgagee's bill to foreclose, and he being of opinion that the *two per cent.* should go towards sinking the principal, the then plaintiff dismissed his bill, and afterwards the mortgagor brought a bill to redeem, and that coming to hearing before the Lord Chancellor *Jefferies*, he was of opinion that the *eight per cent.* being paid, and received as interest, no part of it ought to be applied to sink the principal, and that the statute had no retrospect beyond 1660, but looked forwards to contracts and agreements then after to be made, and not to any contracts and agreements before that time, and decreed the account to be taken accordingly.

Now upon the bill of review, Lord *Trevor*, being there was a decree already made in it, would not reverse it. Lord *Rawlinson* and *Hutchins*, on reading the act of parliament, held

[ 146 ] the act had a retrospect, (2) and makes it unlawful to take

(2) In Eq. Ca. Ab. 288. pl. 1. it is said, "but it seems to be now settled, that the Stat. 12 Ann, cap. 16. has not a retrospect to any debts con-

tracted before the making thereof." But no case is cited, *Hedworth v. Prime*, Hard. 318.

more than *six per cent.* upon any contract, whether made before or after the act of parliament. But that part of the statute which adds penalties, relates only to contracts and agreements then after to be made. (3)

WALTER v.  
PENRY.

(3) And it was ordered that what money the plaintiffs have paid for interest since *Michaelmas*, 1660, over and above *6l. per cent.* be applied to sink the principal, and the Master was to take the account accordingly. Reg. Lib. 1689. B. fol. 812.

### GRAHAM *versus* STAMPER.

THE defendant had recovered against the plaintiff at law in an *indebitatus assumpsit* for goods sold and delivered; the bill was to be relieved against that recovery, surmising it was for goods sold to the plaintiff, as he was Master of the Buck-Hounds and that the lace and lining was for the King's servants, and that 'twas the King's debt and not the defendant's, and what he acted was in relation to his office, and not as a private person, and that the defendant was to expect his money from the King, and not from the plaintiff, and that the plaintiff was only to pay it, if he received the money from the King. The defendant pleaded the verdict and judgment, and that the plaintiff had insisted on the same matter at law, where it was ruled against him; and that a writ of error being near spent, he now brought this bill for delay and demurred; for that the matter was conusable at law, and the bill contained no equity; yet the court, notwithstanding, over-ruled the plea, and ordered the defendant to answer the bill. (4)

CASE 142.  
Eodem die.  
Pre. Ch. 45.  
Eq. Ca. Ab.  
308. pl. 2. S. C.  
*Indebitatus assumpsit* for goods sold and delivered and verdict for plaintiff. Defendant brought a bill, suggesting that he was Master of the Buck-hounds and acted only in relation to his office, and that the King ought to pay for these goods. Defendant pleaded the verdict and demurred, for that the matter was conusable at law. Plea overruled.

(4) The benefit of the plea to be saved to the hearing. Reg. Lib. 1689. A. fol. 911. Note. It seems as if the bill was ultimately dismissed, as it appears, Journal House of Lords, 26th January, 1663, that an appeal by *Graham*, against the dismissal of his Bill in Chancery was dismissed. Journ. House of Lords, 15 vol. 353.

### ROBINSON *versus* BELL.

BILL to be relieved against a judgment in an action of debt upon a bond, upon *plenement administr.* pleaded. The bill surmised that there were several debts still unsatisfied of a higher nature than the defendant's, and that the plaintiff had relieved after a verdict at law had against him upon a *plene administravit*, and the verdict was had on producing the executor's own letter confessing a mortgage made to the testator for 300*l.* the executor proving in equity, that this mortgage appeared afterwards to be worth nothing, and that there were two prior mortgages upon the same estate.

CASE 143.  
Sabbati,  
4 Julii.  
In Court.  
LORDS COM-  
MISSIONERS.  
Eq. Ca. Ab.  
237. pl. 10. S. C.  
Executor re-

ROBINSON v.  
BELL.

given directions to his attorney to plead specially, and he had not assets *ultra* what would satisfy those debts, but he by mistake had pleaded generally, *plenement administr.* and farther charged that the now defendant, by her friends, applied to the plaintiff, to know the value of the testator's estate, and of the debts that were owing by him; and he informed them thereof accordingly, and at their desire he was prevailed upon, for the now defendant's satisfaction, to write a letter to the defendant, and therein to mention the particulars of the said testator's estate; and in the letter so by him wrote, he mentioned *three hundred pounds* as due on a mortgage to the said testator; and upon the producing that letter at the trial, the judge took it as sufficient evidence to prove, that the *three hundred pounds* came to the defendant's hands, and directed the jury accordingly; (1) whereas in truth, after such time as the plaintiff wrote that letter, he discovered that it was a bad security, there being three precedent mortgages on the same lands, so that the *three hundred pounds* is not received, but is all standing out at this day: the defendant confessing the letter, and that it was given in evidence at the trial at law; and it appearing that there were such precedent mortgages, and that the *three hundred pounds* was still standing out upon that security; (2) the court thought fit to relieve the plaintiff, and granted an injunction to stay proceedings at law, and directed an account of assets, and on payment of what should appear due to the defendant, to acknowledge satisfaction of the judgment, (3) and the Lord Commissioner *Hutchins* said he thought the plaintiff was proper in this court for relief upon both points, and cited a case in the Lord *Bacon's* time, where upon an action of debt upon a bond of *seven hundred pounds*, brought against one as executor, he pleaded *ne unques\* execut'*, and upon the evidence it appeared, that a chimney-back, or some other slight thing, came to the defendant's hand, plaintiff had a verdict, but equity relieved against the verdict. So in another case upon the like plea of *ne unques executor* plaintiff proved the defendant took money for a pot of ale sold by the testator in his life-time, and equity relieved.

In debt  
against an  
executor for  
700*l.* executor  
pleads *ne un-*  
*ques executor*,  
and on proving  
at the trial, that  
a chimney-back,  
or some other  
slight thing, came  
to the defendant's  
hand, plaintiff  
had a verdict, but  
equity relieved  
against the verdict.  
So in another  
case upon the like  
plea of *ne unques  
executor* plaintiff  
proved the defendant  
took money for a  
pot of ale sold by  
the testator in his  
life-time, and equity  
relieved.

[ \*148 ]

(1) All separate debts set forth by an executor, shall be accounted assets in his hands, unless demand and refusal be proved. *Harding v. Salkill*, Salk. 296.

(2) This does not appear in the statement in the Register's Book, the decree goes upon the ground "that the verdict was obtained upon a mistake and misconception of the

"said letter, and that therefore the plaintiffs ought to be relieved against it." Reg. Lib. 1689. B. fol. 744. Vide *Stephenson v. Wilson*, post 325.

(3) Vide *Anon.* ante 1 vol. 119. As to cases in which this court will relieve after a verdict. Also *Barbone v. Brent*, *ibid.* 176. *Nash v. Lord Derby*, post 537.

ROBINSON v.  
BELL.

back, or other matter of very small value, had come to his hands; and thereupon a verdict passed against him, and the judges came into court and informed the *Lord Keeper* this was the fact; and the party was relieved in equity. And he also cited the case of *Cryer* and *Goodhand*, in my Lord *Nottingham's* time, where in an action of debt brought against the widow of an ale-house keeper, who died intestate, she pleaded *ne unques executor*, and all the proof that was against her, was, that she had taken money for some few pots of ale sold in the house after her husband's death, and upon hearing she was relieved.

CORDELL *versus* NODEN & Al.CASE 144.  
Die Martis,  
8 Julii.  
LORDS COM-  
MISSIONERS.  
Eq. Ca. Ab.  
244. pl. 5.  
Pre. Ch. 12.  
S. C.

ONE Mr. Cordell, in 1674, made his will to the effect following: *I dispose of my estate after mentioned, and what else I have in the world, in manner and form following*, and then distributes his estate amongst his relations, (the particular legacies amounting unto near the value of his whole personal estate, as appeared by a calculation of his own hand-writing by him about that time made) and then made his mother and Mr. Noden executors, and gave them *twenty pounds*, and intreats them to take the trouble of getting in his estate. The testator lives ten years after this, and acquires an additional estate, and dies, not having altered nor new published his will.

A. by will  
gives several  
legacies to his  
relations,  
amounting to  
near the value  
of his estate;  
and makes  
B. and C. his  
executors, and  
gives them 20*l*.

and intreats them to take the trouble of getting in his estate. Testator lives 10 years after, and acquires an additional estate. Decreed the surviving executor but an executor in trust, and that the new acquired estate should go to the legatees in proportion to their legacies.

The bill was by the legatees to call Mr. Noden, who was the surviving executor, to an account for the personal estate alledging he was intrusted therein for their benefit. The defendant by answer confessed the will, that the testator lived ten years afterwards, and acquired a considerable additional personal estate, and conceived he was entitled to it, as being the surviving executor, but submitted to the judgment of the court. (1)

[ 149 ]

Upon long debate of this case, the court agreed in opinion, that the defendant should be but in the nature of a trustee for the benefit of the legatees. Lord Trevor conceived Cordell could not be said to die intestate, (as was urged by the plaintiff's counsel) as to the new acquired estate; for having left a will, and an executor, he could not be said to die in-

(1) Vide *Roberts v. Bennet*, ante p. 136.

CORDELL v.  
NODEN.

testate : but he took it, that upon the face of the will, the defendant *Noden* was only an executor in trust for the plaintiffs, and that the new acquired estate should be distributed to the legatees in the will, in proportion to the legacies thereby devised ; and as if the estate had fell short, they must have abated in proportion, so now it is increased, it shall be advanced in proportion. (2)

Lord *Rawlinson* of the same opinion, and rested much on the words, *I dispose of my estate after mentioned, and what else I have in the world, as follows, &c.*

Lord *Hutchins* : That *Noden* was a trustee, and the estate should go to augment the legacies in proportion, and said there might a trust appear upon the face of a will in an executor, as well as upon the face of a deed or assignment ; and cited the case of *Pring* and *Pring*, where in the will it was said, he made *J. S.* executor in trust, and not said for whom, and decreed a trust for the widow. And said he was told of a case adjudged in the court, when he was absent through sickness, where a man had made his wife and *J. S.* executors, his wife being aged and unable to collect and get in the estate, and made his wife residuary legatee : it happened that the wife died in the life-time of the testator, who left four children, who brought a bill against the surviving executor, and their bill was dismissed : though upon the will the wife was made residuary legatee, and the intention of the testator, no question was, that she should dispose of the estate for the benefit of the children, and confided in her for that purpose. (3)

(2) [In *Clennell v. Lewthwaite*, 2 Ves. Jun. 471, Lord *Alvanley* says of this point, "the court did what could not be warranted by ordering the residue to be distributed among the next of kin in proportion to their legacies," and in *Smith v. Fitzgerald*, 3 V. & B. 6, he is confirmed by Sir *W. Grant*.] (3) Vide *Foster v. Munt*, ante 1 vol. 473, and cases cited in not. there.

CASE 145.  
Jovis 17 Julii.  
LORDS COM-  
MISSIONERS.  
Eq. Ca. Ab.  
355, pl. 7. S. C.  
The mother  
who was the  
absolute  
owner of a  
term, is pre-  
sent at a

### HUNSDEN versus CHEYNEY.

THE mother to whom a term was limited in tail, stands by at a treaty of a marriage, intended to be had betwixt her son and the plaintiff's mother, and hears her son upon that marriage declare, that the term was to come to him after the death of his mother, and is a witness to the deed, whereby the son took upon him to settle the reversion of the term expectant on treaty for her son's marriage, and hears her son declare, that the term was to come to him at his mother's death, and is a witness to the deed, whereby the reversion of the term is settled on the issue of this marriage after the mother's death. The mother is compellable in equity to make good this settlement, and to settle the reversion of the term accordingly after her death.



his mother's decease, on the issue of that marriage, and did not mention or insist she had more than an estate for life therein: the bill was brought by the son of that marriage, complaining that his grandmother, notwithstanding the premises, gave out she *was tenant in tail of the term*, and could dispose of the term at her pleasure, and threatened to alien it, and prayed the benefit of the marriage-settlement, and that the defendant might be compelled to make it good, as to the reversion of the term after her decease.

HUNSDEN v.  
CHEYNEY.

And though it was insisted on for the defendant, that she was not guilty of any fraud or ill practice, but was ignorant of her title, and knew not that she, as being tenant in tail of a term, might dispose of it, and was no party to the marriage-agreement, or concerned in it, and that it might rather be presumed, that she was imposed upon by her son and made to believe that she had but an estate for life, when she had in truth the ownership of the whole term in her, yet the court decreed it for the plaintiff (1); and as a like case cited the case of *Dr. Amyas*, who stood by and suffered a purchaser to go on without disclosing of his title, and the case between *Charles Clare* and the *Earl of Bedford*, who only witnessed a deed, and told the money lent at his master's chamber, being his clerk, and for that alone had his own security postponed. (2)

[ 151 ]

A prior incumbrancer being a witness to a subsequent mortgage does not disclose his own incumbrance. He shall be postponed.

(1) The case as to witnessing the deed by the defendant, is not exactly as stated in the printed report, but it was distinctly proved in the cause, that the defendant and her then husband agreed on the marriage of the plaintiff's father, that in consideration of a marriage portion which the plaintiff's father was to have with his intended wife, the said term should after the decease of the defendant, go to the plaintiff's father, and the issue of his body, and that the 700*l.* was thereupon paid, and the marriage had: and it was also proved that the treaty for the plaintiff's marriage on which he received a portion of 500*l.* was founded on the assurances of the plaintiff, that he was intitled to the

remainder of the term, after the decease of the defendant his grandmother, and that the defendant and her then husband were privy, and consented to the said treaty and marriage: and decreed as above. Reg. Lib. 1689. A. fol. 735. 7. 8. Vide *Beverley v. Beverley*, ante 133. *Raw & Ux. v. Pole*, post 239, affirmed on appeal. And as to frauds on marriage, particularly by bonds privately given to return part of the fortune, *Redman v. Redman*, ante 1 vol. 348, and cases cited there. [*Roberts v. Roberts*, 3 P. Wms. 66.]

(2) Vide *Hobbs v. Norton*, ante 1 vol. 136. *Mocatta v. Murgatroyd*, 1 P. Wms. 394. and cases cited in not. (1) there.



## CASE 146.

Eodem die.

One borrows  
70*l.* of *A.*; andas a security  
gives him a  
warrant of  
attorney for  
a judgment in

ejectment of three closes of land, upon a feigned demise for 20 years. This is a defective security, but a good agreement in equity to charge the land.

DALE *versus* SMITHWICK.

THE plaintiff lent *seventy* pounds to the defendant's uncle, and for his security took only a warrant of attorney to confess a judgment in ejectment of three closes upon a feigned demise for *twenty* years.

*Per Cur.* It is a defective security, and amounts to a good agreement in equity to charge the land, and decreed it accordingly against the heir. (1)

(1) With interest and costs, unless the debt claimed by the plaintiff was paid within three weeks, and without further account or trouble, and then to be exempted from paying either interest or costs. Reg. Lib. 1689. *A.* fol. 897. There was also a question of notice as to a purchaser (one of the defendants) of a judgment that had been entered up, and who had taken in a mortgage to protect his title, and it appearing to the court that he had notice, it was declared that the plaintiff was intitled to the benefit of his security. Reg. Lib.

1689. *A.* fol. 897. So a recovery though defective as to a tenant to the *præcipe*, sufficient to bar an equity, *Beverley v. Beverley*, ante 132. *Quæ.* if the judgment in the principal case might not have been entered up, notwithstanding the death of the party. Vide *Odes v. Woodward*, 2 Raym. 766, 849. 1 Salk. 87. S. C. And in *Lucas v. Viccarage*, in B. R. Tr. 8 and 9 Geo. 2d. 1735, an old judgment was allowed to be brought in on condition not to docket it.

## CASE 147.

Die Veneris,

18 Junii.

LORDS COM-  
MISSIONERS.

Eq. Ca. Ab.

192. pl. 9. Pre

Ch. 15. S. C.

Devise of a

term to *J. S.*

and his as-

signs for ever,

but if he dies

without issue

before 21,

then to go

over to his

brother, This

is a good de-

vise over.

MARTIN *versus* LONG.

*J. S.* devises to his son *Martin* a leasehold estate to him, his executors, administrators and assigns for ever; but if he died before *twenty-one* without issue, in that case devises it over to his brother. The question was, whether the remainder over was good: it was objected, that it was a perpetuity, for that the remainder depends on *Martin's* dying without issue; for if he die before *twenty-one*, though he leaves a child, and that child afterwards dies without issue, \**Martin* may be said to be dead before *twenty-one* without issue. *Sed non allocat'* *per Cur.* Decreed the remainder over good, (2) and the like case between *Smith* and *Smith* in the exchequer, was cited to be so adjudged.

[ \*152 ]

(2) Together with an account of rents and profits, from the death of *Martin*, the son of the testator, and that the defendant should authorise

the plaintiff to receive what rents should be in arrear. Reg. Lib. 1689. *B.* fol. 605. Vide *Pawlet & Ux.* v. *Doggett*, ante 88, and cases cited there.

CLAXTON *versus* CLAXTON.

ONE *Morris Claxton*, devises his lands to the defendant *Dorothy* his widow, for life, remainder to the plaintiff and his heirs, paying several legacies at the times appointed in his will for that purpose; (1) and if he do not pay accordingly, remainder over to one *Bacon*, he paying the legacies; and if he failed, the like remainder over to the defendant *Felton*, he paying the legacies: now the plaintiff's bill was, in regard there was a great quantity of timber growing upon the estate, which belonged to him in right of his reversion, that he was willing it should be sold, and the legacies paid, but that the widow, who had barely an estate for life, and could make no profit thereof herself, yet she in combination with the other remainder-men, designing to make the plaintiff forfeit his estate, by non-payment of the legacies, refused to permit him to fell the timber, though he offered satisfaction for any damage she should sustain thereby, and therefore prayed he might have liberty to cut and carry off the timber, and sell it for payment of the legacies, making the widow satisfaction.

cut down timber for the payment of the legacies, though it was opposed by the and the devisee over.

CASE 148.  
Eodem die.  
LORDS COM-  
MISSIONERS.  
Eq. Ca. Ab.  
400. pl. 7. Pre.  
Ch. 15. Gilb.  
Eq. Rep. 338.  
S. C.  
Devise of land  
upon which  
timber is  
growing, to  
A. for life,  
remainder to  
B. in fee, pay-  
ing several  
legacies with-  
in a limited  
time. And in  
default of pay-  
ment the re-  
mainder in  
fee is devised  
over to C. he  
paying the  
legacies. Upon  
a bill brought  
by B. the  
court gave  
leave to B. to  
tenant for life,

The widow by answer insisted, that the plaintiff had no right to take off the timber in her life-time, and the defendant *Felton* hoped he should not be compelled to consent to the doing thereof.

It was objected, that the plaintiff had made the widow and Mr. *Felton* parties, and had not *Bacon*, who was next in remainder after the plaintiff, before the court, but Mr. *Felton* a more remote remainder-man; the answer that was given, was that *Bacon* was willing and consenting to it, and therefore they had no occasion to make him a defendant.

The court thought it reasonable that the plaintiff should have liberty to take off the timber, making satisfaction to the widow for breaking the ground by carriage, waste, &c. and referred it to a Master to see what quantity of timber was necessary to be felled for payment of the legacies, and what might be conveniently spared. (2) Lord *Hutchins* cited a

[ 153 ]

(1) The words are, " Upon con-  
" dition, that he and his heirs should  
" pay unto the several persons in the  
" will named, the several legacies and  
" sums of money to them respectively  
" given by the said will, but in case

" the plaintiff or his heirs should fail  
" in the condition aforesaid, then he  
" devised the said reversion to R. C.  
" on the same condition." R. L.

(2) Leaving sufficient for repairs,  
&c. and the defendants to have their

CLAXTON v.  
CLAXTON.

case of *Nelson and Nelson*, where he said was a like decree for sale of timber, in the life-time of the tenant for life, for payment of legacies.

costs. Reg. Lib. 1689. A. fol. 996. Vide *Aspinwall v. Leigh*, post 218. As to timber, it is a clear settled rule, that timber while standing, is part of the inheritance, but whenever it is severed either by the act of God as by tempest, or by a trespasser, and by wrong, it belongs to him who has the first estate of inheritance in the lands, whether in fee or in tail, *Bewick v. Whitfield*, 3 P. Wms. 268. *Garth v. Cotton*, 3 Atk. 755, and cases there

cited. But yet where tenant for life has in himself the next existent estate of inheritance, subject to intermediate contingent remainders, the court will preserve the timber for the benefit of the contingent remainder-men, *Williams v. Duke of Bolton*, 1 Cox 72. Et vide further on this subject, *Ex parte Bromfield*, 1 Ves. jun. 453. *Powlett v. Dutchess of Bolton*, 3 Ves. 374. *Smith v. Collyer*, 8 Ves. 69. [*Lansdowne v. Lansdowne*, 1 Mad. 140.]

CASE 149.  
Eodem die.  
Eq. Ca. Ab.  
202. pl. 17.  
S. C.

EDWARD WAREHAM, and other Creditors }  
and Legatees of Sir ANTHONY BROWN, } Plaintiffs;

Sir GEORGE BROWN, Nephew and Heir }  
of Sir ANTHONY, WILLIAM BROWN } Defendants.  
the Executor, & Al', }

One devises to two of his sisters 400l. apiece, and to his third sister what his executors should think fit. The court decreed the third sister should have 400l. also, and he made equal to her two other sisters, if the estate would hold out.

[ \*154 ]

SIR *Anthony Brown* being seised in fee of several manors and lands in the counties of *Wilts* and *Bucks*, 19 Octob. 1688, \*made his will, and thereof made the defendant *William Brown* executor, and by his will devised unto two of his sisters 400l. apiece, and unto the third, what his executors should think fit, and then (*inter alia*) devised as followeth, viz. I give and bequeath all that manor of *Ludgishall*, and the manor of *Biddwell*, in the county of *Wilts*, and all that lordship of *D.* in the county of *Bucks* unto my brother *John Brown*, and to the heirs of his body; and for want of such issue, I give the same to my brother *George Brown*, and the heirs of his body; and for want of such issue, I give the same to my uncle *Anthony Brown* and his heirs. Item, I give and bequeath unto my executor, full power and authority to raise out of my estate, the sum of five hundred pounds, for the use of the next heir of my estate, if my said executor shall think it necessary; and also I desire my executor, to see all my just debts which he shall find due, and my funeral charges, paid and satisfied. Item, I give and bequeath unto my said executors, all the rest and residue of my whole estate unbequeathed, to pay and distribute according as my said executor shall think it most fit and requisite.

Upon the reading of this will, the court held that *William Brown* the executor, had sufficient power to sell the lands, and that the real estate by the will was subjected to the payment, both of debts and legacies, and decreed it accordingly. And as to the eldest sister, who was to have only what the executors should think fit, they thought it reasonable she should have *four hundred pounds*, and be equal with her other sisters; but reserved the consideration thereof, until after the account taken, and they should see how the estate would hold out. (1)

gives the executor a power to sell the lands to pay the debts.

WAREHAM v. BROWN. A. devises lands to B. in tail remainder to C. and gives his executor power to raise out of his estate 500*l.* for his next heir, and desires him to see his debts paid. This

(1) The words of the decree as to the trust are "Whereupon, &c. this court is of opinion, and doth declare that the said Sir *Anthony Brown* hath subjected his real and personal estate to the payment of all his debts and legacies, and that the same ought to be paid and satisfied, by and out of both the said estates; and doth think and so order and decree that an account be taken of the real and personal estate of the said Sir *Anthony Brown*, and that it be referred to the Master to take an account of the personal estate, and an account of what profits have been made and raised out of the said testator's real estate, and examine how and for what disposed of, and what debts

"there are now due and owing to the plaintiffs and others the creditors, and also what legacies are due to the legatees of the said Sir *Anthony Brown*, and what is the true and real value of the whole estate, and what monies can be raised and made by granting of estates, filling up lives, and renewing estates, rents, wood-sales, or otherwise; and upon the Master's report, this court will give directions how and in what manner the monies so raised or that can be raised, shall be applied." Reg. Lib. 1689. B. fol. 606. The point respecting the legacies to the testator's sisters, does not appear. Vide *Wynne v. Harding*, 1 Bro. Ch. Rep. 179. *Bull v. Vardy*, 1 Ves. jun. 270.

### TYRREL versus BEAKE.

THE defendant was owner and freighter of an interloping ship that went to the *East Indies*, the plaintiff was captain of a man of war, and took the defendant's ship at sea, even out of the limits of the *East India Company's Charter*, and she was condemned in the *Admiralty*, and the ship and goods delivered to the *King's use*. Upon the plaintiff's return to *England*, the defendant brought an action of *trover* against him the plaintiff; the defendant at law first put in a plea in *abatement*, which was over-ruled, then pleaded the same matter in *chief*, and thereupon judgment was obtained against him, and a writ of inquiry of damages executed, and damages assessed to 1300*l.* To be relieved against which the plaintiff brought his bill, alledging, that what he did, was by virtue

over to the *King's use*. The defendant, the owner and freighter of the ship, brings *trover*, and recovers 1300*l.* damages. The plaintiff brings bill to be relieved against this judgment; defendant pleads the judgment and proceedings at law. Plea overruled.

[ 155 ]  
CASE 150.  
Die Lunæ,  
21 Julii.  
LORDS COMMISSIONERS.  
The plaintiff, captain of a man of war, seizes the defendant's ship, (being an interloper,) out of the limits of the *East India Company's charter*, and she and her goods condemned in the *Admiralty*, and delivered

TYRREL v.  
BEAKE.

of his majesty's commission, and as he was captain of a man of war, that the ship and goods were condemned in the *Admiralty*, and seised to the *King's* use; that he received not one shilling to his own use; that the damages were excessive, as would appear by the bills of lading, if produced, and that the writ of inquiry was by contrivance executed when he was at sea; so that no defence could be made, and done the last day of the term, about noon of the same day; so that he could not move the court at law for a new trial that term; and judgment was entered up before the next term; so that then he came too late. The defendant pleaded the proceedings at law *prout*, &c. that defence was made at the executing the writ of inquiry, that his ship and goods were really worth *one thousand three hundred pounds*, &c.

The court disallowed the plea, and ordered the defendant to answer, and continued the injunction to hearing. (1)

(1) The order was, "That the defendant's plea do stand for an answer, without liberty to except, the benefit whereof and of the said demurrer is saved hereby to the defendants at the hearing, except in default of the defendant's producing all books, papers, invoices, &c. before one of the examiners of this court, and giving due notice thereof to the plaintiff, in which case the plaintiff is hereby at liberty to take excep-

tions to the said plea, and the plaintiff is hereby ordered not to bring any writ of error at law on the judgment obtained by the defendant." And then the order proceeds to grant injunction till the hearing, in case the plaintiff proceeds to a hearing, the next term, otherwise to be dissolved. Reg. Lib. 1689. B. fol. 653. Afterwards, 15th Dec. the bill was dismissed, with costs to be taxed. Reg. Lib. 1690. B. fol. 81. no statement of the pleadings.

[ 156 ]

CASE 151.  
23 Julii.

LORDS COM-  
MISSIONERS.

Post Case 187.  
Eq. Ca. Ab.

323. pl. 5. S. P.

HITCHCOCK & Al' versus SEDGWICK & Al'  
& à contra.

THE case was, that one *Slaney* was joint factor with one *Cudmore* at *Lisbon*, in *Portugal*, in 1682, and they being considerably indebted, procured a letter of licence from their creditors, 18 Nov. 1684. *Slaney* being seised of the manor of *Lulsey*, in the county of *Worcester*, demises the same to one *Minshal* for five hundred years, by way of mortgage to secure a debt of eight hundred pounds. Some time after *Slaney* comes over into *England*, and in *March* following borrows two thousand two hundred pounds of *Sedgwick*, and by lease and release the 6th and 7th of *March* 1684, makes a mortgage in fee to him of the said manor of *Lulsey*, and on the 7th of *March*, *Minshal* being paid off with this money, assigns his mortgage to one *Harris* in trust

HITCHCOCK v.  
SEDGWICK.

for *Sedgwick*. It seems that on the 21st of *Feb.* 1684, but unknown to *Sedgwick*, a commission of bankruptcy was taken out against *Slaney* and *Cudmore*, and on the 2d of *March* before *Sedgwick's* mortgage, the commissioners had made an assignment to *Yote* and *Birds* in trust for the creditors: *Sedgwick* hearing of it, and understanding that the estate was sufficient to pay all the creditors, who were then come in, as also to pay him his *two thousand two hundred pounds*, is advised to come in as a creditor, and paid his contribution; and *August* 14, 1685, there was a deed of distribution made of the said manor, that is to say, the same was valued at *three thousand pounds*, and that money distributed amongst the creditors. *Sedgwick's* share was *two thousand two hundred thirty-five pounds, six shillings and five pence*. On the *Decemb.* 2, 1685, more creditors came in, and a *second* distribution is made: In *Jan.* 1685, the assignees sold the manor, and conveyed it to *Noden* in trust for *Sedgwick* for *three thousand pounds*. *Sedgwick* had in money and bills the whole consideration-money there, and had an allowance of his own debt, and paid the rest of the monies to the assignees for the creditors. After this, several orders on petitions were made by the late Lord Chancellor *Jefferies*, for setting aside this purchase, and proceedings upon the statute of bankrupt, and for letting in other creditors, and the assignees were ordered to repay the money, and *Noden* to reconvey to the assignees.

[ 157 ]

The plaintiff's bill was by the creditors of *Slaney*, to be let in under the commission of bankrupt, and to have the lands sold for their satisfaction, and to redeem the first mortgage, if precedent to the bankruptcy: *Sedgwick's* bill was to have a reconveyance from the assignees, and be restored to what he had lost by arbitrary orders on the petitions. The principal questions in the case were,

Whether a man who lends money to a bankrupt after a commission of bankruptcy sued out against him, and actual notice of it, can come in under the statute as a creditor.

Whether one who lends money to a bankrupt after a commission

sued out against him, but before actual notice of it, can come in under the statute as a creditor. By two Lords Commissioners against one, who doubted, he cannot.

A. makes a mortgage, and afterwards a commission of bankruptcy is taken out against him, and commis-

*Secondly*, Whether *Sedgwick* having really and *bona fide*, lent his money without any actual notice of the bankruptcy, and having an assignment of *Minshal's* mortgage, by which he might protect himself at law, a court of equity shall take that plank from an innocent purchaser.

Commissioners make an assignment of his estate, and then *B.* lends 2000*l.* to the bankrupt on a second mortgage having no notice of the bankruptcy, and afterwards he gets in the first mortgage. This prior mortgage shall not protect the mortgage subsequent to the bankruptcy.



**HITCHCOCK v.  
SEDGWICK.**

Whether a distribution by commissioners of bankrupt among the creditors upon a supposed value of the bankrupt's real estate, when the commissioners

A third question was made, whether any distribution or dividend in this case had been well made, in regard that though a deed for that purpose was made in *Aug.* 1685, and the *three thousand pounds* mentioned to be distributed amongst the creditors, yet in truth the manor was not then sold, nor had the assignees any money to distribute, but this was a colourable distribution contrived to defraud and shut out the rest of the creditors.

had no money to distribute, is fraudulent ; and to be set aside.

As to this last matter it was answered, that the distribution was well and regular, and so held to be by the court, and that nothing is more usual than to make a distribution before the estate be actually sold, and the words of the act of parliament are, that the commissioners shall have the ordering of the bankrupt's estate, so there is no necessity for them to sell and distribute the money amongst the creditors ; if they allowed a proportion of the land to each creditor, it is well enough.

As to the first question, whether *Sedgwick* could come in as a creditor for money lent after the commission sued out ; Lord *Trevor* and *Hutchins* held that he could not, but was excluded ; *Rawlinson* doubted, and took it to be a new point not yet settled, and that there were no words in the act to exclude him. (1)

As to the second point, Lord *Rawlinson* was of opinion, that *Sedgwick* as an innocent purchaser, ought to have the advantage of all his securities to defend himself at law, and that this court ought not to take any advantage from him ; and said he would consider the several steps that this court had gone in favour of purchasers, in allowing them to defend themselves by any advantage they could get at law : that where a purchaser buys in an old statute or mortgage, though nothing be due upon it, he shall be admitted to defend himself by it, as was the case of *Higden* and *Calamy*, 21 *Car.* 2. and the case of *Wymensel* and *Hawland*, May, 1674, and many cases of that kind. (2) The next step has been that purchasers who have got an advantage at law, though by undue means, have been permitted to profit by it. And for that purpose cited the cases of *Burnel* and *Ellis*, where *Ellis* had got the deed of rent-charge into his hands : and 22 *Car.* 2. Sir *John Fagg's* Case, who got the deed of entail into his hands by a trick : and the case of *Harcourt* and *Knowel*, where a release

[ 159 ]

When a purchaser buys in an old statute or mortgage, though nothing is due upon it ; yet in equity he shall defend himself by it. So he shall though he got in this prior incumbrance by undue means.

(1) *Eq. Ca. Ab.* 54. pl. 1.

(2) *Vide Stanton v. Sadler*, ante 30. and cases cited there.



was obtained from a grantee of a rent charge, without any consideration and by fraud, and yet a purchaser admitted to *take the advantage* of it: and the case of Lord *Huntington and Greenville* (3) first decreed to protect a purchaser, and after that a release gained from an administrator *de bonis non*: and the case of *Seybourne and Clifton*, (4) where plaintiff and defendant had each of them purchased a reversion, expectant on the death of tenant for life, the plaintiff's bill was, that he might examine his witnesses to preserve their testimony, and be admitted to try his title in the life-time of the tenant for life; but forasmuch as the purchaser was a defendant, the court would do nothing in it, but dismissed the plaintiff's bill, and he lost his land for want of examining his witnesses; and as to what has been objected, that the suing out the commission, was presumptive notice of the bankruptcy to all persons, and that *Sedgwick* was bound to take notice of it: he said this court had been always very careful not to impeach purchases by presumptive notice, and for this cited the case of *Brampton and Barker*, 2 die Junii, 1671. (5) Tenant for life, remainder to his first son mortgaged for *one thousand five hundred pounds*: the deed of settlement was then produced, and seen by the purchaser, \*who notwithstanding lent the money, being advised that the tenant for life, not having then any son born, could destroy the contingent remainders; whereas in truth there was a son born *five days* before the lending of the money; but the mortgagees having no notice thereof, and having got the deed of settlement, the court would not relieve against the purchaser; but dismissed the bill. And the case of *Phillips and Redhil*, 17th Nov. 1679, where tenant for life sold as tenant in fee, and the very deed of settlement at the time of the purchase was produced and delivered to the purchaser himself; yet the court would not affect the purchaser with the presumptive notice; but dismissed the bill.

lends his money, having no notice a son was born. The son of the mortgagor shall not be relieved against this mortgage.

HITCHCOCK v.  
SEDGWICK.

Court wo'nt give leave to plaintiff to examine witnesses to perpetuate testimony, though in case of a purchase of a reversion, where there can be no trial at law during the estate for life. Court of equity cautious in impeaching a purchaser's title upon presumptive notice. Tenant for life, remainder to his first son, assures the mortgagee that he had no son, whereas he had a son born five days before, and delivers the settlement to the mortgagee. The mortgagee being advised that before the birth of a son the tenant for life might destroy the contingent remainder,

[ \*160 ]

As to the objection, that a bankrupt had nothing in him to sell or dispose of, but the estate was divested by act of par-

(3) Ante 1 vol. 49. But where purchase of a trustee after notice of the trust, such purchaser held bound by the trust, *Saunders v. Dehew*, post 271.

(4) Nelson Ch. Rep. 125. Said there the demurrer over-ruled, but not so, the demurrer was argued and ordered

to stand over. Reg. Lib. 1669. B. fol. 520. and afterwards there appears an entry of an order to dismiss on plaintiff's motion, with 40s. costs. Reg. Lib. 1670. B. fol. 499. Eq. Ca. Ab. 234. pl. 4.

(5) Eq. Ca. Ab. 333. pl. 3.

HITCHCOCK v.  
SEDGWICK.

A man makes a first mortgage and afterwards for a further consideration, absolutely releases the equity of redemption, and then makes a second mortgage. The second mortgagee shall protect himself under an old statute. One in the time of the rebellion purchased under the Parliament's title, and after the restoration gets in an old statute; equity would not relieve against him. One articles to sell lands to *A.* and afterwards articles to sell the same lands to *B.* *B.* pays the money and gets a conveyance, and *A.* assigns his articles to *C.* who gets in an old statute; he shall defend himself by it.

[ \*161 ]

† A plank not to be taken from an innocent purchaser.

Every one bound to take notice of a commission of bankruptcy when taken out.

liament, and the inheritance and equity of redemption vested in the *commissioners*, who by the act have power to perform conditions, and at the time of the commission sued out, the mortgage was not forfeited. He said there had been cases in this court, where a man purchased from a bankrupt, who in truth had no estate at all in him, and yet such purchaser by buying in an incumbrance has been permitted to protect himself; as where a man first made a mortgage, and after for a further consideration absolutely released the equity of redemption, and after all this makes a second mortgage for *one thousand pounds*, such second mortgagee shall protect himself by an old statute; and cited the case of *Taylor* and *Tabor*, where the defendant in the late times having purchased under the parliament title, after the restoration of King *Charles II.* purchased in an old statute, and this court would not relieve against the purchaser; and he put this case; a man articles to sell unto *J. S.* afterwards *J. D.* gets a \*second article, and actually pays his money, and has a conveyance. *J. S.* afterwards assigns the benefit of his articles to a man, who gets in a statute, and he was permitted to defend himself by it. † And he said forasmuch as *Sedgwick* had in this case got the law on his side, he could not consent to do any thing to take a plank from an innocent purchaser, as *Sedgwick* appeared to be, no manner of actual notice being proved; nor could it be presumed he would have been so mad as to lend *two thousand two hundred pounds*, if he had known *Slaney* was a bankrupt. And although the commission was sued out before the money lent, he did not think that ought to bind him, or to be such notice as should affect a purchaser.

Lord *Trevor* and *Hutchins* were of a contrary opinion, and held first that he was not a creditor within the act of parliament. And *secondly*, that he was not in the case of an innocent purchaser: when the commission was sued out, he was bound to take notice: Lord *Hutchins* said, the case turned upon this, that *Slaney* at the time of *Sedgwick's* mortgage, had no estate or interest in him, either in law or equity: all was divested and gone by the act of parliament, to which all persons are presumed to be parties, and are bound by it. And the act gives the *Commissioners* power to perform conditions, and in this case the mortgage was not forfeited; but in case it had, he held the *Commissioners* should have had the equity of redemption; and said the cases that had been put, would not come up to this case, for that there was a difference

where a man had divested himself of his estate by his own act, and where it was taken out of him by act of parliament, whereunto all persons are supposed to be parties, and are concluded by it; and said that seemed a very strong case to him that had been put of a purchaser's, in the late times, buying in a statute to protect his title; if that had been allowed, most *Cavaliers* would have lost their estates. And said he looked upon the distribution that was in this case to be a fraudulent contrivance, to divide when they had nothing to distribute; and said, though *Thomas Sedgwick* had an honest debt, he had lost that honesty by playing a trick to come at it; and cited Sir *William Beversham's* sister's case, who by adding a seal to a note, which was sufficient without a seal, lost her security. And said he thought the Lord *Chancellor* had done well to set aside the colourable distribution and sale, and that he might well do it, even upon a petition. And said it had been so done in the Lord *Clarendon's* time; and that it appeared in the case that *Slaney* was a factor in *Portugal*, and so long ago as in 82 did that in *Portugal*, which, if done in *England*, would have made him a bankrupt; but that question was not yet settled, whether the committing acts of bankruptcy beyond sea, (1) or whether trading only beyond sea, be within the reach of the statutes. He said in the case of one *Anderson*, who traded in *Ireland*, he was adjudged a bankrupt within the statute; but there it was proved, he came sometimes over to *Chester* to buy goods, and therefore he did not see any bankruptcy that would reach *Minshal's* mortgage.

HITCHCOCK v.  
SEDGWICK.

[ 162 ]

An honest debt may be lost by playing a trick to come at it, as by adding a seal to a note, which is good without it. Fraudulent distributions by commissioners of bankrupt, may be set aside by the Lord Chancellor on a petition. Whether trading beyond sea, or committing an act of bankruptcy beyond sea, be within the statutes of bankrupt.

And thereupon it was decreed that the land should be sold, *Sedgwick* to be paid the *eight hundred pounds*, and interest due on *Minshal's* mortgage, then the costs of this suit to be borne out of the estate, and the residue to be paid amongst all the creditors in proportion; but *Sedgwick* not to come in for his *two thousand three hundred pounds*. (2)

(1) [The trading and the act of bankruptcy must be in England, *Bird v. Sedgwick*, 1 Salk. 110. *Alexander v. Vaughan*, Cowp. 398. *Inglis v. Grant*, 5 T. R. 530. *Williams v. Nunn*, 1 Taunt. 270.]

(2) And that *Sedgwick* on payment of the 800*l.* and interest due on *Minshal's* mortgage, should deliver up on oath, the conveyance made to *Noden*

in trust for *Sedgwick*, and all deeds, &c. relating to the title of the estate in question, and *Sedgwick's* Cross Bill was dismissed. Reg. Lib. 1689. A. fol. 774. But this decree as against *Sedgwick* was afterwards reversed in the House of Lords, Journ. House of Lords, vol. 14. p. 601. Vide *Abery v. Williams*, ante 1 vol. 27, and cases cited there.

CASE 152.  
Eodem die.  
LORDS COM-  
MISSIONERS.

THOMAS BRADLEY, one of the younger } Plaintiff.  
Sons of THOMAS BRADLEY, deceased, }

RICHARD BRADLEY, Son, Heir, and Exe- } Defendants.  
cutor of the said THOMAS BRADLEY }  
& Al., }

Equity will supply the want of a surrender of a copyhold, as well for an elder son as a younger, in case of Gavelkind copyhold, if it appears to be the intent of the will that the eldest son shall have the copyhold, paying a legacy thereout to the younger son.

**THOMAS BRADLEY** deceased, the father of the plaintiff and defendant, *Sept. 7, 1688*, made his will, and devises to each of his younger children pecuniary legacies, and particularly to the plaintiff *one hundred pounds at twenty-one or marriage*, and thereby deviseth unto the defendant his *three* copyhold messuages at *Mile End* in fee, and likewise his leasehold estate of several tenements at *Rateliff* and *Redriff* to the defendant his executors, administrators and assigns, *subject nevertheless, and my will and pleasure is, that the copyhold messuages or tenements, and also the leasehold premises hereinbefore bequeathed to my son Richard Bradley, and also what shall be herein given to my son Richard Bradley, shall be liable and chargeable for the payment of the legacies before given to my younger children.* It happened that there was no surrender of the copyhold estate to the use of the will, and *that* being of tenure of *Gavelkind*, the plaintiff got himself presented and admitted to a *third* part of the copyhold, as descended on him in *Gavelkind*, and having lately attained his age of *twenty-one*, exhibited this bill for satisfaction of his *one hundred pounds* legacy, and prayed an account and discovery of the personal estate in order thereunto.

[ 164 ]

The defendant confessed the will, set forth the value of the estate, that he was willing to pay the legacy, in case he might enjoy the land according to the will; but set forth how his brother taking the advantage of the want of a surrender, had got himself admitted; and unless he might have the copyhold, hoped he should not be compelled to pay the legacies; for if so, he who was the eldest son and heir, and unto whom the testator intended much the greater part of his estate, would have the least share of it.

Equity will supply the want of a surrender of a copyhold, when it is devised for a provision for younger children or in favour of creditors, or a purchaser.

When this cause came first to be heard, the court took time to consider of it, and would be attended with precedents; and cause coming on again to be heard, the precedents, that were insisted on, were the case of *Hardham* and *Roberts*, *Jan. 22, 1682—3*, where by the custom of the manor, a surrender ought to be into the hands of *two* tenants, and the surrender was into the hands of one only; yet being for a provision for a younger

child, the court supplied that defect, and the case of *Croft and Lyster*, Feb. 22, 1675, where husband and wife were joint-tenants for life, remainder in fee to the wife; the husband purchases the freehold, and takes the conveyance to the use of himself and his wife, and their heirs; the husband dies, the wife surrenders to the use of a daughter by a former husband, and decreed accordingly against the heir: and the case of *Smith and Ashton*, where the defective execution of a power was supplied in equity, being a provision for younger children. And several other cases were cited, where surrenders and liveries (1) had been supplied in equity; but those cases were grounded upon a long possession and enjoyment.

BRADLEY v.  
BRADLEY.

A defective execution of a power to provide for younger children supplied in equity. 1 P. Wms. 443. 2 Vol. 490. pl. 263.

It was objected first, that there was sufficient personal estate without the copyhold for payment of the legacy; and if the copyhold was charged, it was but in aid and supplement of the personal estate; and here being no deficiency, there was no need to supply the want of a surrender, upon pretence that it is for making provision for younger children. And *secondly*, that the plaintiff's bill was barely for his legacy, and he asked it only out of the personal estate, and the defendant had no bill to have the defect of a surrender supplied.

[ 165 ]

The *Commissioners* all concurred in opinion, that the want of the surrender ought to be supplied, and therefore decreed the plaintiff to re-surrender the copyhold, and the defendant in the mean time to hold and enjoy, and upon surrendering he to be paid the *one hundred pounds* legacy. (2)

Lord *Hutchins*: I take it the objection that the heir has no bill to have the want of a surrender supplied, turns upon them, for a man in many cases may defend himself with that which would not give him title to sue. There is no doubt but in the case of a purchaser the want of a surrender shall be supplied, and so in the case of a creditor, or provision for payment of debts; and there having been precedents already of relief where it is a provision for children, he thought the best service they could do was to make the rule uniform, and to stick to a

(1) As to liveries, vide *Lyford v. Coward*, ante 1 vol. 196.

(2) With interest from the time the plaintiff attained his age of 21. As to supplying the surrender, the words of the decree are, "this court declared in-  
"asmuch as the said copyhold premises  
"were chargeable by the testator's will,  
"with the plaintiff's said legacy, that  
"the said plaintiff in case he will be  
"paid his said legacy, must surrender

"unto the defendant all his right, title,  
"and interest in the said copyhold es-  
"tate." Reg. Lib. 1689. A. fol. 1037.  
Vide on this head, *Hardham v. Roberts*,  
ante 1 vol. 132, 3. and cases in not.  
there. [See 55 *Geq.* III. c. 192. where-  
by copyhold estates will pass by devise  
or appointment without surrender in all  
cases where they would have so passed  
with surrender.]



BRADLEY v.  
BRADLEY.

rule. (3) As to the objection that the personal estate is sufficient to pay the legacies, the eldest son has no legacy, and the provision intended him will be gone, if the surrender be not supplied. Suppose the houses were burnt down, so that the personal estate fell short, no doubt but the younger children would have an equity to charge the copyhold, and to supply the defect of a surrender, and there ought not to be one sort of equity for an eldest, and another for a younger son.

(3) And it is upon the ground of supplies the want of surrender for them. considering younger children unpro- Arg. *Whitcombe v. Whitcombe*, Pre. vided for as creditors, that the court Ch. 282.

[ 166 ]

WOODMAN *versus* BLAKE, & *è contra*.

CASE 153.  
24 Die Julii.  
LORDS COM-  
MISSIONERS.  
Eq. Ca. Ab.  
103. pl. 3. S. C.  
One scised in  
fee of lands of  
10000*l.* value  
settles it so,  
that in case  
his eldest  
daughter  
within six  
months after  
his death,  
should pay  
6000*l.* to the  
use of his other  
four daugh-  
ters, then the  
eldest to have  
the land. But  
if she failed in  
payment, then  
the second to  
have the like  
privilege. The  
six months passed without payment. Whether the eldest daughter can assign over this privilege. Post Case 202.

SIR THOMAS BADE having five daughters by deed settles his *Hampshire* estate so, that in case his eldest daughter should pay 6000*l.* within three months after his and his wife's de- cease, to be equally distributed amongst his other daughters, that then she should have the estate, being worth ten thousand pounds to be sold; if she failed, then the like power to another daughter, (1) with power in the deed to change, alter or revoke the same. By will reciting his power to alter or revoke the deed, he devises that his eldest daughter shall have the pre-emption, and gives six months time for payment of the money. (2) The eldest daughter within the six months made application to the trustees, that they would join in mortgage or sale for raising of the money; and some difficulties arising about it, she upon the expiration of the six months time for payment of the money, exhibited her bill in this court, and being indebted to the now plaintiff *Woodman*, assigned her in-terest and right of preemption to him. (3)

The question was, whether the six months being elapsed, they should have any benefit of the assignment. It was insisted for the defendants, that the intention of the testator was to keep the estate in his family, and therefore in case one daughter was not able, or should neglect, to pay, he limits that privilege over to another. Now here comes *Woodman*, the assignee of a daughter, to take the estate out of the family,

(1) And so on to his five daughters the said deed, R. L.  
successively, R. L.

(2) And in case she failed, then as in R. L.

(3) Devised it to him by her will,

R. L.

contrary to the intention of the donor ; and that the deed was not revoked by the will, but only altered as to the time of payment, so that if the first daughter failed, that privilege is to go over to another by the deed, which ought to be taken strictly, [ 167 ] in favour of those who were to come after. The court took time to consider of it. (1)

WOODMAN v.  
BLAKE.

(1) Afterwards 21st of *March*, 1691, the Lords Commissioners by their decree in this cause, declared, " that the plaintiff *Woodman* ought to be relieved, for that though the time for payment of the said 6000*l.* was elapsed, yet there was an interest and benefit in Mrs. *Dennys* (the daughter for whom the time had been enlarged by the will) which was not forfeited, and do therefore think fit and so order and decree that the said plaintiff *Woodman* be

" let into the benefit of the said estate." Reg. Lib. B. 1690. fol. 687. Vide post 222. S. C. Et vide this case, 1 Bro. Parl. Ca. 127. Colles' Parl. Ca. 74. where it is said this decree was reversed in the House of Lords. And Sir *Thomas Man's* Case cited by *Master of the Rolls*, 2 Freem. 206. S. P. if not S. C. where it was resolved that the second daughter should have the land, for the eldest could have no relief, *Price v. Price*, *ibid.* 258.

### EARL OF PLYMOUTH *versus* HICKMAN.

THE case appeared to be, that in 1681, a settlement was made of *Tovey's* estate, whose daughter the Lord *Windsor* married, and out of that settlement lands called *Breedon* and *Redmarley* were omitted, to the intent that if a purchase should offer itself of lands more convenient, and lying better to the Lord *Windsor's* estate, these might be sold and other lands purchased ; much about the same time in 1681, there was a treaty for the purchase of the manor of *Bromesgrove*, (being the lands in question) carried on by *Emes*, on behalf of the Lord *Windsor*, and *Emes* and Lord *Windsor* were obliged by the articles to pay the purchase-money, and in the same year, to wit, in 1681, is the purchase made, and the conveyance taken in the name of the Earl of *Plymouth* and *Emes*, and to the heirs of the Earl of *Plymouth*. The three thousand three hundred pounds consideration-money, is mentioned in the deed of purchase, to have been paid by the Earl of *Plymouth*, and was in truth by him borrowed of the Earl of *Conway*, on a mortgage of his own estate. The Lord *Plymouth* at the courts he held there, declared it was his son's estate. In 1683, Sir *William Hickman* lends three thousand three hundred pounds, to pay off the Lord *Conway*, and he accepts of a security of the Lord *Windsor's* lands, to wit, of *Breedon* and *Redmarley* ; and thereupon the Earl of *Plymouth's* security was discharged : to this security the Earl of *Plymouth* was a party, and, as was said, gave a receipt

CASE 154.  
Eodem die.  
LORDS COM-  
MISSIONERS.  
Though in the purchase-deed, the consideration money is mentioned to be paid by the purchaser, and there is no express declaration of a trust ; yet upon the circumstances of the case, decreed a trust, though to the disappointment of the purchaser's will and of his creditors.



EARL OF PLY-  
MOUTH v.  
HICKMAN.

[ 168 ]

on the back of it, for the *three thousand three hundred pounds*. The Earl of *Plymouth* afterwards by his will, devises this manor of *Bromesgrove* (*inter alia*) for the payment of his debts : and now the question was, whether here was a trust for the plaintiff, the infant heir, sufficiently declared in writing, according to the statute of *Frauds* and *Perjuries*.

It was insisted on for the defendants, that here was no sufficient declaration of the trust ; that as to the articles, nothing was more usual than for one man to article for another ; that when the matter is proceeded in, as in this case, and conveyances come to be executed, the articles are out of doors, and the deed of purchase declares the money was paid by the Earl of *Plymouth*, as in truth they cannot controvert, but that it was ; then, when should the trust begin ? for it was no trust at the time of the purchase ; and there is no express declaration of the trust in writing to this day ; the most they can make of it, is but an inference, that because the father had the like sum of money afterwards out of the same estate, that therefore that money must be applied to the purchase, and come in lieu of the consideration-money, which was paid by the Earl ; and this to disappoint a man's will, and to discredit it, who is not presumed to do an ill thing *in articulo mortis*, and to prevent his creditors of their satisfaction.

*Per Cur.* We think it a trust, upon the face of the deeds ; though creditors are favourites, we must not pay them out of other men's estate, nor as Justice *Twisden* was wont to say, *steal leather to make poor men shoes*, and decreed it for the plaintiff.

CASE 155.  
28 die Julii.  
In Court.  
LORDS COM-  
MISSIONERS.  
One dies in-  
testate leaving  
an uncle and  
a deceased  
uncle's son,  
whether the deceased uncle's son shall come in for a share on the statute of distribution. Post Case 213.

### BEETON *versus* DARKIN & è contra.

THE question arose upon the statute for *distribution of intestate's* estates ; in this case there were \*four brothers and a sister, being uncles and aunt to the intestate, one of them was dead, leaving children ; the question was, whether these children should come in for a share.

[ \*169 ]

Mr. *Finch* argued that before the making of this statute, if there were a brother living and a nephew, the brother should have had the administration, and the nephew should have had nothing. But now by this act of parliament, the nephew comes in for a share, but the act goes only to brothers' and sisters' children, and their representatives, which will not reach this case, for the words of the act are, *there shall be no distribution*

further than brothers' and sisters' children and their representatives, and that must be intended of collaterals to the intestate.

BERTON v.  
DARKIN.

Objected *per* Lord *Hutchins*: if there be two uncles both dead, leaving issue, the child of one of them gets administration; by Mr. *Finch*'s rule, the administrator is not bound to distribute.

Mr. *Finch*: that is not my argument, I do not say that even in that case there shall not be distribution amongst those who are in equal degree; but what I say is, that there shall not be any representation amongst collaterals to the intestate, beyond brothers' and sisters' children.

Mr. *Solicitor General*, and Mr. Serjeant *Levinz*, argued *contra*, that the proviso in the act of parliament, that there shall be no representation beyond brothers' and sisters' children, must be taken with relation, not to the intestate, but to the persons amongst whom the distribution is to be made: there are no such words in the act of parliament, as that there shall be no representation amongst the collaterals to the intestate beyond brothers' and sisters' children to the intestate; there wants the word (intestate) in that place to support Mr. *Finch*'s argument.

[ 170 ]

*Per* Lord *Hutchins*, the Ecclesiastical Court very anciently made distribution of intestates' estates long before the act of parliament; many precedents whereof were lately produced at the Bar of the House of Lords, in the case of *Crook* and *Watts*, between the half blood and the whole blood, that the spiritual court was not prohibited from making distribution until the reign of King *James* the First, and the prohibition was then grounded on the statute of *Henry VIII.* which directs the ordinary to grant administration to the next of kin, and when that was done, they had executed their authority; and he took it that the words in the act of parliament, to distribute according to the laws for that purpose, and rules in the act afore-mentioned, the word (laws) must relate and be intended of ecclesiastical laws, and the usage in the spiritual court before that time practised. Ant. Case 124.

The court inclined that the nephew was well intitled to a share with the uncles and aunt, but took time further to consider of the case. (1)

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(1) Reg. Lib. 1689. A. fol. 971. but it is now settled that in such a case, the uncle and aunt shall take the whole, *Pett's Case*, 1 P. Wms. 25. *Bowers v. Littlewood*, ibid. 593. *Maw v Harding*, post 233. Pre. Ch. 28. S. C.

CASE 156.

Die Mer.

30 Julii.

In Court.

LORDS COM-  
MISSIONERS.

A woman re-  
sorts to places  
of gaming at  
court, and bor-  
rows money to  
supply persons  
of quality in  
their gaming,  
and gives the  
lenders great  
rewards, and  
afterwards  
borrows more,  
and is arrested  
for the last  
money lent,  
and gives bond  
and judgment  
for it, and  
brings a bill  
to have an al-  
lowance for  
the former ex-  
cessive pre-  
miums which  
she allowed.  
The court  
would not re-  
lieve other-  
wise than on  
payment of  
principal, in-  
terest, and  
costs.

TAYLOR & Ux', & Al' *versus* BELL, BAGNAL & Al'.

THE plaintiff's wife resorted to places of gaming at court, and by supplying persons of quality there with sums of money and otherwise, made considerable profit, and for the better carrying on this sort of trade, she borrowed great sums of money of several persons, and amongst others of the defendants and their wives, boasting to them the great advantage she made by this sort of dealing, and that they should have the benefit of it; and for gaining the better credit with them, she would bring them *five* guineas for the loan of *ten* for a week, and so from time to time, alledging their money had gained so much profit; and they finding this great profit were encouraged to lend greater sums, at least *one hundred* or *two hundred* guineas at a time, and then put them off, that there had been disappointments, and but little play, but that there would shortly be great gluts of play, and great profits made, and they should be sure to have at least five for one. The defendants at last suspecting her fair promises, arrested the plaintiff her husband, who had then lately married her, and the plaintiff the wife also, by her maiden name, and held them in custody until they agreed to an account of what they alledged was due, and gave bonds with sureties, who had been some of her like customers, for payment of the monies, with a warrant of attorney to confess judgments against the plaintiff *Taylor* and his wife.

The bill was to be relieved against those securities thus obtained, and to bring the defendants to a fair account, setting forth the plaintiffs had no dealings with them, but by way of monies borrowed and repaid, and annexed a schedule of receipts and payments. The defendants by answer confessed the fact to be as above, and that they had often received *five* or *ten* guineas for the loan of *ten* guineas for a week or ten days, as profit that had been made of the same, and so of other sums, and they lent and gave the plaintiff new credit for the sums so paid as profit; so that it appeared by their answers, that though they had got securities from the plaintiff for great sums of money, that yet the defendant *Bell* had in truth received more than she really lent to the plaintiff, and that there was but little due to *Bagnal*; but insisted that the sums so received were paid as profit and not towards satisfaction of the monies lent.

[ 172 ]

For the plaintiff it was insisted there ought to be an account; by their own answers it appears there is no such sums due, as those for which they have got securities. As to the

TAYLOR v.  
BELL.

pretence that the monies repaid were so paid as profit made at play, and not to satisfy the monies due, it was said they might make what agreements they thought fit amongst themselves, but if they came into *Westminster Hall*, there would be little regard given to them; they must there be governed by the rules at law. Now here they had no right to any profit arising by play, for they run no hazard: they of their own shewing were to have their principal again in all events; then it comes to this, that it is a debt for money lent, and the measure there is what is due for principal and interest; and as to what they object, that the plaintiffs made great profit with their money, and they run a great hazard in trusting us, they run the same hazard that other people do who lend money on a promise or personal security, and that hazard will not justify the taking of unlawful interest; (1) and where a merchant borrows money, and makes great advantage by it, by ingrossing a particular commodity or the like, that will not intitle the lender to come in a sharer with him for the profit, nor for him to take more than statutable interest. In this case it appears by the defendants' own answers, that the bonds they have gained from the plaintiffs, are within the provision of the statute against excessive usury, but they got a warrant of attorney from us, and have entered up judgment, so we have lost our opportunity of defending ourselves at law, but ought to be relieved in this court, and cited the case of *Powell* and *Hall* in the *Exchequer*, where *Hall* had got judgment in a trustee's name, upon a bond given for a play-debt; there the court, though the plaintiff had slipt his opportunity at law, directed an issue and relieved the plaintiff.

Though a security be hazardous, yet this will not justify excessive interest.

The court thought not fit to relieve the plaintiffs, but ordered them to pay principal, interest, and costs at law and here, or the bill to be dismissed with costs, for that the court would not interpose or meddle with play-debts and things of this kind. (2)

[ 173 ]

*Per Lord Hutchins.* If the sureties had not been plaintiffs as well as *Taylor* and his wife, he would not have relieved even against the penalty. (3)

(1) Vide on this head, *Chesterfield v. Janssen*, 1 Atk. 301.

Book. Reg. Lib. 1689. B. fol. 652.

(2) The decree is so, but no case as to the use made by the plaintiff's wife, of the money borrowed from the defendants, is stated in the Register's

(3) [By the 4 Ann, c. 16. courts of law can relieve against the penalties of a bond on payment of principal, interest and costs.]

## CASE 157.

Inquisition finding two negligent escapes per warden of the Fleet, is forfeiture of the office, though but for small sums. So is one voluntary escape a forfeiture.

Grant by the Crown of an estate, &c. forfeited before any inquisition finding the forfeiture, is illegal.

Warden of the Fleet, if but tenant for life, his forfeiture of the office belongs to the reversioner and not to the Crown.

[ 174 ]  
4 Co. 32. b.

In case of an inquisition finding a forfeiture by the warden of the Fleet, whether it ought to find, what estate the warden had in the office.

9 Co. 95. a.

## Colonel LEIGHTON'S Case.

**MEMORANDUM**, That upon a caveat put in against the passing of a patent to Colonel *Leighton* of the office of *Warden of the Fleet*, upon hearing counsel on both sides, it was admitted that the inquisition having found two escapes, though but for small debts, that amounted to a forfeiture of the office; nay, that one voluntary escape made a forfeiture.

But it was objected against passing the patent, that Colonel *Leighton* had been too hasty in this matter, and proceeded illegally in having applied and obtained a promise and order for a grant before any inquisition taken, or forfeiture found, which they alledged was against the Bill of Rights, and mentioned the case in *Co. 7 Rep. fol. 36.* as to the granting forfeitures on penal laws.

**Secondly**, That the inquisition in this case had not found what estate the *Warden* had in the *Fleet*; for in case he had but an estate for life only, as in truth he had not, then the forfeiture, if any, would not be to the *King*, but to him that had the inheritance, which was the point adjudged in the *Duke of Norfolk and Brandon's Case*, 39 H. 6. and that point was agreed in *Whitchcott's Case*, and in *Mitton's Case*, *Co. 4 Rep.* and *Crabley the Exigenter's Case* in *Dyer*, and in the *Lady Broughton's Case* of the *Gate-House* at *Westminster*, she having but an estate for life in it, the *King* could not have the forfeiture, but the *Dean* and *Chapter* had it.

As to the first objection, it was answered, that Colonel *Leighton* had not proceeded unduly or illegally in order to the obtaining of this patent, for that in truth the inquisition bears date, and was taken before the warrant for passing of the patent, and though it was not filed till afterwards, that is not material; for this is none of those cases where the statute requires the filing of an inquisition, and only in cases of grants of lands and tenements.

And as to the second objection, that the inquisition has not found what estate the *Warden* had therein, it is a strange objection; for that first the inquisition does not direct that any such thing shall be inquired into, and *Mounson's Case* in *Moor* 216, 217, is that the inquisitors must not exceed the commission, though to find a matter necessary to be found; nor was it done in *Sir George Reynell's Case*, or in any case, nor is it possible to be done: who can tell what private or secret conveyances the *Warden* may have made? So to say the *Warden*

had but an estate for life, and that therefore the forfeiture was not to the *King*, but to him that had the inheritance, was a foreign objection, and a matter that could not at this time come judicially before the court; so they relied on it that a forfeiture being found, that *prima facie* was to the *King*, which was sufficient ground for him to seize and grant. If there be a reversioner who has the inheritance, he may come in, and set forth his title; and in the *Lady Broughton's Case*, there the *Dean* and *Chapter* upon the inquisition and before judgment, were by the court admitted to come in, and surmise on the Roll that they had the inheritance.

COL. LEIGHTON'S CASE.

*Per Cur.* It is a matter of great consequence to the *King*, and to the subject, should the seal be put to this patent, it might occasion a general escape of all the prisoners in the *Fleet*, and therefore would know his *Majesty's* pleasure before they would pass the grant. (1)

Court cautious how they pass a patent for grant of warden of the Fleet, because it may occasion a general escape of the prisoners.

(1) Vide *Rex v. Manlove*, 3 Lev. 238, where it appears that the court were of opinion that two voluntary escapes were a forfeiture of the office; and that where the office is for life in one, and the fee of the same office in another, the forfeiture is to him in the reversion and not to the *King*. So the *King v. Lady Broughton*, 2 Lev. 71. and by stat. 8 and 9 Will. III. cap. 27.

sect. 4. the penalty for taking any gratuity or security for the same, by any keeper of a prison, to procure, assist, or connive at an escape of a prisoner in his custody, is 500*l.* forfeiture of the office, and to be ever thereafter incapable of executing such office. Et vide further that statute on the Law of Escape.

DE

[ 176 ]

## TERM. S. MICHAELIS, 1690.

## IN CURIA CANCELLARIÆ.

NOTE, Per Lord Commissioner HUTCHINS.

CASE 158.  
Eq. Ca. Ab.  
Policy of insurance, how far it extends.

WHERE a policy of insurance is against restraint of princes, that extends not where the insured shall navigate against the law of countries, or where there shall be a seizure for not paying of custom or the like, *die Martis*, 14 Oct.



MARSHFIELD *versus* WESTON.

CASE 159.  
Eq. Ca. Ab. 11.  
pl. 13. S. C.  
In what cases,  
as to matters  
under 40s.  
party's own  
oath is allowed  
to be a proof.

IN an account between the plaintiff a gardener, and the defendant a seedsman, though the defendant be allowed sums under forty shillings upon his oath, as to his seeds sold and delivered, &c. yet the plaintiff shall not be allowed any thing upon his oath, as to trees that he sold and delivered to the defendant or the like. (1)

(1) Vide *Anon.* ante 1 vol. 283. *Whicherly v Whicherly*, ante ibid 470.

[ 177 ]

## ANONYMOUS.

CASE 160.  
Lessee for  
years mort-  
gages his  
term, and  
afterwards  
borrows more  
money of the  
mortgagee on  
bond, and dies,  
his executor

*PER CUR.* A man having a mortgage of a lease for years, afterwards lends more money to the mortgagor on bond, if the executor comes to redeem, he shall not be admitted to a redemption, unless he pays both debts, though no special agreement that the bond-debt should stand secured by the mortgage. (2)

shall not redeem without paying the bond as well as the mortgage.

(2) Vide *Shuttleworth v. Laycock*, April, 1788, on a bill filed by creditors ante 1 vol. 245. *Vanderzee v. Willis*, 3 on which circumstance it should seem Bro. Ch. Rep. 21. Note. In *Vanderzee* the cause was determined. *v. Willis*, there had been a decree

CASE 161.  
Die Lunæ,  
27 Octobris,  
1690.

SMITH *versus* DUFFIELD.

In Court.  
Lords RAW-  
LINSON and  
HUTCHINS.

THE plaintiff's bill claimed a provision of *three thousand* pounds made for daughters, upon failure of issue male, by a settlement in *one thousand six hundred thirty-one*.

Bill is to have 3000*l.* provided for daughters' portions, on failure of issue male by an old settlement in 1631. The brother of the plaintiffs who might have barred them by a recovery, giving them by will above the value of the 3000*l.* it shall be intended a satisfaction.

For the defendant it was insisted, that this dormant settlement had not been taken notice of in the family, and having been made *sixty-two* years since, was in truth forgotten, and not regarded, for otherwise the plaintiff's brother, who by virtue of this settlement was tenant in tail, precedent to the provision for daughters, might have destroyed and barred that provision. And the brother, who had it then in his power, and might have destroyed that provision without making any compensation to his sisters, has by his will given them his whole personal estate, being of greater value than the provision made them by the settlement, and therefore in conscience they



ought not to make this demand, and cited the case of *Brook and Yeomans*.

SMITH v.  
DUFFIELD.

The Court was of opinion that the devise of the personal estate ought to be taken as a sufficient compensation of the plaintiff's demands, and therefore dismissed the bill, with costs. (1)

[ 178 ]

(1) Reg. Lib. 1690. B. fol. 8. Vide post 258. S. C.

Sir THOMAS SMITH, Bar. PETER WIL- } Plaintiffs.  
BRAHAM and ANNE his Wife & Al'.

Dame ABIGAIL SMITH, Widow, RICHARD } Defendants.  
LISTER and FRANCES PATE his Wife,  
Sir CHARLES HOLT, Bar. & Al'.

CASE 162.  
Die Mercurii,  
29 Octobris.  
In Court.  
LORDS COM-  
MISSIONERS  
RAWLINSON  
and  
HUTCHINS.  
Eq. Ca. Ab.  
247. pl. 5. S. C.

THIS cause came now to be reheard upon the defendants' petition, who conceived themselves aggrieved, by the decree made upon the hearing of the cause by the late *Lords Commissioners*.

The case was that upon the marriage of Sir *Thomas Smith* with Dame *Mary* his wife, being the grandfather of the defendant *Frances Pate Smith*, now wife of the defendant *Lister*, by settlement on his marriage assured the manors and lordship of *Hough Weston cum Charleton Grash* and *Great Shavington* in *Com. Cestr.* to the use of himself for life, remainder to Dame *Mary* his wife for her jointure, remainder to the first son in tail with other remainders over.

Grandfather  
being tenant  
for life, re-  
mainder to his  
first son in tail,  
remainder  
over, with  
power to  
charge the  
estate with  
250l. per ann.  
does by deed  
charge the

premises with 250l. per ann. for four years, to commence from his death, in trust to raise 1000l. part to be paid to *A.* and the other part to the plaintiff *B.* and dies. The son pays *A.* what was due to him, and he delivers up the deeds and they are suppressed. The son takes the profits for four years and more, and leaves a daughter his heir at law, and leaves no personal assets. The daughter enters on the estate. The lands shall be liable in her hands to pay the money due to the plaintiff with interest, though the term for years that was to secure the money is expired; and though the person be dead that received those profits, and should have paid the money in question.

*Provided* that the said Sir *Thomas* should have power by any deed or writing attested by two witnesses to grant an annuity or rent-charge not exceeding two hundred and fifty pounds out of all the said manors and premises, or any part thereof, to any person for any term not exceeding four years, to commence after the death of Sir *Thomas* and Dame *Mary*.

[ 179 ]

Sir *Thomas* pursuant to the power by indenture July 23, 1666, grants an annuity of two hundred and fifty pounds per ann. to Sir *Robert Holt* for four years, to commence after his death, upon trust to dispose thereof, as he by deed or will should direct or appoint.

Sir *Thomas* afterwards by deed-poll, appoints one hundred and fifty pounds of the said monies to be expended in his

SMITH v.  
SMITH.

funeral, and *one hundred and fifty pounds* in a monument to be erected for him in *Covent-Garden Church*, and gave several sums to Sir *Robert* and his *Lady*, (who was his daughter) and their children, and distributed the rest amongst the plaintiffs and those they represent.

In *April*, 1668, Sir *Thomas* died, and upon his decease, the premises came to Sir *Thomas* the son, who prevailed with Sir *Robert Holt* to deliver up the indenture of rent-charge, and to join in a fine and deed to lead the uses thereof, whereby Sir *Thomas* the son became seized in fee of the premises; and in lieu of the said indenture of rent-charge delivered up as afore-said, Sir *Thomas* and his trustees make a mortgage to Sir *John Bridgman*, and *Humphrey Jennings*, Esq. being persons nominated by Sir *Robert Holt*, for a term of *seven* years, defeasable on payment of the said *one thousand pounds*, by several annual payments therein mentioned; after this, Sir *Robert Holt* has satisfaction made to him for the sums payable to himself, his wife and children, and thereupon the indenture of rent-charge, the deed-poll for distribution, and the subsequent mortgage for *seven* years are suppressed and hushed up.

[ 180 ]

Sir *Thomas Smith* the son, enjoyed the profits during his life, and upon his decease, the premises descended and came to his only daughter and heiress, the defendant *Frances Pate Smith*, now the wife of *Lister*, who had ever since taken the profits; and the defendant Dame *Abigail* was executrix of Sir *Thomas* the son, her late husband, but had not assets.

The plaintiff's bill was for that as much as the deed had been thus concealed from them, and Sir *Thomas* the son and heir having received the profits, which ought to have been applied to have satisfied their demands, that therefore the defendant Dame *Abigail* might either pay them out of the assets, if any she had, or that the land might stand charged.

The defendant Dame *Abigail*, insisted she had not assets; and the defendant the heir, insisted, that if there were such deeds *ut supra*, which she did not admit, that yet the profits which ought to have satisfied the plaintiff's demands, were taken by her father, and not by her, and the *four* years for the rent-charge, as also the subsequent term for *seven* years, were both expired before the lands came to her possession, therefore insisted that the lands ought not to stand charged in her hands.

Upon hearing the cause, it being fully proved, that there were such several deeds, (*ut supra*) and that the same had been suppressed or concealed by agreement between Sir *Robert Holt* and Sir *Thomas Smith*; the court thereupon declared,

SMITH v.  
SMITH.

[ 181 ]

that although the *four years'* term for payment of the rent-charge, and the *seven years'* mortgage-term was expired, yet the plaintiff's share of the *one thousand pounds* which remained unpaid, ought to remain a charge on the said lands; and decreed the same accordingly, with interest at *4l. per cent.* from *April 5, 1672*, being the time when the mortgage-term for *seven years* expired, and cited Sir *Andrew Corbett's Case*; where even at law, if the heir has taken the profits which should be applied for payment of debts, the lands shall still remain charged therewith.

And now upon the rehearing, the *Lords Commissioners* confirmed the former decree *in omnibus*. (1)

(1) There is an entry of an order Reg. Lib. 1683. B. fol. 845. But no 5th July, 1690, for a rehearing of this entry of the rehearing appears. Vide cause on the 27th October then next, *Harrison v. Cage*, ante p. 85.

ROBINSON *versus* DUSGATE.

CASE 163.  
Die Veneris,  
31 Octobris.  
In Court.  
Lord HUTCH-  
INS, MASTER  
of the ROLLS,  
Eq. Ca. Ab.  
201. pl. 16. S.C.  
A. by will de-  
vises his land  
to B. in fee,  
paying 400l.  
whereof 200l.

THE case was, that *J. S.* by his will, devised his lands to *A.* for life, remainder to *B.* in fee, he paying *four hundred pounds*; whereof *two hundred pounds* to be at the disposal of his wife, in and by her last will and testament to whom she shall think fit to give the same. The wife dies intestate, the plaintiff takes out administration, and brings his bill to have this *two hundred pounds*.

to be at the disposal of his wife by her will, to whom she should think fit. The wife dies intestate, her administrator shall have this 200l. the property thereof being absolutely vested in the wife.

For the defendant, it was insisted that the property was not absolutely vested in the wife, but that she had only a power to dispose by will, if she thought fit; and not having made any disposition, it becomes a lapsed legacy, and the defendant not chargeable with the payment of it, and cited for that purpose, the Case of *Pease and Stileman ver. Mead*, in *Hob. fol. 9*, where the condition of a bond was, that the defendant *Mead* should pay *twenty pounds* to such person or persons as *Eliz. Hanchett* should by her will and testament in writing, name and appoint the same to be paid to, and she died having made her will, and *Pease* and *Stileman* executors, but no express appointment; and it was there adjudged, that an express appointment was necessary, and that the plaintiffs the executors, as assignees in law, were not intitled thereunto.

[ 182 ]

But the court took it, that the whole interest and property of the *two hundred pounds* vested in the wife, and that she

**ROBINSON v. DUSGATE.** had power to dispose of it as she thought fit, and therefore decreed it for the plaintiff as administrator of the wife. (1)

(1) With interest from the time of filing the bill. Reg. Lib. 1690. B. fol. 101. Note. The testator's wife became lunatic about ten years after the death of her husband, and continued so till her death. Vide *Tomlinson v. Dighton*, 1 P. Wms. 149. 170. where by *Parker*, Chief Justice, a clear distinction is taken between a power given with a particular description and limi-

tation of the estate, and where generally, for in the former case the power is a distinct gift, and comes in by way of addition, but in the latter, the whole as it is to be disposed of, must be supposed to be in those who are to dispose of it, and this distinction recognized, and the doctrine settled on the authority of the principal case in *Maskeline v. Maskeline*, Amb. 750.

## CASE 164.

In Court.

Die Lunæ,  
10 Novembris.

One dies leaving a debt by judgment, and another by bond; the judgment creditor levies his debt out of the personal estate; whether the bond creditor shall in equity stand in the place of the judgment creditor, and charge the land with his debt.

## POREY et AL' versus MARSH &amp; AL'.

THE plaintiffs being bond-creditors, brought their bill against the heir and executor, and against Sir *John Thompson*, who had a judgment which bound the land; but he being at a good understanding with the heir, refused to go upon the land, but levied his debt upon the personal estate, so that there was nothing left to satisfy the plaintiffs. They prayed that Sir *John Thompson* might either refund, or they might have the benefit of his security to follow the land.

It was insisted for the defendant the heir, that here being no trust nor equitable assets, they were to be administered in a course of law, and that there was no precedent, where this court had interposed, where there were only legal assets, but left the creditors to take their satisfaction in a course of law, unless where the court has interposed that bond-creditors subsequent to a decree, shall not sweep away the assets. As to the case of *Knight and Gay*, (2) that was cited on the other side, it was not like to this, where a man having a mortgage and statute as a further security, and he by virtue of the statute swept away the personal estate, and the plaintiff a legatee in that case had a decree to go upon the land; for there the land was the principal security; (3) but in the matter in question, the judgment affected the personal estate as well as the real; and as to *Sibly's* case in the Lord *Jefferies's* time, this point was stirred, but no decree made in it.

Lord Commissioner *Hutchins* inclined to relieve the plaintiff,

(2) S. C. cited in *Fox v. Crane*, post 306, under the name of *Knight v. Keyme*.

(3) So *Fletcher v. Stone*, post 273.

and said the heir in many cases has the assistance and favour of the court, as to make the personal estate first liable to debts, and to be applied in ease and exoneration of the real estate, and even an *hæres factus* has had that relief here, and he therefore thought it reasonable *e converso*, that as the heir was to have equity, he ought to do equity. (1)

POREY v.  
MARSH.

(1) On the head of marshalling 1 vol. 455. and cases cited in not. there. assets. Vide *Sagitary v. Hide*, ante *Sprignall v. Delawne*, ante p. 36.

### LOVEL *versus* LANCASTER.

CASE 165.  
Eodem die.

*J. S.* devises land to *A. B.* for payment of debts, and devises to *J. D.* certain lands which the testator in his life-time had mortgaged, and likewise gives him his personal estate: the question was, whether *J. D.* should have the benefit of the trust for payment of debts, so as to have the money owing on the mortgage paid off by monies raised out of the trust, that the lands might come to him clear of the debt owing to the mortgagee.

One devises *B.* acre to *A.* for payment of his debts; devises *W.* acre to *B.* which the testator had mortgaged, and likewise devises to *B.* all his personal estate.

*B.* shall take the mortgaged premises *cum onere*, and though the personal estate is devised to *B.* and the land is devised for the payment of the debts; yet the personal estate shall be subject to the debts.

*Per Cur.* He must take the mortgaged lands *cum onere*; and the personal estate also, though devised to him, yet must be subject to the debts, notwithstanding lands were devised for payment of the debts. (2)

(2) There does not appear to be any direct devise of lands for payment of debts. The testator in his life time conveyed to certain persons by indentures of lease and release, the premises therein mentioned, "upon trust that they should sell and dispose thereof for and towards payment of his debts to such person or persons, and in such manner as he, his executors, or administrators should direct or appoint;" but no appointment by

the will appears so far as the same is stated in the Register's Book: the decree directs "that in case the personal estate should not be sufficient for payment of the debts, then the trust estate to come in aid and be applied to pay what the personal estate shall fall short to pay." Reg. Lib. 1690. *B.* fol. 166. Vide *Mead v. Hide*, ante 120. Et vide *Bartholomew v. May*, 1 Atk. 487. [*Howel v. Price*, 1 P. Wms. 294, and note (2).]

### BROWN *versus* BOOTH.

[ 184 ]

CASE 166.

In Court.

Mercurii, 12

die Novemb.

Eq. Ca. Ab.

164. pl. 5. S. C.

THE plaintiff being vicar of the parish of *Wirksworth* in *Derbyshire*, brought a *subpoena* in the nature of a *scire fac.*

Decree 5 Car. 1. that all the miners within the parish of *D.* as well for the time being as to come, shall pay to the vicar for tithe, the tenth dish of lead-ore cleaned. All miners within the parish held to be within the decree, though not parties to the decree, nor claiming in privity under any that were.

BROWN v.  
BOOTH.

against the defendants to enforce the performance of a decree made 5 Car. 1. by which (amongst other things) it was decreed that all the *miners* within the said parish, as well for the time being, as to come, should pay the *tenth dish* of lead-ore cleansed, &c. to the vicar of the said parish for the time being for tithes, &c. The defendants appeared to the *scire facias*, and set forth they claimed not in privity under any of the parties to that *decree*, and that some of them were seised of mines not then found out or opened, and that there had not been any performance or execution of the *decree* and other matters in avoidance.

*Per Cur.* The decree extends to all miners within the parish for the time being or to come, so the defendants are within the letter, and expressly bound by the *decree*, and as long as the *decree* stands in force must obey. (1)

(1) The words of the decree are, "that the then defendants and all and every other the miners within the said parish for the time being, and to come for ever, were and are to pay to the then plaintiff and his successors, Vicars of *Wirksworth* aforesaid, for the time being, and to come, for ever, the tythe or tenth dish of all lead ore to be gotten within the said parish, washed and cleansed from the earth and rubbish, at the charge

"of the miners, the then plaintiff and his successors paying one penny a dish for the cleansing of each tenth dish." Reg. Lib. 1690. A. fol. 29. Note. In a case between one *Thomas Browne*, then Vicar of *Wirksworth*, and *Cornelius Vermuyden*, Esq. then a miner within the said parish, 1st Feb. 28th Car. 2. the like order appears to have been made by Lord Nottingham, R. L. Vide *Harvey v. Mountague*, ante 1 vol. 124.

CASE 167.

In Court.

Die Jovis,  
13 Novemb.

Estate *pour autre vie* may be limited to a man and his heirs, and may be entailed, and may descend, though a term for years cannot be so entailed. Post Case 205.

[\*185]

### FINCH *versus* TUCKER.

THE question arises on exceptions taken to a Master's report, who had reported the defendant's answer to be insufficient, the plaintiff by his bill seeking a discovery of a settlement made by one who was tenant *pour autre vie*, and the \* plaintiff claiming as issue in tail. The defendant insisted such limitation, if any there were, was void, and that he ought not to be put to discover such settlement, if any such there were.

*Per Cur.* We remember not any express precedent in the point, but take it that a term *pour autre vie* may be limited to a man and his heirs, and may be entailed, and shall descend, and is not like the settling of a term for years in tail, where, as has been often adjudged, the tenant in tail is looked upon to have the whole estate in him, and may dispose of it at his pleasure. (2)

(2) The exceptions came on again but no counsel attending for the defendant, they were over-ruled. Reg. for argument, 20th Nov. following.



Lib. 1690. A. fol. 26. Vide *Baker v. Bayley*, post 225. And for further learning on this subject, vide 2 *Black. Com.* 258. cap. 16. *Low v. Burron*, 3 P. Wms. 262. *Duke of Devon v. Atkins*, 2 P. Wms. 382. and the cases there respectively referred to. In addition to which *Ex parte Sterne*, 6 Ves. 158. *Ripley v. Waterworth*, 7 Ves. 425. and particularly *Eldon, Lord Chancellor's* judgment, *ibid.* 441. in which this subject with reference both to the nature of the estate and its application as assets, and the cases relating thereto are fully considered. As to entails of terms for years and personal chattels, vide cases referred to in not. (1) *Whitmore v. Weld*, ante 1 vol. 327.

### LOMAX *versus* HIDE.

THE plaintiff being a second mortgagee, and coming to redeem the defendant, who had been at great expences in law-suits, to foreclose the mortgagor, and otherwise in relation to the estate. The court ordered that his costs should not be taxed as in an adversary suit, but that he should be allowed all his costs and expences, as is done in the case of a solicitor, who lays out and disburses money for his client and the like, and the court further ordered that the profits of the estate in question, should in the first place be applied to pay and satisfy what was due for such costs, charges and disbursements, before it is applied to sink the principal, for that it was not reasonable he should expect for it, and be allowed it only at the foot of the account, (as had been usually done) whereby to make him lose the interest of what he had so laid out, for ten or more years together. (2)

his costs and charges, as is done in case of a solicitor who lays out money for his client; and the profits of the mortgaged premises shall be first applied to pay off those costs, before they go to sink the principal.

Note. The parties being in court, the matter was compromised, and the sum remaining due to the defendant, agreed on in court.

(2) Vide *Vin. Ab.* 446. *Tit. Mort.* 3 *Ch. Rep.* 83. [*Ramsden v. Langley*, post 536.]

### BROOM WHORWOOD *versus* SIMPSON, & è contra.

THE plaintiff in right of his wife, who was one of the daughters of Sir John Fortescue, Bart. was seised of the manors of Over Shenley and Nether Shenley in the county of Bucks. The defendant Simpson had been for many years employed much land returned, as would make up what he paid short of the 15000*l.* *A.* conveys part of the lands to *B.* and by his persuasion values that part at an under-value; and then *B.* sells this part to *C.* and would then have returned so much of the rest as would make up the 15000*l.* Articles set aside as unreasonable, but the sale by *B.* to stand.

CASE 168.  
Eodem die.  
In Court.  
Eq. Ca. Ab.  
126. pl. 9. S. C.  
The second mortgagee brings bill to redeem the first mortgagee, who had been put to great charge in foreclosing the mortgagor. Cur', The costs which the first mortgagee has been put to, shall not be taxed, as in case of an adversaries suit, but he shall be allowed all

[ 186 ]

CASE 169.  
In Court.  
9 die Novemb.  
Eq. Ca. Ab.  
26. pl. 3. S. C.  
*A.* articles to sell lands to *B.* for 15000*l.* the whole to be paid in money, or so *A.* conveys part of the lands to *B.* and by his persuasion values that part at an under-value; and then *B.* sells this part to *C.* and would then have returned so much of the rest as would make up the 15000*l.* Articles set aside as unreasonable, but the sale by *B.* to stand.



**WHORWOOD v. SIMPSON.** in the management of the estate, and at last articles with Mr. *Burdett*, whom the plaintiff had impowered on that behalf, to become the purchaser thereof, at *fifteen thousand pounds*; and by the articles *Simpson* was either to pay the whole in money, or might return lands to make up what he paid short in money of the *fifteen thousand pounds*; pursuant to the articles, the defendant had obtained a conveyance of part to himself, at an under-value, alledging it was not material, what sum was mentioned to be the consideration of the conveyance, in regard he was to make up the whole *fifteen thousand pounds*, and had sold other parcels and paid the money, as the plaintiff *Broom Whorwood* appointed, amounting in the whole to about *four thousand five hundred pounds*, and would now return so much land as should make up the *fifteen thousand pounds*.

The original bill brought by *Broom Whorwood* was to set aside the articles, and the cross bill to have them performed, and time for the performance of them enlarged.

[ 187 ] Upon the hearing, though there was no surprise, fraud, or circumvention proved, and though conveyances had been made pursuant to the articles, several sales made, part of the purchase-money paid, and the articles in great part performed; yet the court set aside the articles, and the conveyance made to *Simpson*; (1) but as to strangers to whom *Simpson* had *bona fide* sold, those purchases were to stand, (2) the court declaring they looked on *Simpson* but as an agent for the plaintiff, and being one in whom the plaintiff reposed great trust and confidence, which he had deceitfully abused, and the articles themselves seem to manifest a surprise, the plaintiff having occasion to sell to raise money, and yet by the articles, *Simpson* might pay as small a sum of money as he pleased, and return what of the lands he thought fit to make up the value; and the court took it they had greater latitude in this case, because *Simpson* had elapsed the time prefixt by the articles, in which he was to make good the *fifteen thousand pounds* by money, and return of lands. And this decree was afterwards confirmed on an appeal.

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(1) “ Allowing to the defendant  
 “ 2000*l.* which he has paid for the pur-  
 “ chase of part of the lands in question,  
 “ together with interest, subject never-  
 “ theless to the deduction of the mesne  
 “ profits, and of all other monies re-  
 “ ceived, or which without his wilful  
 “ default might have been made or re-  
 “ ceived by him by or out of the said  
 “ estate.” R. L.  
 (2) And as to those which rested  
 in contract, the plaintiff was to in-

dennify the defendant against them, and the defendant was to reconvey to the plaintiff all such parts of the said estate as he had purchased, covenanting that they were free from all incumbrances by him or any claiming under him. Reg. Lib. 1699. B. fol. 52.

**MATTHEW versus HANBURY & Ux', and Al'.**

CASE 170.

In Court.

10 die Novem.

Eq. Ca. Ab.

87. pl. 5. S. C.

Bill by execu-

tor to avoid

bonds given

by testator, on

suggestion

that they were

gained by

threats and

undue means.

Defendant by

answer says

they were

entered into

for money

lent, and debts

due. It ap-

peared by

THE plaintiff as executor to *Eusebius Matthew* his father, brought a bill to be relieved against several bonds obtained from the testator, by one *Frances Moore*, whilst sole, now the wife of the defendant *Hanbury*, some of them being taken in her own name, and others in the name of other the defendants, her trustees; the bill charging that those bonds were extorted from him by threats and menaces, and by undue means, and were not for any real debt, or other good consideration:\* but upon the proofs, it appeared that the defendant *Frances* was a common harlot, and that the plaintiff's father, an old weak man, having an unlawful conversation with her, was prevailed upon to enter into the bonds in question.

proof, defendant was a common harlot, and plaintiff's father had unlawful conversation with her. *Cur'*, though this not set forth in the bill, yet the defendant's answer, saying, the bonds were given for money lent, this sufficiently puts it in issue, though not laid in the bill. Where the party himself that is culpable comes for relief against the said bonds, court may refuse; otherwise where his executor comes. Post Ca. 226.

[\*188]

It was objected by the defendant's counsel, that the plaintiff could not be relieved upon this bill, having charged only that the bonds were obtained by force and other undue means, and charged not any thing in particular of any *turpis contractus*, and so had not made a proper case upon his bill, which was the reason of the dismissal in the case of *Peyto* and *Wanklin*.

*Per Cur.* Though where the party himself, who was the person culpable, comes to be relieved, the court may justly refuse to interpose; yet where the plaintiff is an executor only, as in the principal case, that varies the matter: and in this case, the defendant by answer, having sworn the bonds were entered into for monies lent, or other debts owing to her, that sufficiently puts the matter in issue, and gives the plaintiff an opportunity to prove that the bonds were entered into upon the account of an unlawful conversation between the testator and defendant, and not for monies lent or real debts; and whereas the trustees had declared a special trust for a particular purpose, as to one of the debts; *per Cur.* That will not avail, there being no proof that the testator was privy thereunto, or directed such trust, and therefore decreed an account of what should appear to be justly due for monies lent, and

MATTHEW v. HANBURY. other real debts, and on payment, the bonds to be delivered up. (1)

(1) Vide *Whaley v. Norton*, ante 1 vol. 483. *Hill v. Spencer*, Amb. 642.

[ 189 ] MICH. PORTINGTON ARM' versus ALEXANDER COM' EGLINGTON & Al'.

CASE 171.

In Court.

14 Novembria.

Plaintiff being a weak man, was prevailed on by two of his relations to give bond to one of them to settle his estate to the use of himself in tail male, remainder to his two brothers successively in tail male. Plaintiff marries and makes a settlement on his marriage, and brings a bill for delivery up of the bond, and it would have been decreed, had not the plaintiff by bill offered to settle part.

THE plaintiff being seised of the manor of *Portington*, and other lands in the county of *York*, and being of mean parts and easy to be imposed upon, and having two younger brothers; the Countess of *Eglington*, who was his relation, and Mr. *Green*, who was his cousin, and had been his tutor at *Cambridge*, designing to preserve the estate in the family, prevail upon him to enter into bond to the Countess of *Eglington*, of six thousand pounds penalty, and (as Mr. *Green* had penned the condition of the bond) it was to settle his estate on himself and heirs male of his body; and for want of such issue, then to his next brother in tail male; and for want of such issue, to his third brother in tail male; the estate to be settled so as to make the estate-tail as durable as may be.

The plaintiff afterwards married Mr. *Nevil's* daughter, and made a settlement of the estate upon the marriage, and now preferred a bill to have the bond delivered up to be cancelled; and had been decreed accordingly, but that he offered by his bill to settle part of his estate in tail on his brother. (1)

(1) Nothing of this offer or of the weakness of the plaintiff appears in the Register's Book; the decree is as above, and that if the *Countess of Eg-* *lington* insisted on her costs, the same were to be paid by the plaintiff's younger brothers. Reg. Lib. 1690. B. fol. 162.

• CASE 172.

Die Veneris,

14 Novemb.

In Court.

LORDS COM-

MISSIONERS.

A fine and

non-claim a good bar to an equity of redemption; so 'tis a bar to a bill of review.

LINGARD versus GRIFFIN.

IN this case amongst other things, a fine and non-claim was allowed to be a good bar to an equity of redemption.

[ 190 ] Per Lord Commissioner *Hutchins*, a fine and non-claim allowed a good bar to a bill of review, and cited Sir *Nicholas Stourton's* Case, where a fine and non-claim was allowed by Lord Chief Justice *Hale*, to be a good bar to an equity of redemption: and it was insisted in this case, that the fine was levied in eighty and the plaintiff's father died not until eighty-

*four*, and that therefore the fine being levied with proclamations in the life-time of the father, and he living *four* years after, that should run upon the heir though an infant, and be a good bar. But as to the fine in this case, it was insisted, it could be no bar, for that the fine was levied upon the making of the mortgage to *Lingard*, and to strengthen his security, and therefore could be no bar to the equity of redemption; for that the very estate which then passed by the fine, was a redeemable estate. (1)

LINGARD v.  
GRIFFIN.

(1) Reg. Lib. 1690. B. fol. 99. there to be agitated, and no mention of it in is a long-statement of pleadings in a the decree. Vide *Welden v. Dux Ebor.* cause of this name on a bill to redeem, ante 1 vol. 132. but the above point does not appear

### HOWMAN *versus* CORIE; and CORIE *versus* HOWMAN and CHETTLEBURGH.

CASE 173.  
In Court.  
LORDS COM-  
MISSIONERS.  
15 die Novem.  
A. by will  
gives his  
daughter 400l.  
and devises  
lands to her  
until his son  
B. should pay  
her this 400l.  
She marries  
C. whose  
father cove-  
nants to settle  
lands of 100l.  
per ann. and  
B. her brother  
covenants to  
pay the 400l.  
to the hus-  
band; and  
upon payment,  
the lands de-  
vised to the  
daughter were to be discharged of this 400l. the husband dies. Decreed the 400l. belongs to the wife, and not to the executor of the husband.  
[ \*191 ]

THE case was, that *William Copping*, by will, (*inter alia*) devised *four hundred pounds* to his daughter *Judith*, charged on certain lands called *Reading*, and *Brickilne*, and devised these lands unto his said daughter, until his eldest son should pay or make good unto her the *four hundred pounds*. *Judith* marries *William Corie*, whose father *George* covenanted to settle on *William* and *Judith*, lands of *one hundred pounds per ann.* present maintenance and jointure, &c. and *George Copping* the brother of *Judith*, who was in possession of the lands charged with the portion, covenants to pay the *four hundred pounds* to *William Corie* his sister's intended husband; and it is thereby further covenanted between all the parties on payment of the *four hundred pounds*, that the lands should be discharged. (1)

daughter were to be discharged of this 400l. the husband dies. Decreed the 400l. belongs to the wife, and not to the executor of the husband.

The settlement was not made, nor *George Corie* able to perform his covenant on that behalf, nor was the portion paid.

But matters standing thus, *George Copping*, who was to pay the *four hundred pounds* portion, dies, and devises all his lands for payment of his debts and legacies to *William Corie* and one *Chettleburgh*: *William Corie* accepts the trust and dies. *Howman* having agreed and articted to purchase the lands charged with the *four hundred pounds*, brings his bill,

(1) *George Copping* paid the interest to *Wm. Corie* the husband of *Judith*, on the 400l. and other monies that for some time after the marriage, R. L. were to make up the portion of *Judith*

**HOWMAN v. CORIE.** that he may pay his money safely; and *Judith Corie* having survived her husband, brings her bill to have the *four hundred pounds*, which was her portion, paid to her: and the question in this case was, whether the portion should survive to the wife, or whether by the marriage-articles it was not so vested in *William Corie*, the husband, as that it should go to his administrator.

For the plaintiff it was insisted, that the covenant from *George Copping* was but an additional security, and did not change the nature of the debt, but it still continued a charge upon the land, and as a *chose in action* it survived to the wife, although it was agreed that the husband during the coverture might have released or discharged it; and that it still continued a charge upon the land, was the more plain from the covenant, that when the portion was paid, the land should be discharged: and of that opinion was the court, and decreed it for the wife. (2)

(2) Reg. Lib. 1690. A. fol. 223. post 401. 2 Freem. 239. Pre. Ch. Vide on this head, Sir *Edward Turner's* 118. S. C. *Cleland v. Cleland*, Pre. Case, ante 1 vol. 7. *Pitt v. Hunt*, ibid. Ch. 63. *Anon.* 3 Atk. 720. *Garforth* 18. *Palmer v. Trevor*, ibid, 261. *Lister v. Bradley*, 2 Vez. 676. *v. Lister*, ante 68. *Burnet v. Kinaston*,

[ 192 ]

CASE 174.

In Court.

Die Lunæ.

17 Novembris.

Bill against an

executor for a

debt due from

the testator,

and though

the debt was

proved, yet

plaintiff sent

to law; but

bill retained

till after the trial,

## GORRAY versus USTWICK.

THE plaintiff's bill was to have a debt due to him from the defendant's testator, and secured by a bill of sale of goods. The defendant the executor denied, he knew or believed there was any such debt; and although the debt was proved in this court, (1) the plaintiff was sent to law to recover his debt; but the bill retained until after the trial had, and if the plaintiff recovered at law, then he might resort back for an account of assets. (2)

till after the trial, in order to take the account of assets, if verdict for the plaintiff.

(1) It does not appear that any proof was entered into, the defendant admitted and offered to pay 40*l.* on having a general release from the plaintiff, this was not agreed to by the plaintiff, who claimed a larger debt, and then the decree was as above. Reg. Lib. 1690. A. fol. 208. (2) But see contra this practice, *Earl of Kildare v. Eustace*, ante 1 vol. 429.

AWDLEY *versus* AWDLEY.

THE committees of one *Awdley* a lunatick, having invested part of the lunatick's personal estate in a purchase of lands, made in the lunatick's name, to him and his heirs, the great question in the cause was, whether the committees had not exceeded their power, by changing the personal estate into a real estate, and thereby defeating the next of kin, in favour of the heirs at law.

This shall still be taken as personal estate, and in case of his death shall go to the next of kin, and not to his heir.

For the defendants it was insisted, that the committees had acted fairly in this matter, having made the purchase, and taken the conveyances in the name of the lunatick, so that in case he had recovered and become of *sane* memory, he might have insisted, that the lands were purchased with his money, and have had the benefit of the purchase, whether the trustees would or not, and cited the case of *Zoach* and *Lloyd*, where the mother, as guardian to her infant-son, had out of his personal estate paid off a mortgage; the infant afterwards died, and the estate descended to a remote heir and then the mother would have had back the money, but the court denied any relief in that case; and likewise the case of *Dennis* and *Badd*. (1)

remote heir. The mother shall not have the

But it was answered, that the trustee had bound himself, by making the purchase in the lunatick's name, so had no election, but the lunatick might have accepted or refused the purchase; and as to the case of *Zoach* and *Lloyd*, there the guardian had done no more than what by the justice of this court she might have been enforced to do, *viz.* to apply the personal estate in ease of the real, by taking off the incumbrances that lay upon it; and suppose in this case, the lunatick had been indebted by simple contract, and had left no personal estate, should not this court have made these purchased lands liable to that debt? and where a mortgagor releases to the heir of the mortgagee in fee, the mortgage being forfeited; the administrator shall have the benefit of that estate, even though

executor or administrator of the mortgagee, shall have the benefit of the mortgage, though there are no debts. So if a mortgagee in fee dies, and the mortgagor will not redeem; yet the executor or administrator of the mortgagee shall have the benefit of the mortgage. So he shall, though the mortgage be foreclosed, or be of so antient a date as not to be redeemable, unless the mortgagee be in the actual possession.

CASE 175.  
In Court.  
19 Die Novem.  
Eq. Ca. Ab.  
277. pl. 5.  
2 Ch. Rep.  
156. S. C.  
Committees  
of a lunatick  
invest part of  
his personal  
estate in the  
purchase of  
lands in fee.

[ 193 ]  
Mother as  
guardian of  
an infant, out  
of his personal  
estate pays off  
a mortgage  
upon his land;  
the infant dies,  
and the land  
descends to a  
money back.

Mortgagor  
releases to the  
heir of the  
mortgagee in  
fee, yet the

(1) 1 Ch. Ca. 156. Eq. Ca. Ab. 261.  
pl. 1. S. C. cited in *Earl of Winchelsea*  
*v. Norcliffe*, ante 1 vol. 435. quod vide

*Palmer v. Danby*, Pre. Ch. 137. *Hooper*  
*v. Eyles*, post 480.



AWDLEY v.  
AWDLEY.

there be no debts. And in the case of *Wood* and *Thorneborough* versus *Nosworthy*, where there was a mortgage in fee forfeited, and the mortgagor would not redeem, yet the administrator should have the estate, though there were no debts; and so in case a mortgagor be foreclosed, or that the mortgage be of so ancient a date, as in the ordinary course of the court, it is not redeemable; yet in case the mortgagee be not actually in possession, it shall be looked upon to be personal estate. (2)

[ 194 ] After great debate, and upon reading the statute made touching the granting of the custody of lunaticks, whereby it is provided, that the surplus shall be safely kept and delivered to him, if he recover; if not, upon his death to be employed for the benefit of his soul, &c. The court decreed an account of the personal estate, and the lands purchased to be sold, and the money to go and be divided as personal estate amongst the next of kin. (1)

Where a man charges himself by his answer, whether his answer shall be allowed as a good discharge. Post Ca. 277.

*Note, Per Cur.* The case of *Howard* and *Brown* was the first case in this court, where because a man had charged himself by answer, that his answer should be allowed as a good discharge, and that it ought to be the last.

(2) Vide *Winn v. Littleton*, ante 1 vol. 3. *Pockley v. Pockley*, ibid. 36.

(1) The decree declared "that it was not in the power of any committee to alter the nature of a lunatic's estate." It does not appear that the decree ordered the lands to

be sold, the plaintiff was to have his share paid so far as there was personal estate to pay, and the purchased lands to stand charged with the remainder. Reg. Lib. 1690. A. fol. 69. Vide *Prodgers v. Phrazier*, ante 1 vol. 9. *Foster v. Merchant*, ibid. 262.

CASE 176.

Mercurii,

19 die

Novemb.

Eq. Ca. Ab.

53. pl. 4. S. C.

Father on his

son's mar-

riage cove-

nants, during

his life to pay

his son 15l.

per ann. the

son becomes a

bankrupt.

### MOYSES versus LITTLE.

THE defendant on marriage of his son settles lands on himself for life, remainder to his son for life, &c. and covenants during his own life, to pay his son *fifteen* pounds *per ann.* the son becomes a bankrupt, the plaintiff as an assignee brings the bill against the defendant the father, to have the benefit of this agreement, and to compel payment of the *fifteen* pounds *per ann.*

His creditors shall not have the benefit of this agreement.

*Per Cur.* An assignee under a statute of bankrupt, is not intitled to have the performance of an agreement made with the bankrupt, and that it was so adjudged in the case of *Drake*.



and the *Mayor of Exeter*, (2) and therefore dismissed the bill. Vide *Jones's Rep.* 437. the case of *Crispe* and *Pratt*, that copyhold lands are within the statute of the 13th of *Elizabeth*, (1) and *Parker* and *Bleake*, that the widow of a copyholder, who was a bankrupt, and where the commissioners had made an assignment of the copyhold, shall not have her *Free-Bench*.

MOYSES v.  
LITTLE.  
[ 195 ]  
Cr. Car. 548.  
March 24, 1  
Rol. Abr. 523.  
Jo. Rep. 451.

(2) Eq. Ca. Ab. 53. pl. 1. 1 Ch. Ca. 1. Nel. Ch. Rep. 102. [2 Freem. 183. and see *Brooke v. Hewitt*, 3 Ves. 253. and *Weatherall v. Geering*, 12 Ves. 504.]

(1) 13 Eliz. Cap. 7. Sec 2. Cro. Car. 568. Et vide *Vandenanker v. Desbrough*, ante 96. *Peters v. Soames*, post 428.

### JACKSON versus RAWLINS.

A MAN having married an administratrix, the plaintiff obtains a decree against the husband and wife for *one thousand five hundred* pounds, out of the estate of the intestate; then the wife dies. The question was, whether he could proceed against the husband without reviving and bringing an administrator of the wife before the court.

dies. Whether the plaintiff can proceed against the husband, without reviving against the administrator of the wife.

CASE 177.  
20 die Nov.  
Eq. Ca. Ab. 3.  
pl. 10. S. C.  
A man mar-  
ries an admin-  
istratrix.  
Plaintiff ob-  
tains a decree  
against him  
and his wife  
for 1500*l.* she

It was insisted, that although the decree is to pay only out of assets, and though the wasting might be before the coverture, yet now the husband and wife are bound to answer it, as far as any assets came to the wife's hands, and being once charged, the death of the wife shall not discharge him. (2) *Tamen Semble* the husband is not bound to answer it farther

(2) This came on upon exceptions to the Master's report, for that such report ought not to have been made until the cause which it was submitted had abated by the death of the wife, had been revived, and the administrator of the wife made a party. And the order declared, "that by the death of the said *Elizabeth Rawlins*, (the late wife of the defendant) the suit is abated, and that the administrator ought to be made a party, before any further proceedings can be had in the cause, and doth therefore order that the said exception be allowed." Reg. Lib. 1690. A. fol. 65. *Batchelor v. Bean*, ante 61. *Sanderson v. Crouch*, ante 118. and cases cited in not. there. *Obrian v. Ram*, 3 Mod. 186. *Woodyer*

*v. Gresham*, 1 Salk. 116. In the last two cases judgment was recovered, in the first *against*, and in the second, *by* a feme sole, and after marriage, husband and wife in both cases sued out, and had sued out against them sci. fa. and judgment *quod habeat executionem*, &c. against husband and wife, *de damno*, &c. and after this award, and before execution executed, the wife died, and after her death, a new sci. fa. against the husband, and he was held chargeable, which per *Holt*, C. J. proves that the award or judgment *quod fiat executio*, on the scire facias, makes a plain alteration, for the husband surviving had not been liable on the first judgment only.

JACKSON v. RAWLINS. than the value of the estate, which he had with his wife; and  
Where two are the rule in equity is, where two or more are liable to a demand,  
liable to a de- you shall not proceed against one alone, but must bring all the  
mand, you persons liable before the court. (3)  
cannot pro-  
ceed against one alone.

(3) Vide *Barker v. Wyld & Al'*, 2 Vent. 348. So *Madox v. Jackson*, 3 ante 1 vol. 140. and cases in not. (2). Atk. 406. contra where the obligors are only sureties, *ibid*. And so said to be clear, where judgment obtained against one of several obligors, because the the charge may be equal, *Blois v. Blois*, bond is drowned in the judgment.

### PEACOCK *versus* SPOONER.

CASE 178.  
Veneris.  
21 Novembris. A TERM of nine hundred years was assigned to trustees in trust  
In Court. permit and suffer the husband \* and wife, and the survivor  
LORDS COM- of them, to receive the profits, for so many years of the term,  
MISSIONERS. as they or the survivor of them should happen to live, and after  
Ant. Case 38. their deaths to the use of the heirs of the body of the wife, by  
Post Ca. 326. the husband to be begotten: question whether the words,  
Term assign- (*heirs of the body*) are words of limitation, or only a descrip-  
ed in trust for tion of the person, so as the heir of the body shall take by  
Baron and purchase.  
Feme for their the Baron, Baron and Feme die.—The term shall go to the heir of the body of the Feme by  
lives, remain- the Baron, and not to her executor or administrator. The words *heirs of the body* being a  
der in trust for good *descriptio personæ*.  
the heirs of  
the body of  
the Feme by

[ \*196 ] *Per Cur.* Held that the heir of the body took by way of purchase, and as a person well described, and the limitation of the term to them good, and therefore dismissed the bill that was brought by the executor of the wife, as supposing the term belonged to him. (1)

*Note*, The Lord Chancellor *Jefferies* in *eighty-eight* had decreed it for the plaintiff. (2)

*Note*, In this case they cited the case of *Wareman* and *Seaman*, and relied upon it, as also *Bowman* and *Yates*, where the words (*heirs of the body*) were looked upon to be a good description of the person, intended to take in a settlement made on a second marriage, although there was issue by a former wife, and so he was not in strictness heir.—*Wyld's* case in *Cook's Reports*, is not allowed to be law. (3)

*Note*, This decree and dismissal was affirmed upon an appeal to the House of *Lords*. (4)

(1) Reg. Lib. 1690. B. fol. 48. on a rehearing.

(2) Ante p. 43.

(3) Vide *Ward v. Bradley*, ante 23.

(4) The following is a MS. note of the late Mr. *Coxe* of *Lincoln's Inn*. "Having often heard the case of *Peacock v. Spooner* questioned, and that

Vide *Webb versus Webb*, Feb. 20, 1710, (5) a decree at the Rolls grounded upon the case of *Peacock and Spooner* reversed. And decreed the limitation to the heir male void, and that the whole vested in the father, by the limitation to him for life, remainder to the heirs of his body.

PEACOCK v.  
SPOONER.

the Judges differed in their opinions upon it, I sometime ago got a copy of the minutes upon it, in the Lord's Journal, where it stands thus, 17 Feb. 1691, Chief Baron *Atkins* of opinion for the plaintiff, the administrator, that the term belonged to the administrator of the wife, and that the limitation to the heirs of the body was not good. *Nevill*, Justice, of a contrary opinion, he said the estate to *Mary* the wife, and the children, was good, being in consideration of the marriage; next *Gregory*, Justice, was against the last decree, he said, had it been a limitation to a man and his issue, the whole would be in the first person, for otherwise it would be a perpetuity, and declared his opinion that this limitation over is not good. Baron *Lechmere* differed from *Gregory*, he said, the cases mentioned, do not come up to this, this is a singular case, the husband would run away with the whole substance of his wife's family, *Peacock*, the administrator, had not a good title. *Rokeby*, Justice, next said, I differ from my brother that spoke last, the wife had the whole, and therefore the husband comes in, so that he was of opinion for the plaintiff. *Powell*, Baron, was of the same opinion, that the decree of Lord *Jeffries*

was right. *Turton*, Justice, was of the same opinion; the major part were of opinion, that the administrator of the wife was well intitled, but notwithstanding the decree of the Lords Commissioners was affirmed: the use which I make of this, is to shew that the resolution depended merely and only upon the construction of the limitation, and not upon any extrinsic circumstance whatsoever."

"I have a manuscript note of this case of *Peacock and Spooner*, as determined by Lord *Jeffries*, to which the following note is added, "but this case was afterwards reversed by the Commissioners of the Great Seal, and their reversal affirmed on appeal to the Lords, and a difference between a limitation of a term to one, and the heirs of his body, and the limitation to one for life, and afterwards to the heirs of his body, vide *Villiers v. Villiers*, in Ch. Lib. H. H. 302." N.B. The editor has searched the printed Journals of the House of Lords, but has not been able to find an entry of this date. *Dafforne v. Goodman*, post 362. Et vide *Hayter v. Rod*, 1 P. Wms. 369, 70, 1.

(5) Post. 668. 1. P. Wms. 132. S. C. *Davis v. Gibbs*, 3. P. Wms. 30 31. Arg. *Read v. Snell*, 2. Atk. 646.

### JONES versus MITCHELL.

[ 197 ]

*PER CUR.* Where a commission is returnable *sine dilatione*, if it be within the kingdom, it must be returned by the second return of next term; if executed afterwards, it is void and the depositions ought to be suppressed.

CASE 179.  
25 die Nov.  
Eq. Ca. Ab.  
102. B. pl. 3.  
S. C.  
A commission  
returnable

*sine Dilatione* must be executed before the second return of next term.

### ANONYMOUS.

CASE 180.

WHERE the Baron and Feme exhibit a bill for a demand in right of the wife, the defendants answer, and the cause being a demand in right of the wife, defendants answer, witnesses are examined, and publication passes; Baron dies, Feme marries a second husband. On a new bill, they may examine again the same witnesses as were examined in the former cause. Post Case 234.

Baron and  
Feme exhibit  
a bill for a  
demand and publication  
again

**ANONYMOUS.** at issue, several witnesses are examined, and publication past, but before it proceeds to a hearing, the husband dies; the wife marries a second husband, and they bring a new bill for the same matter. It was moved they might be restrained from examining the witnesses examined in the former cause; but not allowed by the court: the wife was not bound by the proceedings in the former cause, and therefore examined, as if no examination had been in the former cause.

CASE 181.  
26 die Nov.  
In Court.  
LORDS COM-  
MISSIONERS.  
Eq. Ca. Ab.  
332. pl. 2. S. C.  
Payment of  
money to a  
trustee, with  
notice of the  
trust, is a mis-  
payment,  
though the  
trustee had  
judgment and  
execution  
against the  
person that  
paid the mo-  
ney.  
[ \*198 ]

### PRITCHARD *versus* LANGHER.

MRS. *Katharine Williams* lent her brother-in-law, the defendant *Langher*, one hundred pounds, and took a bond for it in the name of one *Morgan Jenkins*; Mrs. *Williams* and the defendant differing about some \* reckonings that were between them, the bond is put in suit by Mrs. *Williams*, in the name of *Morgan Jenkins* her trustee; and to avoid charges, the defendant confessed a judgment in the *Grand Sessions* in *Wales*. The defendant to prevent being taken in execution, pays the money to *Morgan Jenkins* the trustee, who gave a warrant of attorney to one *John Deere*, to acknowledge satisfaction on the judgment, which was done accordingly.

The bill was to compel the defendant to pay the money again to the plaintiffs, the administrators of *Catharine Williams*, and decreed accordingly, with full costs, the court declaring it to be a fraud in the defendant, who knew the money was Mrs. *Williams's*, to pay it to her trustee; and the principal evidence of the fraud was, that there was a new attorney made, or named to acknowledge satisfaction on the judgment, and not the attorney on record, who was employed by Mrs. *Williams*. And although in this case it was insisted, that it was hard to decree a double payment in equity, where the money was really paid to the person that Mrs. *Williams* intrusted, and by law was intitled to receive it; and the rather, for that in this case, Mrs. *Williams* lived in *London*, so that the defendant who lived in *Wales*, could not have recourse to her, and had no other way to avoid being taken in execution; *Sed non allocatur.* (1)

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(1) Reg. Lib. 1690. B. fol. 153. It appeared that the defendant had tendered the 100*l.* to the plaintiffs, on condition of receiving a general release, which the plaintiffs refused to give, there being a further sum due from the defendant, vide *Roberts v. Matthews*, ante 1 vol. 150.

TOOK *versus* TOOK.

REFERENCE to the *Six Clerks*, whether by the course of the court a plea of an outlawry with the averment of the same person ought to be upon oath. In the Lord *North's* time it was ruled, it might be without oath, because it might come in on the other side to aver, that he was not the same person.

CASE 182.  
10 die Decem.  
In Court.  
Eq. Ca. Ab.  
14. pl. 8. S. C.  
Plea of an outlawry with the common averment of the identity of the person need not be upon oath.

*Per Cur.* Being only the common averment of identity of person, allowed the plea to be good without oath, but gave the plaintiff leave to amend paying *twenty shillings* costs. (1) *Per* Lord *Hutchins*, to avoid pleas of outlawry, may make all that have outlawries against him defendants.

[ 199 ]  
A good method to avoid the plea of an outlawry, is to make all those that have outlawries against the party, defendants.

(1) Nothing further than the order for liberty to amend appears, Reg. Lib. 1690. B. fol. 104. Vide *Parrot v. Bowden*, ante p. 37. Plea of privilege and outlawry without oath allowed, *Prat v.*

*Taylor*, 1 Ch. Ca. 237. So *Masters v. Bush*, cited *Anon*, ibid. 258, Bacon's Tracts, 290. [And see Mitf. 3d edition, 243.]

ANONYMOUS.

THE case of *Cloberry* and *Lampen* cited, (2) where a legacy was devised to a child, payable when *twenty-one*, and he dies before, his administrator shall have it, but he shall wait and expect for it, until such time as the son would have been *twenty-one*, and this confirmed upon an appeal to the House of Lords, (3) though the Lord *Nottingham* for some time doubted whether it should not be paid presently; but it was said, *that* was but an invention to encourage administrations.

CASE 183.  
11 Decembris.  
In Court.  
2 Vent. 342.  
Legacy given to a child payable when 21, the child dies before, his administrator shall have the legacy, but shall stay for it, till such time as the child if he had lived would have come to 21.

Vide *Saunders's Case*, legacy payable at *twenty-one*, the child dies in minority. If by the will it was to be paid with interest, it shall be paid to the administrator presently; but if it does not carry interest, the administrator must expect, until the child would have attained the age of *twenty-one*. (4)

(2) This is incorrect, the case of *Cloberry v. Lampen*, 2 Freem. 24. is stated, as follows: A. gives to B. 500*l.* when she shall attain 21, or be married, which shall first happen, *to be paid with interest*; A. dies, and B. dies before 21 years and marriage, and the question was between the executors of A. and B. and decreed to be paid to the executor of B. *presently*, on the ground that it was to be paid with interest.

(3) 12 June, 1689, vide Journal House of Lords, 14 vol. p. 241.

(4) *Saunders v. Earle*, 2 Ch. Rep. 98. S. C. the legacy in that case was made payable at 16, and with interest, and that was the ground for deciding it was vested. Et vide *Pawlett v. Pawlett*, ante 1 vol. 204. 321. 4. and in addition, *Papworth v. Moore*, post 283. *Laundy v. Williams*, 1 Eq. Ca. Ab. 299. 300. & P. Wms. 478. 6th Ed. S. C. and

cases there cited. *Chester v. Painter*, 2 P. Wms. 335. *Roden v. Smith*, Ambler 588. *Crickett v. Dolby*, 3 Ves. 15. *Muckell v. Winter*, ibid. 543. Where per *Loughborough*, Lord Chancellor, the rule that where a testator gives a legacy "payable at 21," it shall vest,

and where at 21, without the word "payable" it shall not vest is a positive rule of the ecclesiastical court, and has been followed in equity as to personal legacies, but must be confined to such cases, and not extended as to real estate.

[ 200 ]

DE

## TERM. S. HILLARII, 1690.

IN CURIA CANCELLARIÆ.

CASE 184.  
Jan. 19.

Marriage agreement reduced into writing, though not signed by either party, yet decreed to be performed.

COOKES & Ux. *versus* MASCALL & COOKES.

IN *eighty-two*, a marriage was treated to be had between the plaintiff *Cookes* and the defendant *Mascall's* daughter, it being pretended Sir *Thomas Cookes* would make a considerable settlement on the plaintiff his kinsman, and proposals being made in order to mutual settlements, *Mascall* to settle *forty pounds per ann.* in present, and *Edward Cookes* the father, to settle the reversion of his estate at *Wick*, after the death of him and his wife, and to allow his son *twenty pounds per ann.* for maintenance in the mean time, and *Mascall* to settle reversions of copyholds, part after the death of himself and wife, of the value of *eighty pounds per ann.*

In 1684, a meeting was appointed and held at *Worcester*, in order to a full agreement; there the proposals were discoursed on, and all parties seemed to allow and approve thereof. In *October* 1684, *Cookes* the father, with one *Baker* an attorney, came over to *Mascall's* house at *Tadebigg*, in order to make a full agreement touching the settlement to be made on the intended marriage: Mr. *Baker* having discoursed with both parties, proceeded to draw the agreement into articles in writing, to be mutually signed by the parties; but before the same were ready for execution, upon discourse between *Mascall* and *Cookes* they disagree. And *Mascall* by his answer, swore positively, that he then reflecting that Sir *Thomas Cookes* had refused to make any settlement on his kinsman as it was pre-

[ 201 ]



COOKES v.  
MASCALL.

tended he would, and *Cookes* the father also refusing to settle a further estate upon the plaintiff to answer the reversion, that *Mascall* settled expectant on the death of his mother *Wallis*, he therefore refused to proceed any further in order to perfect the agreement, and never signed it : But *Cookes* put up what *Baker* had wrote into his pocket, and so they parted, and had no further meeting nor treaty : but old *Cookes* swore that after the articles were drawn, they were read over and agreed to, and that *Mascall* promised to meet at another time to execute : that young *Cookes* was afterwards permitted to come to *Mascall's* house, and in *December* 1684, married his daughter, *Mascall* being privy to it, helping to set them forward in the morning, and entertaining them, and seemed well pleased with the marriage, upon their return to his house at night.

Upon this case *Cookes* the father, having by his answer offered to perform the agreement on his part ; the court thought fit to decree *Mascall* also to perform the agreement, according to what was contained in the writing drawn by *Baker*, though that was not signed by *Mascall*, as was intended it should have been, nor any other agreement reduced into writing. (1)

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(1) Reg. Lib. 1690. A. fol. 139. Vide ante p. 34. S. C. and cases referred to in not. there.

DOUGLAS *versus* VINCENT.

[ 202 ]

CASE 185.

Jan. 24.

Eq. Ca. Ab. 23.

pl. 19. S. C.

One by letter under his hand promised 1000*l.* with his niece, but

THE bill being for one thousand pounds, as promised by Sir *Matthias Vincent* with his niece by a letter under his hand, but in the same letter he dissuaded her from marrying the plaintiff, yet was afterwards present at the marriage, and gave her in marriage.

in the same letter dissuaded her from marrying the plaintiff, but afterwards was present at, and gave her in marriage. *Cur.* Would not decree the payment of the 1000*l.* but left the plaintiff to his action at law.

In this case the court would not decree the payment of the thousand pounds, but left the plaintiff to bring his action to recover it as he could at law. (1)

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(1) Vide *Moore v. Hart*, ante 1 vol. 114. and cases cited in not. there, and particularly *Wankford v. Fotherley*, post 322. where in the like case, the court decreed the portion to be paid, without going to law, and that decree affirmed in dom. proc.



BENTHAM v.  
ALSTON.

executors of Doctor *Tudor* had a better right than the plaintiff, and they no parties.

*Per Cur.* Of opinion in the old books that the fee is in the patron during the vacancy, and a release to him alone is good. Recommended it to the parties to end the matter by compromise. (1)

(1) Nothing of this opinion or recommendation appears in the Register's Book, the cause had been heard on the 13th *May* preceding, and the bill dismissed, and now came on for a rehearing, but the decree (which under the circumstances is not very clear) was made by consent, and was, that the defendants should pay the rent that had accrued due for the last year, after the death of Dr. *Tudor*, to the plaintiff, after such deductions as therein mentioned, the plaintiff indemnifying them against Dr. *Tudor's* executors, who were no parties to the suit. Reg. Lib. 1690. A. fol. 284. Note. The lease in question is stated

to have been made about *Christmas*, 1685, for three years, the rent payable half yearly. The Doctor died about *October*, 1688, and the bill prayed that the defendants might pay plaintiff the rent accrued due from Dr. *Tudor's* death, to the expiration of the said lease; by the sums admitted by the defendants to be in their hands, it appears the decree must have been made on the last half year's rent. Et vide ante 136. S. C. [See *Aynsley v. Wordsworth*, 2 V. & B. 331.] As to demise of benefice for years by spiritual persons. Stat. 28. Hen. 8. Cap. 11. Sect. 7. 1st and 2d Phil. and Mary, Cap. 17, and other Statutes there referred to.

CASE 189.  
Jan. 31.

Eq. Ca. Ab.  
299. pl. 4, 5,  
6, 7, 8. S. P.

Where assets fall short, legatees shall refund to unsatisfied creditors. But where an executor has made voluntary payment to a legatee, he shall not make him refund. Otherwise if the executor pays a legatee by compulsion.

#### NEWMAN *versus* BARTON.

THE question being whether an executor should compel a legatee to refund. And the case of *Grave* and *Bainson* cited, where one legatee being paid in full his whole legacy, and there wanting assets to pay the other legacies, it was decreed for the benefit of the unsatisfied legatees, that the legatee who had received his full legacy, should refund, and be paid only in proportion; and the case of *Hodges* and *Waddington*, where a creditor compelled a legatee to refund.

*Per Cur.* A creditor shall follow the assets in equity, into whosoever hands they come. But where the executor had voluntarily paid the full legacy, and afterwards assets proved deficient to pay the other legacies, they conceived neither the executor, nor any of the other legatees should compel him to refund; (2) but if the payment had not been voluntary, but he had recovered his legacy by decree, there he should have refunded. (3)

(2) This appears to be the doctrine generally laid down. Sed vide dict. [Atkins v. Hill, Cowp. 287.] per *Raymond*, Ch. Just. contra. *Edwards v. Freeman*, 2 P. Wms. 447.

(3) Vide *Noel v. Robinson*, ante 1 vol. 94. *Anon.* ibid. 162.

WHITTINGHAM *versus* THORNBURGH & Al'.

CASE 190.  
Feb. 4.  
Pre. Ch. 20.  
S. C.  
Policy of insurance for insuring a life gained by fraud set aside with costs both at law and in equity, and the premium received on the policy to go in part of costs.

THE defendant *Thornburgh* in *March*, 1689, caused a policy of insurance to be drawn for the ensuring the life of one *Edward Harwell* for a year, and left it at one *Samuel Luplon's* office, to get subscriptions at *five pounds per cent. premium*; and to draw in the plaintiffs and others to under-write the policy, procured one *Marwood*, a near neighbour of *Harwell's* to under-write *one hundred pounds*: and he giving out he knew *Harwell* healthy and like to live, and the plaintiffs relying on such information, under-wrote the policy. *Whittingham* for a *hundred pounds*, the other four for *fifty pounds* apiece. *Harwell* soon after died.

It appearing that *Thornburgh* had no estate or interest that depended on *Harwell's* life; that *Marwood's* subscription was only colourable to draw in others, and that *Harwell* was in a languishing condition; though *Marwood* affirmed and pretended he was his neighbour and a healthful man, and the plaintiff having on the first discovery of the contrivance offered to return the *premium*, and published the fraud to prevent others from being drawn in; and the defendants intending to get a very large subscription, having by a like contrivance, got between *one and two thousand pounds*, on making the like insurance on the life of *William Sweeting*, the court therefore decreed the policy of insurance to be delivered up to be cancelled, and a perpetual injunction against the verdict thereon obtained at law, and the plaintiffs their full costs both at law and in this court, and the money received for the premium to go in part of their costs. (1)

(1) The decree so as to the payment of costs, &c. but nothing said as to the money received for the premium to go in part of costs. Reg. Lib. 1680. B. fol. 264. And on the same principle, *De Costa v. Scandret*, 2 P. Wms.

170. As to the state of the common law on this head, *Wilson v. Duckett*, 3 Burr. 1361. Et vide *Ryan v. Macmath*, 3 Br. Ch. Rep. 15. *Park on Insurance*, 5 Ed. p. 216. 18.

MARGRAVE *versus* LE HOOKE.

[ 207 ]

CASE 191.

Feb. 11.

If A. makes two several mortgages, and dies, and one of the mortgages is

THE plaintiff's bill was to redeem a mortgage made by his father to the defendant, who by answer insisted, that the plaintiff's father had made him two several mortgages of several lands, that the plaintiff endeavoured to defeat him of an entailed estate, or is deficient in value, the heir of the mortgagee shall not be admitted to redeem one, without redeeming the other.

MARGRAVE v.  
LE HOOKE.

one of those mortgages, by reason of an entail, and hoped that in equity he should redeem both or neither.

*Per Cur.* He shall redeem both or neither; and so if one mortgage had been deficient in value, and the other mortgage had been more worth than the money lent upon it, the heir should not have been admitted to redeem the one without the other. (1)

(1) Vide *Shuttleworth v. Laycock*, there. [*Willie v. Lugg*, 2 Eden 79, ante 1 vol. 245. and cases in not. and note.]

CASE 192.

Feb. 19.

Eq. Ca. Ab.  
297. pl. 5. 298.

pl. 7. S. C.  
and S. P.

Devise of a  
legacy of  
1500*l.* to *A.*

payable at his  
age of 21, and  
if *A.* die before  
then to *B.*

*A.* dies in the  
life of the tes-  
tator, yet *B.*  
shall have the  
legacy.

### MILLER versus WARREN.

[ 208 ]

SIR John Borlace by his will, devises to the four children of Sir Henry Miller, one thousand five hundred pounds apiece in this manner, viz. to Nicholas Miller, one thousand five hundred pounds, to be paid him when he shall attain the age of twenty-one; to Benjamin Miller, one thousand five hundred pounds, when he shall attain the like age; to Elizabeth Miller, one thousand five hundred pounds, to be paid at eighteen or marriage; the like to Mary Miller; and in case one, or more of the aforesaid children shall happen to die, before his, her, or their respective legacy or legacies shall become due to them as aforesaid, then my will and meaning is, that his, her, or their legacy or legacies shall be equally divided amongst the survivors of them; and in case three of them shall happen to die before their respective ages or days of marriage, then my will and meaning is, that the aforesaid legacies to them bequeathed shall be and remain to the survivor of them. Mary, one of the four children of Miller, died in the life-time of the testator: the question was, whether that one thousand five hundred pounds should go to the surviving children.

Decreed that it should survive. (1) If a legacy is devised to *A.* at twenty-one, and if he die before, to *B.* though *A.* die in the life of the testator, the legacy shall go to *B.* But where a man devised three hundred pounds to his sister, willing her

(1) Contrary. The bill was by Nicholas Miller, one of the legatees, for his legacy, and also for 500*l.* his share of the deceased Mary's legacy, and the decree as to the 500*l.* was, "that the plaintiff's bill as to the 500*l.* part of the said legacy of 1500*l.* given by the aforesaid will to the said

"Mary, who died in the life-time of her testator, and for which the plaintiff seeks relief therein, be dismissed out of this court." Reg. Lib. 1690. B. fol. 248. Vide *Perkins v. Micklethwaite*, 1 P. Wms. 274. and cases in not. there.

to give thereof *two hundred pounds* to her child, she died in the testator's life-time: bill by the child for the *two hundred pounds* dismissed. (2)

MILLER v.  
WARREN.

(2) *Birkhead v. Coward*, ante 116.

### NORFOLK versus GIFFORD.

CASE 193.  
Feb. 20.

ONE by will, charged his lands with *six thousand pounds* for the child his wife was *privement ensient* of, if it proved a daughter, with clause of entry for non-payment. A daughter is born, who died; the mother as her administratrix would have had the *six thousand pounds* raised: but the bill was dismissed. (3)

One charges his lands with 6000*l.* for the child, with which his wife was *privement ensient*, if it proved a daughter, with a clause

of entry for non-payment. A daughter is born and dies. The 6000*l.* shall not go to her administrator. Ant. Case 67, 88.

not go to her

The case of *Powell and Morgan* (4) was cited, where a term raised for the portion of a daughter was extinguished, by the inheritance descending on the daughter, yet revived and set up in equity for the benefit of creditors.

(3) The case although imperfectly stated by the Register's Book, appears to be different from that in the printed report. *Robert Norfolk* deceased, had by his will devised 6000*l.* to his daughter *Dorothy*, and with which the bill filed by the testator's widow, sought to charge the lands of *Robert Norfolk*: the answer stated and insisted that the lands so sought to be charged, descended on the death of *Robert Norfolk* on the said *Dorothy* in fee, as his daughter and heir, and that thereby the said devise of 6000*l.* was extinguished, and that the said lands had by the death of *Dorothy*,

descended on the defendant's wife as her heir at law; and the said defendant by his cross-bill prayed to have the deeds delivered up, and by the decree, the original bill of the plaintiff, the widow *Norfolk* was dismissed without costs, and the defendants to the cross-bill were ordered to produce all deeds, &c. except the jointure-deeds, the plaintiffs in the cross-suit were not to be at liberty to inspect the writings until they had confirmed the defendant *Norfolk's* jointure. Reg. Lib. 1690. B. fol. 255. Vide *Chester v. Willes*, Amb. 246.

(4) Ante p. 90. Et vide note there.

### ALFORD. versus EARLE.

[ 209 ]

CASE 194.  
Feb. 21.

JOSEPH JACKSON senior, possessed for *ninety-nine* years, of lands in *Barton Regis*, if his brother *John Jackson* so long live, by will, *July 17*, 1658, devises all his interest in *Barton Regis*, which he held for the life of his brother *John Jackson*, with liberty in *nine* months time to change the life, to his daughter *Sarah*, and desires her life may be put in, in adds a codicil to his will. Whether the renewal of the lease is a revocation: and whether the adding a codicil to his will is a republication.

Nels. Ch. Rep. 162. S. C. One devises a lease to his daughter, and afterwards renews the lease, and afterwards

ALFORD v.  
EARLE.

lieu of his brothers. On *Octob.* 20, 1659, he surrenders the term, and takes a new lease for the like term of *ninety-nine* years, if his son *Joseph Jackson* so long live; and afterwards adds several codicils to the will, taking no notice of this leasehold estate.

*First*, whether renewing of the lease be a revocation of the devise to his daughter *Sarah*. (1) And

*Secondly*, If a revocation, whether the codicils amount not to a republication: the case of *Bret* and *Rigden* cited, where a devise was to *J. S.* and his heirs; *J. S.* died, a new publication after his death will not carry it to his heir.

Testator saying his will was in a box in his study, amounted to a republication.

The case of *Cotton* and *Cotton* cited, tried in the *Common Pleas* before Lord Chief Justice *North*, where the testator's saying his will was in a box in his study, amounted to a new publication. (2)

(1) And this doubt occurs in *Bunter v. Cook*, 1 Salk. 238. Sed vide *Wind v. Jekyl & Al'*. 1 P. Wms. 575. But in *Marwood v. Turner*, 3 P. Wms. 167. 8. where the principal case is cited by the name of *Alford v. Alford*, a renewal of a lease under similar circumstances, was expressly held by *King*, Lord Chancellor, to be a revocation. So *Abney v. Miller*, 2 Atk. 597. Et vide the other cases cited by Mr. Cox in note (1), *Marwood v. Turner*, 3 P. Wms. 171. [*James v. Dean*, 11 Ves. 383. 15 Ves. 236. *Slatter v. Noton*, 16 Ves. 197. *Colegrave v. Manby*, 6 Mad. 72.] And as to the doctrine of revocation in case of freehold, the cases cited in note (1) 3 P. Wms. 165. And in addition on the first head, *Ellison v. Ellison*, 6 Ves. 656. And in *Weld v. Eyton*, in Canc. Mich. Term, 1735, before *Talbot*, Lord Chancellor, in which case Sir *John Wolridge* by his will, devised his real estate to trustees for *two hundred* years in trust, to pay all his debts; after the date of the will, he executed a deed, whereby he conveyed his estate to his former trustee and another for the term of *two thousand* years in trust, to pay particular debts mentioned in a schedule. And *per Cur.* Though this conveyance be in law a revocation of the will, yet in equity, it shall be considered only as a security, so as to give a preference to the schedule debts, and that afterwards the estate

would be chargeable with the other debts by virtue of the will. And on the second, *Langford v. Pitt*, 2 P. Wms. 629. affirmed on appeal, where held, that in the case of a contract entered into for the purchase of lands prior to the making the will, the execution of the contract after the will no revocation. And the same principle held, *Perry v. Phillips*, 1 Ves. jun. 255. *Williams v. Owen*, 2 Ves. jun. 601. *Knollys v. Alcock*, 5 Ves. 648. affirmed on rehearing, 7 Ves. 558. Et vide on the general head of revocation, *Perkins & Al' v. Walker & Al'* ante 1 vol. 97, and cases cited in not. there.

(2) Et vide *Anon.* 2 Show. 48. where said that in a trial at bar, it was resolved by all the court that these words, "*my will in the hands of J. S.*" "*shall stand*" amounts to a good republication. Sed Quære, as to such words as in the case cited in the principal case, unless attended by circumstances demonstrating *animus republicandi* in the testator; for the like words held to be no republication, there being no such circumstance, *Abney v. Miller*, 2 Atk. 599. Et quære also in the case of a will of lands, for since the Statute of Frauds, 29 Car. 2d. there shall be no republication by implication, but the will must be executed, otherwise a devise of lands shall not be good, per *Parker*, Chief Justice, *Acherley v. Vernon*, Com. Rep. 381. So *Martin v. Savage*, Nov. 22, 1740.



As to the principal case, the decree was as follows, "Whereupōn and upon  
 "reading of the codicils made after  
 "changing of the said life, wherein the  
 "testator took particular notice of his  
 "will, and that he had reviewed the  
 "same, and devised several legacies,  
 "and hearing what could be insisted  
 "on by counsel on either side, this  
 "court declared that in case the chang-  
 "ing the life, and taking the new lease  
 "had amounted unto a revocation,  
 "yet the annexing those codicils to  
 "the will, amounts to a republication,  
 "and therefore doth order that the de-  
 "fendant the executor do assent to the  
 "said legacy given by the said will to  
 "the said Sarah, and do assign the  
 "term therein to her." Reg. Lib.  
 1690. A. fol. 351. And so said by  
 Lord Hardwicke, Chancellor, in *Carte*  
*v. Carte*, 3 Atk. 180. Amb. 28. S. C.  
 So *Potter v. Potter*, 1 Vez. 437. 442.  
 But in *Crosby v. Macdoul*, 4 Ves.  
 610. the Master of the Rolls (Arden)  
 seemed of opinion, that a codicil  
 merely for a particular purpose as to  
 change an executor, and confirming the  
 will in all other respects, does not  
 revive a part of the will revoked by  
 a former codicil. Note, in that case,  
 the codicil was not attested. So *Lord*  
*Carrington v. Payne*, 5 Ves. 419.  
 Nor will codicil concerning only per-  
 sonal legacies amount to republication  
 of will of lands, *Strode v. Russell*, post  
 625. A distinction seems to have been  
 formerly held in the doctrine of re-  
 publication of a will of lands by codicil,  
 between codicils relating to real estates,  
 and executed according to the Statute  
 of Frauds, and codicils executed accord-  
 ing to the Statute of Frauds, but re-  
 lating to personalty only, *Gibson v.*  
*Lord Montfort*, 1 Vez. 492. 3. Amb.  
 93. S. C. by the name of *Gibson v.*  
*Rogers*: but in *Barnes v. Crow*, 4 Bro.  
 Ch. Rep. 2. 1. Ves. jun. 486. S. C.  
 there cited, the cases and doctrine on  
 this subject are stated and discussed,  
 and there a codicil relating only to  
 personalty, but attested so as to pass  
 lands, was held a republication; it  
 however appears that the testator in  
 that case thought it was a codicil of  
 real estate. It is now however esta-  
 blished that a codicil relating to per-  
 sonalty only, and expressing no inten-  
 tion as to republication, if with three

witnesses, will amount to a republica-  
 tion, *Doe v. Davy*, Cowp. 158. *Pigott*  
*v. Waller*, T. 1802. 7 Ves. 98. Et  
 vide *Strathmore v. Bowes*, 7 Term  
 Rep. 482. [On Appeal 2 Bos. & Pul.  
 500.] As to the doctrine of annexation  
 of the codicil to the will, there seems  
 at first sight to have been formerly  
 some contrariety of opinion; in *Hut-*  
*ton v. Simpson*, post 722, it is said to  
 be resolved that the merely annexing  
 a codicil to a will, does not amount  
 to a republication, and in *Potter v.*  
*Potter*, 1 Vez. 442. it is laid down  
 that annexing the codicil to the will is  
 not necessary to make it a republica-  
 tion: but in *Attorney General v.*  
*Downing*, Amb. 573, 4, though an-  
 nexation of the codicil to the will,  
 seems to be considered only as a mode  
 of expressing the *animus republicandi*,  
 yet Lord Northington, Chancellor, is  
 there made to say, the annexing a  
 codicil, unites both the instruments,  
 and is sufficient, and for that cites  
*Beckford v. Parnacot*, 1 Ro. Abr. 618.  
 Marg. not. in Dyer, 143. the principal  
 case by the name of *Alford v. Alford*,  
 as cited in *Marwood v. Turner*, 3 P.  
 Wms. 168. *Lytton v. Lady Falkland*,  
 and *Lord Lansdown's Case* as cited in  
*Acherly v. Vernon*, Com. Rep. 381.  
 And in *Barnes v. Crow*, 4 Bro. Ch.  
 Rep. 2. *Pigott v. Waller*, 7 Ves. 98.  
 the necessity of actual annexation is  
 considered as exploded. Et vide *Simp-*  
*son v. Hornsby*, Pre. Ch. 439. *Strode*  
*v. Russell*, post 2 vol. 625. From a  
 consideration of the cases however on  
 this part of the subject, it should seem  
 that annexation of the codicil to the  
 will was never viewed in any other  
 light than as merely one mode amongst  
 others of demonstrating the *animus*  
*republicandi*; and that in all cases of  
 republication, where the form of words  
 alone is concerned, no precise form is  
 necessary, but any denoting the con-  
 tinuance of testator's mind, so far as  
 he makes no alteration will do, 1 Rol.  
 Ab. 617. Z. 1 *Potter v. Potter*, 1 Vez.  
 442. [*Jackson v. Hurlock*. 2 Eden. 273.  
*De Buthe v. Fingal*, 16 Ves. 167.  
*Hulme v. Heygate*, 1 Mer. 285. *Row-*  
*ley v. Eyton*, 2 Mer. 128.] And for  
 remark on the aforesaid case of *Lytton*  
*v. Lady Falkland*, vide judgment in  
*Gibson v. Lord Montfort*, 1 Vez. 493.

CASE 195.  
Jan. 15.  
Eq. Ca. Ab.  
374. pl. 6. S. C.

EDWIN MIL', and STAFFORD & Al' } Plaintiffs;  
Owners of the Ship Falcon,  
EAST-INDIA COMPANY, Defendants.

Though a  
Charter-party  
is so penned,  
that no freight  
can be reco-  
vered upon it  
at law, yet if  
the owners of  
the ship have  
a just demand,  
equity will  
relieve.

[ 211 ]

SIR *Humphry Edwin* and *Stafford* the part-owners, and *Prestwith* master of the ship *Falcon*, let her to freight to the *East India Company*, by *Charter-party*, dated *Feb. 20, 1683*, by which the plaintiffs agreed to fit up the ship with all necessaries, so as she might be ready to sail by the 10th of *March* then next following, and she was to go from port to port, and to any port or place within the limits of the *East-India Company's* Charter, as they should direct; but was to be dispatched back for *England* on or before the 24th of *Jan. 1684*, or so soon after as to save her *Monsoon* for *England* that year; or in default of her being dispatched within the time aforesaid, the owners were to pay *four* months demurrage, at *seven pounds ten shillings per diem* for her *Monsoon* so lost, and her stay in *India*, after the 20th of *Jan. 1684*, with this further clause, that the company might detain the ship in their employment in trade or warfare for any longer time, not exceeding *twelve* months, after the 20th of *Jan. 1684*, after the rate of *seven pounds ten shillings and sixpence per diem* demurrage, until the ship be dispatched from the last lading port, or expiration of the *twelve* months, which shall first happen; but after the *twelve* months expired, the ship is to return to *England*, and the company not to be liable for any further demurrage, or any damage that may accrue by her detention after that time. The company covenant, on the ship's arrival in *England*, to pay freight for *three hundred and one* tun, and demurrage, from the 20th of *Jan. 1684*, until the ship should be dispatched for the space of *twelve* months after the said 20th of *Jan. 1684*; and it was thereby provided, that until *six* days after the ship shall have returned to the port of *London*, and make a right and full discharge of all her lading, the company are not to pay, nor to be liable to pay any of the sums of money agreed on for freight or demurrage, or for detaining the ship in *India*, it being the intent of the parties, that if the ship should be lost either in her outward or homeward bound voyage, nothing should be paid by the company for freight or demurrage.

The ship set sail according to the charter-party, arrived in *India*, and was employed by the Company in trading from port to port for *one* year and upwards: the ship arrived in



*India*, Nov. 23, 1684, and was to enter into demurrage in four months afterwards, which was the 23d of *March*, 1685, and the *twelve* months after (during which time the Company by their Charty-party might detain her) ended *March* 23, 1686, but the ship was employed in the Company's service, so that she arrived not at *Surat* until 1686, and from thence was ordered to *Bombay*, where the ship having been so long detained in those seas, was surveyed, and found not sufficient for a voyage to *England*; and on *Sept.* 24, 1686, the seamen were discharged, and the ship left there.

EDWIN v.  
EAST-INDIA  
COMPANY.

The Company refused to pay any thing for freight or demurrage, because by the express provision of the Charter-party, they were not to pay until *six* days after the ship's arrival in *England*, and discharged of her lading; and if they were to pay any thing, yet they were to be charged with demurrage until *March* 23, 1685, only, and for no longer, and so it is provided by the Charter-party, and refused likewise to account for the value of the ship, or shew how they had disposed of her.

[ 212 ]

*Per Cur.* Though the Charter-party is so penned that nothing can be recovered at law, yet the plaintiffs had a just demand, and ought to be relieved in equity; and cited the case of *Westland* and *Robinson*, (where as in most cases, there was to be no freight paid for the outward bound cargo, but only a certain rate *per* tun for the homeward bound cargo,) when the ship arrived beyond sea, the factor had no goods at all to load the ship with, so she was forced to come home with her ballast: but in that case the court decreed the payment of freight; and so was it done in a like case of a ship that was hired at *Newcastle*, for a voyage to the Duke of *Courland's* country, there being freight to be paid only for the homeward bound cargo; and when the ship came thither, the goods were seized and attached, so as the ship was forced to come home empty, and yet there freight was decreed. (1)

In the principal case the court decreed the Company should account for what they had made of the ship, that they should pay demurrage according to the rate mentioned in the Charter-party, and that they should also be charged in respect of freight; but as to the *quantum* of the freight, the court would further consider of it, in regard that by the Charter-party,

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(1) Vide clauses usually inserted in the Charter-parties of the *East-India Company*, respecting freight, stated in *Hotham & Al' v. East-India Company*, Doug. 272. Et vide *Lewin & Al' v. East-India Company*, Peake Ni. Pri. p. 241. and not. (d) *Abbott's Law of Shipping*, p. 22.

EDWIN v.  
EAST-INDIA  
COMPANY.

there are several rates agreed on to be paid, as freight for the homeward bound cargo, viz. for callicoed, &c. *twenty-one pounds* per tun; for salt-petre, &c. *eighteen pounds* per tun; for iron, copper, &c. *six pounds* per tun; and therefore, before final judgment, would be informed what quantities of these respective commodities were usually brought home on such a voyage, and how much in proportion to each other. (1)

(1) Vide *Edwards v. Child*, post 727.

[ 213 ]  
CASE 196.  
Feb. 7.  
TREVOR,  
RAWLINSON,  
HUTCHINS.  
Ant. p. 52.  
S. C.

BADEN & Al' Creditores PHILLIPPI nuper } Plaintiffs;  
Com' PEMBROKE,  
Comitiss. PEMBROKE, Dom' JEFFERIES,  
& Domina CHARLOTTE Ux' ejus' fil' & } Defendants.  
hæres dicti PHILLIPPI Com' PEMBROKE,

*PHILLIP* late *Earl of Pembroke*, upon the marriage of the now Countess of *Pembroke*, in consideration of *ten thousand pounds* portion, and pursuant to articles by which he had covenanted to charge his estate in *Glamorganshire*, with a rent or annuity of *one thousand three hundred pounds per ann.* to her for her life, and afterwards agreed to make it up *one thousand five hundred pounds per ann.* did by indenture, *Octob. 1, 1675*, demise to the *Earl of Sunderland* and *Lord Godolphin* his manors and lands in *Glamorganshire*, for *ninety-nine years*, at a peppercorn rent, and by indenture, *Octob. 2, 1675*, the *Earl of Sunderland* and *Lord Godolphin* redemise the premises to *Earl Phillip*, for *ninety-eight years* and *eleven months* at a peppercorn rent during his life, and after his death *one thousand five hundred pounds per ann.* by half yearly payments, during the life of the Countess, for her jointure, and after her death, a peppercorn rent during the residue of the term, with a covenant for payment of the rent, and a clause of re-entry for non-payment.

[ 214 ]

The said late *Earl* by way of demise and redemise, had secured the payment of several annuities for life, viz. for securing an annuity of *seventy pounds per ann.* to one *Uphill* for life, the said late *Earl* and his trustees had demised a meadow called *Burdinsball* meadow, to *Richard Uphill*, for *ninety-nine years*, and *Uphill* by indenture, bearing date the next day after, redemised the premises to the late *Earl*, for *ninety-eight years* and *six months*, reserving the rent of *seventy pounds per ann.* during *Uphill's* life, and a peppercorn during

the residue of the term, a clause of re-entry, and a covenant from *Uphill*, if the rent was paid, to surrender the term; and in like manner secured other annuities to *Negus* and others.

The said Earl also with his trustees to secure *four thousand* pounds to his *three* sisters, and *four hundred* pounds *per ann.* to the present Earl, demised several manors and lands in *Monmouthshire* to *Villers*, *Salladine*, and *Chomley*, for *five hundred* years, in trust out of rents and profits, to raise the interest of the *four thousand* pounds, and the *four hundred* pounds *per ann.* to the present Earl for his life, clear of all taxes and deductions, under a proviso that on payment of the *four thousand* pounds and interest, and securing the *four hundred* pounds *per ann.* to the now Earl's content, they should at the request of the late Earl, surrender the term.

The said Earl in *November*, 1682, demised the manor of *Patney* in *Wilts*, for *one thousand* years, to one *Clerke*, as a collateral security for his enjoyment of the manor of *East Overton*, which he had bought of the late Earl.

And *June* 18, 1683, by articles under hand and seal, did covenant for him and his heirs for *five thousand two hundred* pounds, to convey to *Pinseint* and his heirs, the manor of *Patney*, and *Pinseint* covenanted in a week after the conveyance made, to pay the *five thousand two hundred* pounds. *Pinseint* pays part of the purchase-money to pay off an old statute and other incumbrances, and before any conveyance made, the Earl dies greatly indebted by bond and otherwise.

[ 215 ]

Upon the first hearing of this cause by the Lord Chancellor *Jefferies* on *July* 11, 1688, assisted by the *Master* of the *Rolls*, Mr. Justice *Lutwich* and Baron *Powell*, it was decreed that the term for *ninety-nine* years raised for securing the *one thousand five hundred* pounds *per ann.* to the Countess for life, was raised only for a particular purpose, and that being done, then to attend the inheritance, and go to the heir, and not to be taken as a term in gross, to be assets to answer debts by simple contract; and that *Pinseint* being willing to go off, he should be repaid, and his purchase discharged, and reserved the consideration of the other points for further debate.

Now upon debate before the *Lords Commissioners*, they were of opinion that the mortgaged terms derived out of the Earl's inheritance, were assets, and liable to bond-debts only, and not to debts by simple contract; (1) and decreed

A. articles to sell lands, and dies before a conveyance made. The heir decreed the executors.

to convey, and the purchase-money to be paid to

(1) This is not correctly stated. "by way of demise and redemise, after satisfaction of the jointure and The decree was, "that the terms raised

**BADEN v. Pinseint's** purchase should go on, and the heir convey, and the  
**COUNTESS OF purchase-money** be paid to the executors. (2)  
**PEMBROKE.**

"arrears, are terms subsisting and  
 "legal assets, and that the mortgage  
 "terms and the purchase money in  
 "the hands of *Pinseint*, are likewise  
 "assets, and subject to the plaintiff's  
 "demands." And the decree then af-  
 ter ordering the Master to report what  
 was due to the bond-creditors, and  
 what money could be raised by sale  
 of goods, &c. goes on to direct that  
 such bond-creditors as had filed origi-  
 nals, should be paid in the first place,  
 before other bonds, and then such  
 other bonds out of the money remain-  
 ing in court, and *Pinseint's* purchase  
 money, and when the bond-creditors  
 are satisfied, then the money arising  
 by the sale of the goods, &c. so far  
 as it would go, and if necessary in

aid thereof, the terms mentioned in  
 the said demises and redemises (sub-  
 ject to the jointure and arrears thereof  
 as aforesaid) are to be applied in  
 payment of the debts by simple con-  
 tract, that were not barred by the  
 Statute of Limitations, at the exhibit-  
 ing the creditor's bill. And the de-  
 cree ordered that *Pinseint* should pro-  
 ceed in his purchase, and pay the re-  
 mainder of his purchase money to Sir  
*Thomas Fowles*, the Master, by a day  
 therein mentioned, and that on pay-  
 ment thereof, he should be let into  
 possession. Reg. Lib. 1690. B. fol 533.  
*Vide Finch v. Earl of Winchelsea*, 1 P.  
 Wms. 281.

(2) *Vide Holt v. Holt*, post p. 322.

CASE 197.  
 Feb'. 24.  
 Eq. Ca. Ab.  
 89. pl. 7. S. C.

ROGER BAKER & ELIZ. Ux',  
 FRANCIS WHITE & Al',

Plaintiffs.  
 Defendants.

*A.* being a wi-  
 dow gives a  
 bond to pay *B.*  
 100*l.* if she  
 marry again,  
 and *B.* gives a  
 bond to the  
 widow, to pay  
 her executors  
 the like sum  
 if she should  
 not marry  
 again.—The  
 widow soon  
 after marries.  
 —Her bond  
 decreed to be  
 delivered up.  
 [\*216]

THE plaintiff *Elizabeth* whilst a widow, was by the contrivance  
 of her sister *Anne*, now the wife of *Alwin*, and of the defen-  
 dant *White*, at a meeting for that purpose appointed at the  
*Devil Tavern*, prevailed \* upon to give a bond of *two hundred*  
*pounds* penalty to the defendant *White* dated Oct. 8, 1683,  
 conditioned that if the plaintiff *Elizabeth*, then a widow, should  
 afterwards marry again, then she, her executors, administrators  
 or assigns, should pay the defendant *White*, his executors, &c.  
*one hundred pounds* in *eight* days after such marriage; and  
 the defendant *White* at the same time gave her a bond, of the  
 like penalty, conditioned to pay the executors, &c. of the said  
*Elizabeth one hundred pounds*, if she the said *Elizabeth* should  
 not marry again before she departed this life. The plaintiff  
*Elizabeth* having married the plaintiff *Baker*, they brought  
 their bill to have her bond delivered up; and although it was  
 insisted that the plaintiff was well apprised of what she did,  
 being then a widow, and near *thirty* years of age, and the mat-  
 ter had been often discoursed of, and considered by her at other  
 meetings between them before that time, at which the bond  
 was executed, and after the giving of the bonds, declared her-  
 self well satisfied therewith; and though the money the defen-  
 dant was to pay, was not payable in the life-time of *Elizabeth*;

yet it would help to increase her daughter's portion ; and that if she the said *Elizabeth* had died unmarried, the defendant *White* could not have been relieved against his bond,

BAKER v.  
WHITE.

*Non allocatur* ; But the bond was decreed to be delivered up to be cancelled. (1)

(1) And also the bond from the defendant to the plaintiff. Reg. Lib. 1690. ante p. 102. [*Cock v. Richards*, 10 Ves. 429. and cases there cited,] A. fol. 522. Vide *Key v. Bradshaw*,

### FINCH *versus* NEWNHAM.

CASE 198.

Feb'. 26

Eq. Ca. Ab.  
164. pl. 6. 332.  
pl. 5. S. C.

A devisee obtains a decree to hold and enjoy against the heir, who it was supposed had suppressed the will. Pending this suit, a third person gets an

*JOHN FINCH*, of *Godstone*, in *Surry*, having issue only one daughter, and being minded to keep part of his estate in his name, by his will in *Octob.* 1684, devised to \* the plaintiff, his near kinsman, in tail male, a messuage in *Godstone* called *Hammerlands*, with remainder over, and gave to his daughter his lands in *Sussex*, and about six months after died ; *Elizabeth* the daughter within three days after the death of her father, married one *Ditcher*, and they with one *Cooper*, were supposed to destroy this will, after the death of the testator.

assignment of a mortgage made by the testator, and then purchases the equity of redemption of the heir, with notice of the will. The court would not admit the purchaser to dispute the justice of the decree, nor to try at law, whether the will was not cancelled by the testator.

[\*217]

The now plaintiff brought his bill against *Ditcher* and his wife, and in *June*, 1687, obtained a decree at the *Rolls*, to hold and enjoy the lands according to the will against *Ditcher* and his wife, and all claiming under them. The estate so devised to the plaintiff, being by the testator, prior to his will, mortgaged to one *Budgin*, for one hundred pounds ; the defendant pending the suit, buys in the mortgage from *Budgin*, and also the equity of redemption from *Ditcher* and his wife. The now defendant was served with the former decree, and appeared and was examined, and set out his title under the assignment of this mortgage ; thereupon the plaintiffs were put to bring their bill to redeem the mortgage ; the defendant by answer insisted, that although he had been informed before his purchase, that it was pretended, that there had been such will made, yet upon enquiry was assured and satisfied, that such will was destroyed by the testator in his life-time, and therefore proceeded in his purchase ; and insisted the former decree, to which he was no party, (1) was unjust, in decreeing the lands to be enjoyed according to such pretended will. But

(1) Vide on this point, *Harvey v. Mountague*, ante 1 vol. 122. *Bacon's Tracts*, 282.

FINCH v.  
NEWNHAM.

in regard he purchased *pendente lite*, and with notice that there was a will, the court would not admit him to examine the justice of the former decree, nor to try at law, whether such will was cancelled or destroyed by the testator; but declared he should be bound by the former decree, and accordingly decreed the redemption of the mortgage to the plaintiff. (2)

(2) It was so decreed, but nothing appears with reference to an examination of the former decree, or trial at law. Reg. Lib. 1690. A. fol. 1119.

[ 218 ]

ASPINWALL & Al' versus LEIGH & Al'.

CASE 199.  
Martii 4.  
Eq. Ca. Ab.  
400. pl. 8. S.C.  
A term for  
years is limited  
for payment of debts  
remainder to  
A. for his life  
*sans waste*,  
remainder to  
his first, &c.  
son in tail. A.  
being in want  
the court gave  
him leave to  
cut timber for  
his support,  
not exceeding  
the value of  
500*l*.

SIR Gilbert Ireland, by deed of the 23d April 1675, grants a term for *five hundred years* to the defendant *Leigh*, and others, of his manors and lands in *Lancashire*, to commence after the decease of him and his wife, for payment of debts and annuities; and by will of the same date, devises the reversion and inheritance thereof to the plaintiff for life, without impeachment for waste, remainder to his first, and other sons in tail-male, with divers remainders over. Sir Gilbert and his wife both being dead, and the trustees in possession under the trust for payment of debts and annuities, which was like to have a long continuance, the plaintiff brought his bill, setting forth that he was reduced to great want, and that there was much decaying timber upon the estate, and that he had an estate for life limited to him *without impeachment of waste*, expectant on the determination of the trust, and that the trustees had no power to cut the timber, and prayed he might be permitted to take off the timber, allowing for what damage he did the estate.

And although it was objected, that the plaintiff might die before the trust performed, and until then, could not be let into possession, and to decree that he in the mean time might take off the timber, would be a prejudice to his sons or other remainder-men; yet the court decreed a commission to go to take off timber for the plaintiff's relief and support, not exceeding *five hundred pounds*. (1)

(1) Reg. Lib. 1690. A. fol. 329. Note, The trustees had power to let the lands for 21 years, or 99 years, determinable on one, two, or three lives, keeping the same in repair and nourishment. And if the person to whom the reversion of the premises expectant upon the said term of 500 years for the time being should belong, should within one year next after the term of 31

years, from the death of Sir Gilbert and Dame Margaret, confirm all such leases as the defendants and other the trustees or the survivors shall happen to make as they the trustees should approve of, under their hands and seals respectively, that then the term of 500 years should cease. Vide *Claxton v. Claxton*, ante p. 152,



LORD STOWELL *versus* COLE.

**PER CUR.** Where a mutual account is decreed, and there happens an abatement, the defendant in such case may revive. (1)

CASE 200.  
5 Martii.  
Eq. Ca. Ab.  
3. p. 5. S. C.  
post p. 296.  
After a decree  
of a mutual  
account the defendant may revive.

(1) So *Anon.* 3 Atk. 691. And in such case if the defendant dies, his representative may revive, both being in the nature of plaintiffs, *Kent v. Kent*, Prec. Ch. 197. As to the general doctrine of revival by defendant, the cases seem to clash; in *Finch v. Lord Winchelsea*, Eq. Ca. Ab. 2. pl. 7. which was the case of a bill brought to supply the defective execution of articles for a settlement, it is said in general terms that "it was agreed a defendant might bring a bill of revivor as well as a plaintiff." In *Lady Stowell v. Cole*, post 296. which was originally the case of a bill to redeem, a defendant was allowed to revive, but that was a bill of revivor by the widow of the defendant, or a person standing in the situation of a defendant, who had before been allowed to bring a bill of revivor (on what ground does not appear) and the proceedings in the cause thereon had been affirmed in the House of Lords; and it seems as though that was the reason which operated on the Court to allow the bill of revivor: in the anonymous case, 3 Atk. 692. Lord Hardwicke expressly says, "a defendant cannot revive but in one instance, and that is after a decree to account." And in *Done's Case*, 1 P. Wms. 263. the principle of both parties being actors seems to be confined to the case of an account, and that ap-

pears to be considered as the principle on which alone a defendant can be intitled to revive, by Lord Hardwicke in that anonymous case; and Lord Redesdale in his treatise, does not state any other case on the subject, except that in the case of a bill by creditors on behalf of themselves, &c. any creditor is intitled to revive; that is the case of *Pitt* and the creditors of the *Duke of Richmond*, Trin. 1702. Eq. Ca. Ab. 3. pl. 7. and is thus stated, "if a creditor (not saying whether plaintiff or defendant) is admitted by order to come in before the Master, and prove his debt, and pay his contribution, he is intitled to revive if the cause abates." Note, In the argument in *Lady Stowell v. Cole*, post 297, a distinction is taken between an account arising out of the cause, and an account decreed upon a dealing in trade and the like. [In *Williams v. Cooke*, 10 Ves. 406. the Master of the Rolls says, "the good sense is where a defendant can derive a benefit from the farther proceeding he may revive;" and in *Horwood v. Schmedes*, 12 Ves. 311. 316. the Lord Ch. says, "the ground, upon which a defendant can seek to revive the suit, must be, that he has some interest under the decree; an interest therefore in the farther prosecution of the suit."]

**WOODMAN v. BLAKE.** declaration of trust, and the bill is preferred within the *six* months, (that is to say) within *six* calendar months, (4), and the plaintiff claimed not a naked power, but a power coupled with an interest, and is relievable within the reason of the case of *Pitcairne* and *Wheeler*. (5)

(4) *Quære* tamen whether the law ever computes by calendar months, unless in the case of a *quare impedit*, and in agreements for payment of interest. Vide Co. Litt. 1 Inst. 135, 6. and references in the margin, Jacob Law Dict. by *Tomlins*, verb. month.

(5) 14 Jan. 1691, 2 Journ. Ho. Lords, vol. 15. p. 30. name *Barton v. Woodman*, this decree appears to have been reversed. In *Master v. Willoughby*, 1 Bro. P. C. 127. it is said, this cause being revived in the name of *Woodman*

came on to be heard before the Lords Commissioners, 21 March, 1690, when it was decreed that *Woodman* should be let into the benefit of the estate on payment of 1500*l.* a-piece to the *four* surviving daughters of Sir *Thomas Badd*, by the end of Michaelmas Term, and upon such payment, the trustee was to convey the estate to *Woodman*, or as he should direct, but in default, the estate to be sold to the best purchaser. Upon appeal, this decree was reversed. Et vide *Colles*, P. C. 74.

[ 223 ]

CASE 203.

1 Maii.

RAWLINSON,  
HUTCHINSON,  
Lords Com-  
missioners.

Eq. Ca. Ab.  
109. pl. 9. 3.  
Ch. Ca. 135.

One by will,  
having two  
daughters,  
gives 20000*l.*  
to each, pay-  
able at 25, or  
marriage, so  
as such mar-  
riage be with  
the consent of

the mother and the trustees, and after the age of 16. If either of the daughters marry before 16, or without consent, such daughter to have only 10000*l.* portion. Testator afterwards treats with the plaintiff for a marriage with his eldest daughter, and he dying before the marriage had, she afterwards marries the plaintiff, with consent of her mother and the trustees, but before her age of 16, yet she shall have the whole 20000*l.*

Com' SALISBURY &amp; Ux',

Plaintiffs.

BENNET &amp; Ux',

Defendants.

MR *Simon Bennet* devised to his *two* daughters, *twenty thousand* pounds a-piece, to be paid them at their respective age of *twenty-five* years, or marriage, which should first happen, so as such marriage was with the consent of the mother and other trustees, and after such time as they respectively had attained the age of *sixteen* years. If either of them married before *sixteen*, or without consent, then such daughter to have only *ten thousand* pounds portion; and directed that the surplus of his personal estate, should be invested in lands, and settled on his daughters and their issue, with cross remainders, &c.

In the life-time of Mr. *Bennet*, a marriage was treated of to be had between the plaintiff and his lady; but before any agreement made, old Mr. *Bennet* died, and the plaintiff, the Earl, married his now wife, before she attained her age of *sixteen*, but with the consent of her mother and trustees.

Whether he should have only *ten thousand* pounds, or *twenty thousand* pounds portion, was the question.

For the plaintiff it was insisted, that here was no express devise over, and that it was a clause inserted, and intended

only *in terrorem*; (1) and old *Bennet* himself after the making of this will, though his daughter was under *sixteen*, treated to have married her to the plaintiff, so (as it stood on the will) if there had been any condition precedent, or forfeiture, he had afterwards dispensed with it. (2) Here the whole portion comes out of the personal estate, and is a legacy, and therefore regard ought to be had to the law and usage in the spiritual court, where conditions of this nature are odious. And the case of the Duke of *Southampton* (3) cited, where relief was given in the like case.

The court decreed the *twenty thousand* pounds to the plaintiff. (4)

SALISBURY v.  
BENNET.

[ 224 ]

(1) Vide *Jarvis & Ux' v. Duke*, ante 1 vol. p. 20.

(2) Vide *Clarke & Ux' v. Berkeley & Ux'*, post 720.

(3) 1 Vol. 338.

(4) Out of the personal estate, and if that not sufficient, then the real es-

tate to stand charged with the remainder. Reg. Lib. 1690. A. fol. 609. So Skin. Rep. 285. S. C. note, in 2 Vent. 365. this case is wrong reported as to the decree. *Lord Keeper* is there stated to be of opinion, that both *parts* must be observed.

CECIL & Al',

COMES SALISBURY,

Plaintiffs.

Defendant.

CASE 206.  
TREVOR,  
RAWLINSON,  
HUTCHINSON,  
Lords Com-  
missioners.  
5 Maii.  
Eq. Ca. Ab.  
282. pl. 4. S. C.

THE plaintiffs, the younger children of the late Earl of *Salisbury*, brought their bill for the execution of a trust, under the will of their father, for raising their portions and maintenances, and prayed the trustees might be decreed to sell, &c. The defendant the Earl, whilst a minor, desired the trust-estate might not be sold, and offered to subject other lands not within the trust, for the better raising of the portions, so that then a sale would not be necessary: upon the hearing of the cause, the question was, whether he should be bound by this offer in his answer, he being then a minor.

*Per Cur.* Shall hold him to his offer, for by that means, he hath delayed a sale, &c. and if he would have departed from what he had offered, he ought immediately when he came of age, to have applied to the court, to have retracted his offer, and amended his answer, but though he came of age in 1687,\* yet no complaint was made, either that he had been deceived or defrauded, or an improper defence made for him; but acquiesced in the answer to this time. This court hath

An infant bound by the offer made by him in his answer, if the other side are thereby delayed; and if the infant does not immediately after his coming of age apply to the

court, in order to retract his offer, and amend his answer.

[ \*225 ]

**CECIL v.  
COMES SALIS-  
BURY.**

Court of equity often decrees building leases for 60 years, of infants' estates, where 'tis for their benefit. Infant exchanges land, and continues in possession of the lands given him in exchange, after his coming of age, he shall be bound. Provision made

often decreed building leases for *sixty* years of infants' estates, where for their benefit. A common recovery suffered by an infant is good; and if the court is satisfied it is for the good of the infant, will take it. (1) Where an exchange is made, if the infant continues in possession after he comes at age, he shall be bound by it. (2) So where a jointure is made after marriage, if after the death of her husband, the wife enters, she shall be bound by it. In Sir *Edward Moseley's Case*, where a provision was made for his lady in lieu of her jointure, by articles during coverture, she after the death of her husband, entered on *forty-six* pounds *per ann.* part thereof only, and she thereby was held obliged to perform the whole articles. And the Lady *Widdrington's Case* was cited, (3) where she and her husband agreed to an inclosure, and she was bound by it, even as to her jointure. (4)

for a wife in lieu of her jointure, by articles during coverture; if the wife after her husband's death enters but upon part of these lands, she is obliged to perform the whole articles.

(1) Vide Sir *Humphrey Mackworth's Case*, ante 1 vol. 461.

(3) *Rothwell v. Widdrington*, ante 1 vol. 456. S.C.

(2) Co. Litt. 51. b. As to deeds of infants, *ibid.* 45. b. As to partition by infant, *ibid.* 171. b. And further as to the general doctrine respecting the acts and contracts of infants. Vide *Franklin v. Thornbury*, ante 1 vol. 132.

(4) There is an entry in a cause of *Cecil v. Comes Salisbury* 5th May, but it respects a report that had been taken off the file only. Reg. Lib. 1690. A. fol. 563.

**CASE 205.  
1 Maij.**

### BAKER *versus* BAYLEY.

A. having an estate for three lives, settles it to the use of himself in tail, remainder to B. the remainder is void, or if good, it might be barred by deed, surrender, or other conveyance.

THE defendant that had an estate for three lives, settled it to the use of himself in tail, remainder to the plaintiff; the defendant surrenders the old lease, and takes a new lease to himself: the plaintiff's bill was to have the benefit of the remainder preserved to him.

[ 226 ]

Lease *pour autre vie*, is not within the statute *de donis*. Ant. Ca. 167.

Bare articles a bar to an intail of an equity. 3 Keb. 475, 486, 498.

Cur. Take the remainder to be void, and dismiss the bill. First, a lease *pour autre vie*, is not within the statute *de donis*, and therefore if a limitation over had been good, it might have been barred by a deed, or surrender, or other conveyance, without a common recovery, as in the case between *North* and *Champernoone* (1) where bare articles shall be a bar to an intail of an equity, and though there was a recovery in that case, yet that was not material, in regard there was no tenant to the precipe; and in this case, if it had been an intail within

(1) *North v. Way*, ante 1 vol. 13. S. C. *Low v. Burron*, 3 P. Wms. 265. [*North v. Frecker*, 1 Atk. 525.]

the statute *de donis*; yet the plaintiff's remainder not to be regarded, by reason the defendant has a prior estate in tail, and might at any time bar the remainder. The case of *Dowdeswell* and *Dowdeswell* cited; adjudged per Lord Chief Justice *Hale*, that an estate *pour autre vie* of lands in *Burrough English*, should descend and go to the heir in *Burrough English*. (2)

BAKER v.  
BAYLEY.

An estate *pour autre vie* of lands in Burrough English shall descend to the customary heir.

(2) So *Baxter v Dowdeswell*, 2 Lev. 138. *Clements v. Scudamore*, 1 Salk. 244. 2 Raym. 1028. S. C.

### BAKER versus CHILD.

The plaintiff had obtained a decree before the ordinary, for an aisle in a church, in the year 1676, and brought his bill for the decree of this court to quiet him in possession; and it was insisted upon by Mr. *Finch*, that the bishop had the disposition of the seats in the church, and when he hath disposed thereof, that gives a right to the party, and he may maintain an action, and that was the case of *Boothby* and *Bayly*, and hoped the court would not put them to bring their action, but would quiet the possession by decree. (3)

*Per Cur.* Dismiss the bill with costs, for this court executes not their own decrees by a bill, without examining the justice thereof; but we cannot examine whether the bishop hath done right, nor will such a decree bind the successors.

CASE 206.  
Eodem die.  
Eq. Ca. Ab. 75.  
pl. 6. S. C.  
Bill will not lie to quiet one in the possession of a pew in a church, though plaintiff before had a decree before the ordinary for this pew.  
Hob. 69.  
[ 227 ]

(3) The bill was also for an injunction against proceedings in the Ecclesiastical Court, wherein an excommunication had issued against the plaintiff for want of appearance, upon which, there is simply an entry of dismissal with costs. Reg. Lib. 1690. A. fol. 637. entered *Baker v. Bayley*,

### SYMONS versus RUTTER.

On the marriage of *Elizabeth Symonds* with *John Rutter*, it was agreed by articles in writing, that five hundred pounds, part of the portion of *Elizabeth*, should be placed in the hands of Sir *Francis Child* and *William Pain*, to be placed out at interest, until it could be invested in a purchase, with the consent of *Elizabeth* and *John Rutter*, her intended husband, in houses or lands of inheritance, to be settled to the use of *John Rutter* and *Elizabeth* his intended wife for their lives, and the life of for their lives; remainder to the heirs of their two bodies; remainder to the heirs of the body of the wife; remainder to the plaintiff, the wife's brother in fee. The wife dies without issue, and then the husband dies, the 500*l.* not being laid out. Whether this money is to be taken as laid, and go to the plaintiff, to whom the fee is limited; or as money, and go to the executor of the husband.

CASE 207.  
4 Maii.  
Eq. Ca. Ab.  
274. pl. 7. Pre.  
Ch. 23. S. C.  
By marriage articles agreed that 500*l.* the wife's portion, should be invested in a purchase of lands to be settled on husband and wife  
is to be taken  
go to the exe-

SYMONS v.  
RUTTER.

the longest liver, remainder to the heirs of their two bodies ; remainder to the heirs of the body of *Elizabeth* ; remainder to the plaintiff the brother of *Elizabeth*, and his heirs. The marriage being afterwards had, and the *five hundred* pounds deposited with the trustees, before any purchase had, *Elizabeth* died without issue ; *John Rutter* survived, and received the interest of the *five hundred* pounds, during his life ; he being dead, the plaintiff now claimed the *five hundred* pounds, by virtue of the remainder to him and his heirs, and as brother and heir of the said *Elizabeth*, and also as having administration to her *de bonis non* administered by *John Rutter* the husband, who survived *Elizabeth* his wife.

[ 228 ]

*Per Trevor* and *Rawlinson*, the *five hundred* pounds in this case is to be looked on as money, and not as land, and go to the defendant as administrator to *John Rutter* the husband, who survived : *First*, because no positive covenant that it should be laid out in land. *Secondly*, not to be laid out in land, but by the consent of *John Rutter* and *Elizabeth* his wife, (1) and no purchase made or consented unto ; and it remaining therefore as money, the interest by the articles was only appointed to the survivor, and no disposition as to the principal, and must go to the administrator of the husband, who survived, and the bill dismissed ; for if settled, the husband had been tenant in tail, and might have barred the issue.

*Per Hutchins*. The intention plain, it should be invested in a purchase, and plain that a purchase might have been had after the death of one of them, because the survivor by the articles, is to have only the interest for his life ; and though if settled, the husband might have been tenant in tail ; yet having no issue, was only tenant in tail after possibility of issue extinct, and conceived this case governed by the rule that had been taken in the several cases of *Whitwick* and *Jermin*, or *Lawrence* and *Beverley*, being the same case ; and by the cases of *Annon* and *Honywood*, (2) *Kettleby* and *Atwood* ; (3) and must not upon the same circumstances be taken as personal estate, which in other cases had been looked on as land, and gone as real estate.

Vol 1. Case  
293, 451.

(1) Vide *Lechmere v. Earl of Carlisle*, 3 P. Wms. 218, 19, 20. where the principal case is cited by the *Master of the Rolls*, and it is there said by him that this clause makes no difference, for on a convenient purchase proposed, the court would have ordered the money to be laid out, unless rea-

sonable objection made.

(2) *Annand v. Honeywood*, ante 1 vol. 345. S. C.

(3) Ante 1 vol. p. 298, 471, S.C. and see the cases in not. there, for the learning on this head. *Abbott v. Lee*, post p. 284.



ALCOCK *versus* SPARHAWK.

CASE 208.

12 Maii.

Eq. Ca. Ab.  
198. pl. 4. S. C.  
Ant. Ca. 140.  
J. S. by will  
devises his  
lands to his  
brother who  
was his heir  
at law, in fee,  
gives legacies  
and makes  
his brother  
executor, de-  
siring him to  
see his will  
performed.  
The real estate  
is charged with  
the legacies.

[ \*229 ]

**JAMES SPARHAWK**, the defendant's brother, seised of freehold and copyhold, and designing to have intermarried with the plaintiff, in case he had lived; by will, *April* 15, 1679, drawn by the defendant his brother, by his direction, deviseth as followeth. As touching my worldly goods, I dispose thereof as followeth. I give and bequeath to *John Sparhawk* (being the defendant) my loving brother, all my houses and lands lying and being in *Feesingfield* and \* *Stradbrook*, and all my houses in *Theberton* to him and his heirs: and after other legacies devises thus. *Item*, I give to Mrs. *Susanna Alcock*, (the plaintiff) the sum of *two hundred pounds*, to be paid by my executor within *five* years after my decease. *Item*, I give my stone-ring unto Mrs. *Susanna Alcock*, and I do nominate and appoint my loving brother *John Sparhawk*, to be my sole executor of this my last will and testament; desiring him to see the same performed, (1) according to the trust and confidence that I repose in him. And the testator proposing the legacies should be paid in *three* years; the defendant desired *five* years' time for the doing of it. The personal estate proving deficient, the question was, whether the real estate was liable.

*Per Cur.* The lands are subject and liable even on the face of the will. Testator needed not have devised the lands to his brother, for he was his heir at law, unless he intended his brother should take them subject to his legacies: but he is devisee and executor, and is desired to see the will performed; and therefore a much stronger case than that of *Cloudesley & Al'*, creditors of *Dean* against *Pelham*, which was confirmed upon an appeal to the Lords. (2)

Vol. I. Case  
386.

*Note*, This decree was also confirmed upon a bill of review, and afterwards upon an appeal to the *Lords* in *Parliament*. (3)

(1) "To perform the same." R. L.

(2) The parties went into evidence, and it was proved in the cause, "that at the time of making the will, the defendant asked the testator how the 200*l.* given to the plaintiff, should be raised, and when paid, and that the testator answered out of his lands within three years, but the defendant declaring that it could not be raised in that time, that the testator thereupon replied, then take five years, by which time he was

"sure it might be done, and the plaintiff would be of age, and the testator asked the defendant if he was satisfied and contented; who answered he was." Reg. Lib. 1690. A. fol. 954. The defendant had been admitted to the copyhold lands as brother and heir at law to the testator. Et vide *Elliot v. Hancock*, ante p. 143.

(3) 25th *February*, 1694. Journal House of Lords, 15 vol. 506. entered, by the name of *Sparhawke v. Alcocke*. vide Vin. Ab. 460, 1, 4. tit. Charge.

*Davis v. Gardiner*, 2 P. Wms. 187, *Fearnley*, 2 S. and S. 592.]  
[and cases there cited, and *Parker v.*

CASE 209.  
18 Maii.

An award is made in an adversary suit between *A.* and *B.* and confirmed by the court, *A.* being then a bankrupt, but not known to be so. A commission is afterwards taken out. This award shall bind the assignee under the commission.

[ 230 ]

WHITACRE *versus* PAWLIN, et Al'.

**PAWLIN** and *Loggin* become partners in some forges and iron mills, and *Pawlin* alledging that *Loggin* had not brought his proportion of stock into trade, and had wasted and embezzled the joint-stock, brought a bill against him to be relieved touching the same. The matter by consent was referred to Mr. *John Trinder*, who in regard *Loggin* had not brought in his first stock, and had wasted and embezzled the joint stock, Jan. 30, 1685, awarded *Loggin* to deliver to *Pawlin* what remained of the joint-stock, and the lease of the iron mills, &c. to be by him enjoyed to his own use, and thereupon general releases to be given; which award, after exceptions taken to it, was afterwards confirmed, and decreed by the court. (1) *Loggin* was afterwards found a bankrupt, and the plaintiff *Whitacre* as being a creditor to him by bond, had an assignment made to him by the commissioners, and brought a bill to have an account of *Loggin's* estate, that came to the hands of *Pawlin*, and alledged, if any such award was made, it was after such time as *Loggin* became a bankrupt.

*Per Cur.* There appearing no fraud or collusion in the obtaining of the award, but the same being in an adversary cause, and the award after excepted to, &c. although *Loggin* might be then a bankrupt, yet not being known so to be at time of the award, such award ought to stand. (2) *Quære*, If the decree upon a rehearing was not reversed? (3)

(1) Vide on this head, *Crossley v. Carrington*, 1 vol. 469. ante p. 79.

(2) Submission to an award held not to be avoided by a secret act of bankruptcy, *Cooke B. L.* 584. 4th edition, but it seems to refer to this case only.

(3) A decree was made on the 15th *January*, by which the bill was dismissed with costs, to be paid by the

plaintiff as therein mentioned, and affirmed on rehearing, 18th *May*, Reg. Lib. 1690. *B.* fol. 433. this decree was reversed in the House of Lords, between the same parties, and relating to the same subject, 18th *Nov.* 1691. Journal. House of Lords, 14 vol. p. 651. and the decree is there stated to have been on 15th *January* then last. No case appears in the Register's Book.

DE  
TERM. S. TRINITATIS, 1691.  
IN CURIA CANCELLARIÆ.

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BURREL *versus* HARRISON.

**BILL** to have an execution of articles for a lease of lands in *Norfolk*, at the rent of *thirty* pounds *per ann.* and the custom throughout *Norfolk* being, that the landlord should do and be at the charge of all repairs during the term. The question was, who in this case should be obliged to repair.

landlords repair; but the rent reserved on this lease appearing to be under the value, decreed the tenant should covenant to repair.

CASE 210.  
10 Junii.  
Pro. Ch. 25.  
S. C.

Bill for a specific performance of articles for a lease of lands in *Norfolk*, where by custom the value, decreed

*Per Cur.* The tenant being plaintiff to have the lease made, and it being in proof that *thirty* pounds *per ann.* is not the full value, decreed a lease to be made; but that the plaintiff the tenant should covenant to repair, and the rent of *thirty* pounds *per ann.* to be subject to no deductions, save only parliamentary taxes. (1)

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(1) Reg. Lib. 1691. A. fol. 338. 368. 15th Dec.

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BLYNMAN *versus* BROWN & Ux'.

**THE** plaintiff being a purchaser, came here for writings and a partition. The defendant insisted there was an intail, and plaintiff's purchase not good. The court upon the first hearing, gave the plaintiff a year's time to try his title. Ejectment was brought, and a copy of the deed of intail produced, but the original lost, and not proved to be executed; verdict against the intail.

the court gave the plaintiff a year's time to try his title. And upon a trial in ejectment verdict for the plaintiff; upon coming on upon the equity reserved, it was insisted, this being a matter of right of inheritance, defendant ought not to be bound by one trial; *sed non allocat'*, it being a decree only for a partition. *Tamen quære.*

[ 232 ]

CASE 211.  
16 Junii.  
Eq. Ca. Ab.  
378. pl. 6. S. C.

Bill for writings and a partition; defendant insists the plaintiff has no title, and that there is an intail subsisting:

The cause was now set down on the equity reserved: the defendant insisted, he ought not to be bound by one trial in a

**BLYNMAN v. BROWN.** matter of right of inheritance; *sed non allocatur*, being a decree only for a partition. *Tamen quære.* (1)

(1) The decree for the plaintiff, but the point insisted on by the defendant, as by the printed report, does not appear. It should seem that after the order on the first hearing, and the verdict, the defendant had brought a bill against the now plaintiffs for a discovery of deeds and writings relating to the premises in question, the now plaintiffs in answer, confessed the deeds and writings, and they were brought into court: the now defendants afterwards by order, obtained possession of them, and then dismissed their bill, and afterwards finding amongst the said deeds, an old settlement in tail, made in 1653, brought an ejectment against the now plaintiff,

and turned him out of possession. And the decree declared "that although this court had been made instrumental to prejudice the plaintiff's title as aforesaid, they ought now to relieve and protect the said plaintiff in the enjoyment of one moiety of the premises in question as far as they can, the said plaintiff appearing to be a purchaser thereof, for good and valuable considerations as aforesaid, and the defendant's pretended right and claim under the entail being set aside by the aforesaid verdict." Reg. Lib. 1690. A. fol. 740. Vide *Edwin v. Thomas*, 1 vol. 489. ante 75. S. C.

CASE 212.  
23 Junii.

### THOMAS versus GYLES.

Eq. Ca. Ab.  
281. B. pl. 5.  
S. C.

One gives her son other lands in lieu of lands intailed, and by her will gives the intailed lands to her daughter, and takes a

**SARAH GYLES**, the mother, agrees to give her son other lands in lieu of lands intailed, and by will disposes of the intailed lands to her daughter *Rebecca*, and takes bond from her son to permit and suffer the intailed lands to be enjoyed as she by will had devised them. The son dies, leaving the defendant his son an infant, who brought an ejectment for the intailed lands. The plaintiff could not sue the bond against the defendant, being an infant.

bond from her son, to permit her daughter to enjoy the intailed lands. The son dies, leaving an infant son, who being in possession of the lands that came in recompence, brings an ejectment for the intailed lands. By reason of the infancy of the grandson, the bond could not be sued. The daughter brings a bill, and is decreed to be quieted in possession of the intailed lands, until six months after the infant comes of age, and then the infant may shew cause.

[ 233 ]

*Per Cur.* The infant being in possession of the lands that came in recompence, we will at present only quiet the plaintiff's possession in the intailed lands, until *six* months after the infant comes of age, and then he may shew cause if he thinks

Partition between tenants

in tail, though only by parol shall bind the issue.—*A.* seised of *Blackacre* in tail and *Whiteacre* in fee, by mistake devises the intailed acre, and leaves the fee-simple acre to descend; the devisee upon his bill, had a decree to enjoy.

(1) It is stated that the plaintiffs had proved in the cause that the defendant's father had received a full recompence and compensation for the entailed lands but by the decree the

defendant was at liberty to proceed to an examination as to that fact on peril of costs, as the court should direct. Reg. Lib. 1690. B. fol. 581.

between tenants in tail, though but by parol decreed to bind the issue; and the like in the case between *Rose* and *Rose*. And a case cited where *J. S.* seised of *Blackacre* in tail, and of *Whiteacre* in fee, by mistake devised the intailed acre, and leaves the fee simple to descend. The devisee came here and had a decree to enjoy.

THOMAS v.  
GYLES.

### MAW *versus* HARDING.

CASE 213.  
20 Julii.

ON the statute for the better settling of intestates' estates, the question was on that clause of the statute, that there should be no representation among collaterals, beyond brothers' and sisters' children. Whether to be intended of brothers and sisters to the intestate, or whether, when distribution falls out amongst brothers and sisters, though remote relations to the intestate, representation shall be admitted.

Eq. Ca. Ab.  
249. pl. 4. Pre.  
Ch. 28. S. C.  
Ant. Case 155.  
The clause in  
the statute of  
distribution,  
which says  
there shall be  
no representa-  
tion among  
collaterals

beyond brothers' and sisters' children, must be intended that none shall take by representation, but the children of brothers and sisters to the intestate.

*Per Cur.* No representation but between brothers and sisters to the intestate. (2)

(2) Vide *Earl of Winchelsea v. Norcliffe*, 1 vol. 403, 4. *Carter v. Crawley*, Sir Thos. Raym. 496. *Pett v. Pett*, 1 Raym. 573. [*Pett's Case*, 1 P. Wms. 25. *Bowers v. Littlewood*,

ibid. 594.] So the Roman civil law allowed no representation after brother's and sister's children to the intestate, *Wood's Inst.* octavo edit. 178.

### FREEMAN *versus* FREEMAN.

CASE 214.  
21 Julii.

THE father settles lands upon his son in tail, and takes a bond from him, that he should not dock the intail. Bill to be relieved against the bond. (3)

Eq. Ca. Ab. 87.  
pl. 9. Pre. Ch.  
28.

upon his son in tail, and takes a bond from him that he shall not dock the intail. On bill to be relieved against the bond, bond decreed to be good. If the son would not have given the bond, the father might have made him only tenant for life. Post Ca. 237.

The father  
settles lands

*Per Cur.* The bond good; had not the son agreed to give the bond, the father might have made the son only tenant for life; and though the alienation is not made by the son, but by his issue; bill dismissed with costs. (1)

[ 234 ]

(3) The plaintiff was executor of the son of him who gave the bond which son it appears had suffered a common recovery, and devised the lands in question to the plaintiff and her heirs. R. L.

(1) Reg. Lib. 1690, A. fol. 794. Quære *Tamen*. Vide 1 Inst. 206. b. 223. b. 224. a. *Tatton v. Molineux*, Moor 809. *Jervis v. Bruton*, post 251. [Sed vide *Collins v. Plummer*, post 635, and 1 P. Wms. 104.]

## CASE 215.

16 Julii.

Eq. Ca. Ab.

155. pl. 7.

S. C. &amp; S. P.

An only child of a freeman of London, advanced in part, is not to bring such part into hotch-pot.

FANE *versus* BENCE.

SIR *Vere Fane* married Alderman *Bence's* daughter, whom he received a portion in marriage. The question whether she was thereby excluded from her orphanage share, the testator not having by his will, or otherwise, declared not fully advanced: (2) and in case she ought to be let an orphanage share; it was agreed her portion was not brought into hotch-pot, there being none in equal degree her, she being the only child. (3)

(2) Vide *Fouke v. Lewen*, 1 vol. 88.

stated, no further mention of the

(3) Reg. Lib. 1690. A. fol. 1105.

appears, *Dean v. Lord Delaware*A case as to the custom ordered to be 628. *Stanton v. Platt*, 758.

## CASE 216.

23 Julii.

Eq. Ca. Ab.

144, pl. 20.

S. C.

A recognizance being enrolled by the special order of the court, after the time for enrolling it was elapsed, the conusor betwixt the date of the recognizance and the enrolling of it, borrowed money of *J. S.* upon a judgment which was now over-reached by

FOTHERGILL *versus* KENDRICK.

A RECOGNIZANCE was enrolled by special order of court, the time for the enrolling of it was elapsed, but being enrolled, that makes the recognizance effectual from time of the date. It so happened that the plaintiff betwixt the date and the enrollment of the recognizance, lent money to the cognisor, and took a judgment for his security, & now was over-reached by this recognizance, made good the subsequent enrollment: and in regard the estate was mortgaged, and neither the judgment or recognizance could reach it without the assistance of a court of equity; the cognisor having only an equity of redemption in him; the court inclined to give the preference to the judgment-creditor, he might not complain of wrong done him by the order enrolling the recognizance. (1)

the recognizance, and the estate of the conusor was in mortgage, prior to the recognizance, so that neither the recognizance, nor the judgment could reach the estate without the equity. The court inclined to give the preference to the judgment-creditor.

(1) Vide *Bothomley v. Lord Fairfax*, 1 P. Wms. 334, post 751. S. C.

[ \*235 ]

## CASE 217.

24 Julii.

Eq. Ca. Ab.

317. pl. 2. S. C.

*A.* mortgages land to *B.* and after mortgages the same land to *C. B.* the first

COOK *versus* SADLER.

mortgagee forecloses *C.* and afterwards devises the premises to the mortgagor. Whether may now in equity set aside the first mortgage.

THERE being a first and second mortgage made of the estate, the first mortgagee brought a bill against the second to compel him to redeem or to be foreclosed, and foreclosed him accordingly. It so happened that the first mortgagee by his will devised the premises to the mortgagor, and thereupon the second mortgagee foreclosed *C.* and afterwards devised the premises to the mortgagor. Whether may now in equity set aside the first mortgage.



the second mortgagee brought a new bill to set aside the first mortgage, and to be let into a satisfaction of his money. The defendant pleaded the former suit, and decree of foreclosure. (2)

COOK v.  
SADLER.

*Per Cur.* Answer the bill. Something like the case of *Bovey and Smith*, where a purchaser that had notice, sold to one that had no notice of the trust, and afterwards repurchases, the trust shall revive in his hands. (3)

Vol. I. Case  
58, 74, 139.

(2) If a mortgagee has a decree of foreclosure, though that decree be signed and inrolled, yet if he afterwards brings an action of debt on bond given at the same time, for payment of the money, and performance of the covenants in the mortgage deed, such action opens again the foreclosure, and lets in the equity of redemption of the mortgagor. *Dashwood v. Blythway*, Eq. Ca. Ab. 317. pl. 3. But it seems that mortgagee may hold mortgagor to bail on the mortgage bond,

pending a suit for foreclosure, notwithstanding he has recovered possession by ejectment, on the ground that he may pursue all his remedies at once, *Burnell v. Martin*, 2 Doug: Rep. 417.

(3) Reg. Lib. 1690. A. 1036. The case is not stated, but the order made on arguing the plea was, that the defendant should answer the whole bill, that the word demurrer should be struck out, and the benefit of the plea be saved to the hearing.

### COLLINS *versus* GOODALL.

BILL to be relieved touching a rent charged upon lands by a will; the defendant pleaded the statute of limitations, and that there had been no demand or payment in forty years. extends only to customary rents between lord and tenant, and not to rent arising by grant, or a will, whereof the commencement may be shewn.

CASE 218.  
Eodem die.  
Eq. Ca. Ab.  
304. pl. 9. S. C.  
Statute of  
limitations as  
to rents,

*Per Cur.* The case in *Cook's Reports*, on the Statute of H. 8. concerns only customary rents between lord and tenant, and not to any rent that commences by grant or whereof the commencement may be shewn. (1)

[ 236 ]

(1) There is an entry of a cause of *Collins v. Goodall & Al'*, in the Register's Book, 14th July, by which it appears that a demurrer had been put in, but that the defendants were ordered to answer, and the benefit of the de-

murrer saved to the hearing, but no case stated, Reg. Lib. 1690. A. fol. 808. Vide on this subject, *Jones v. Pope*, 1 Saund. Rep. 38. arg. *Freeman and Stacie's Case*, Hutton. Rep. 109.

### ENGLEFIELD *versus* ENGLEFIELD.

THERE having been a decree made for a very liberal allowance for the maintenance of the infant out of a trust estate, and not according to the trust; upon a rehearing it was endeavoured to set aside the decree.

CASE 219.  
Eq. Ca. Ab.  
165. pl. 6.  
281. pl. 7.  
S. C.

ENGLEFIELD v.  
ENGLEFIELD.

Where an infant recovers by a decree of the court, the court may with the approbation of the infant's relations, allot the infant a maintenance, though no provision in the trust for that purpose; and this is founded on natural equity.

*Per Cur.* Where an infant recovers by decree of the court, the court may with the approbation of the infant's relations, allot him a maintenance, though no provision in the trust for that purpose; (2) and this founded on natural equity: and though in this case the decree went beyond the rules of regular equity, yet a decree being made in it, we will not reverse it, though possibly we would not have made the decree.

(2) Vide *Barlow v. Grant*, ante 1 vol. 255.

[ 237 ]

DE

## TERM. S. MICHAELIS, 1691.

IN CURIA CANCELLARIÆ.

### OWEN *versus* CURZON.

CASE 220.  
Decembris 16.  
LORDS COM-  
MISSIONERS.  
Eq. Ca. Ab.  
3. pl. 6. S. C.  
Administrator obtains a decree, and dies, the administrator *de bonis non* may revive this decree, within the equity of statute 30 Car. 2. cap. 6.

AN administrator as such, obtains a decree, but before enrollment, or any further proceedings dies. The administrator *de bonis non* brings a bill of revivor, to have the benefit of that decree, whereto the defendant demurred, because the *administrator de bonis non* came not in privity to the administrator, that obtained the decree, but claimed paramount, and therefore could not revive.

Stat. 30. Car.  
2. cap. 6.

*Per Cur.* By the *Oxford Act*, after a judgment obtained by an administrator, the administrator *de bonis non* may revive; and so in this court where a decree is obtained, as there was in this case. (1)

(1) The demurrer was *allowed*. Reg. Lib. 1691. B. fol. 76.

UNDERWOOD & Al', *versus* MORDANT & Al.

CASE 221.

Dec. 7.

Nel. Ch. Rep.  
181. S. C.By marriage  
articles, the  
household  
goods and  
plate of the  
wife were as-  
signed to  
trustees, the  
husband to  
have the use  
of them for his  
life only, after-  
wards to the

UPON the marriage of *Suckley* and *Grace Hill*, articles were made whereby the estate of *Grace* was assigned over to trustees therein named; thereout in the first place to raise *one thousand* pounds, and pay it to the husband, and the residue of the personal estate to him, save the household goods and plate, of which the husband was to have only the use for his life, then to his wife, her executors and administrators; but if the husband survived her, he to have the absolute property therein.

wife, her executors and administrators. But if the husband survived, then the absolute property to be to him. *A.* having got judgment against the husband, takes the goods in execution. The wife's friends give security to the sheriff, who returns *nulla bona*, whereupon *A.* brings an action against the sheriff and recovers. Afterwards the same goods are taken in execution by *B.* another creditor of the husband, and the sheriff on the like security given him by the wife's friends, returns *nulla bona*, whereupon *B.* also brings action and recovers. The wife's trustees bring bill, but could have no relief, it being all at law, in whom the property of the goods are.

The defendant *Mordant* having recovered a debt against *Suckley* the husband, takes the household goods and plate, &c. in execution, the friends of the wife give security to the sheriff, and he thereupon returns *nulla bona*. And *Mordant* brings his action against the sheriff for a false return, and recovers against him. And afterwards the same goods were taken in execution by one *Pyle* for a debt, also due from *Suckley* the husband; and upon the like return of *nulla bona*, the like recovery was had against the sheriff, and after a writ of error spent, the plaintiffs brought their bill for relief. (1)

*Per Cur.* There being an assignment made of the goods in question to trustees, the matter is purely at law, whether such assignment well vests the property in the trustees, and whether fraudulent as against a creditor or not. *That* having been already tried, no room for equity to interpose; if we should relieve the plaintiff, we must declare *that* not to be fraudulent in equity which is found to be so in law. And as to that part of the case where two several creditors have recovered the value of the self-same goods, it was the folly of the party not to provide better for himself. For although when a man re-

[ 239 ]

(1) The bill was brought by *George Underwood* and *Richard Webb*, (probably the trustees of *Grace Suckley*) but there is no statement of the case on the pleadings, save that by the bill it appears "that the goods taken in execution for the debts of the defendant *Suckley* the husband, were

" by virtue of an agreement, dated  
" 28th December, 1681, executed be-  
" fore the marriage, between the said  
" defendant *Suckley* and the said *Grace*,  
" to remain to her own proper use."  
The bill was dismissed with costs. Reg.  
Lib. 1691. B. fol. 102.

UNDERWOOD  
v. MORDANT.

In Trover the  
plaintiff re-  
covers; the  
property of  
the goods  
vests in the  
defendant  
against whom

the damages for them are recovered. But where upon a *Fi. fa.* the sheriff returns *nulla bona*, and an action is brought against him for a false return, and a recovery is had against him, the property of the goods is not vested in him, but they are liable to any other execution.

(2) So *Putt v. Rawsterne & Al'*, goods in execution, he may have trover, Pollex, 640, 1. *Adams v. Broughton*, 2 or trespass against him who takes them Str. 1078. away, *Wilbraham v. Snow*, 2 Saund. Rep. 46.

(3) But where the sheriff has seized

CASE 222.

JOHN RAW and ELIZABETH POTE, *versus* POTE.

14 Nov.

Eq. Ca. Ab.  
355. pl. 6. Pre.  
Ch. 35. S. C.

*A.* on his mar-  
riage with *B.*  
settles lands  
for her joint-  
ure, which  
were subject  
to an entail;  
*C.* brother of  
*A.* was privy,  
to the entail,  
ingrossed the  
jointure-deed,  
had the deed  
of entail in his  
custody and  
concealed it.  
*A.* the hus-  
band devises  
the inherit-  
ance of the  
premises to

*LEONARD POTE*, the defendant's elder brother, upon his marriage with the plaintiff *Elizabeth*, settled the lands in question upon her for her jointure. The defendant was privy to the treaty of marriage, and ingrossed the jointure-deed, and concealed the intail, *Leonard Pote*, the defendant's elder brother being dead without issue, and having devised the inheritance of these lands to the plaintiff *Raw*; the defendant *Pote* having the deed of intail in his custody made by his grandfather, brought his ejectment and recovered; the plaintiffs brought their bill for relief, and the defendant by answer, confessed he was privy to the marriage-treaty, and ingrossed the plaintiff *Elizabeth's* jointure-deed, and that he had then the deed of entail in his hands; but did not mention his title, nor discover the antient deed of entail, because\* he apprehended his brother would dock the entail.

*J. S.* afterwards dies without issue, and *J. S.* marries the widow; *C.* the brother sets up the intail, and brings an ejectment. *J. S.* and his wife bring a bill to be relieved against this deed of intail. Decreed the wife to hold her jointure; but bill dismissed as to the husband's claim under the will, it being a voluntary conveyance.

[ \*240 ] The court decreed the plaintiff *Elizabeth* to hold and enjoy her jointure against the defendant, and all claiming by or under him, and a perpetual injunction against the judgment in ejectment. But as to the plaintiff *Raw*, who claimed the reversion and inheritance by a voluntary devise; the bill as to him was dismissed. Dr. *Amye's Case*, and *Charles Clare's Case* cited. (1)

Note, This decree was afterwards affirmed upon an appeal to the House of Lords. (2)

(1) Reg. Lib. 1691. *B.* fol. 67.

vol. 136. [*Neville v. Robinson*, 1 Bro.

(2) Vide *Hobbs v. Norton*, ante 1 C. C. 543.]

CODDRINGTON *versus* WEBB.

CASE 223.

11 Nov.

Eq. Ca. Ab.  
377. pl. 3. S. C.  
Bill for a new  
trial, plaintiff  
suggesting  
that her mark  
to the bond  
was forged by  
the verdict was

BILL for a new trial, suggesting the plaintiff's mark to the bond was forged by one *Webb*, and by surprise, defendant had recovered against him at law, all the pretended witnesses to the bond being dead. New trial ordered, *Tewke's Case*, *Swinfield's Case* cited. (3)

one *Webb*, and all the pretended witnesses to the bond were dead, and that the recovered by surprise. A new trial ordered.

(3) 20th Nov. Entry of bill to reverse a decree, as having been obtained by fraud, and decreed accordingly. Reg. Lib. 1691. A. fol. 50. Vide *Barbone v. Brent*, ante 1 vol. 176.

DEAKINS *versus* BUCKLEY.

CASE 224.

Eodem die.

Eq. Ca. Ab.  
159. pl. 1. S. C.  
A freeman of  
London de-  
vises 700*l.* for  
mourning. It  
shall be paid  
only out of the  
legatory part,  
and not out of  
orphanage or  
customary  
part.

WHERE a citizen of *London* by will, had devised seven hundred pounds for mourning, the question was, whether this seven hundred pounds should come out of the whole estate, or only out of the legatory part; for it was insisted, if there had been no direction by the will, or if the will had only \*directed that the expences of the funeral should not exceed such a sum, there the deduction must have been out of the whole estate.

*Per Cur.* Mourning devised by the will must come out of the legatory part, and not to lessen the orphanage and customary share.

[\*241]

Dame MARY VERNON, Relict of Sir THO- } Plaintiff.  
MAS VERNON of Hodnet,

JONES, SQUIBB, TILSON, & Al', Defendants.

CASE 225.

10 Nov.

Eq. Ca. Ab.  
410. pl. 10.  
Pre. Ch. 32.  
2 Freem. 17.  
S. C.  
A. devises  
lands to trus-  
tees to pay his  
debts, and  
then to pay  
his wife 200*l.*  
per ann. for  
her life; tes-  
tator lives se-  
veral years,  
and his debts  
are increased  
from 2500*l.* to  
10000*l.* for  
8000*l.* whereof  
his said trus-  
tees were  
bound. A. the

SIR Thomas Vernon, in 1680, by will devises several manors and lands to Jones & Al', to pay his debts, then to pay two hundred pounds per ann. to the plaintiff for her life, and to make provision for younger children, Sir Thomas Vernon living many years afterwards, his debts increased from two thousand five hundred pounds, to ten thousand pounds or thereabouts; and Jones and Squibb being bound with him for payment of about eight thousand pounds, Sir Thomas Vernon conveyed all the premises to the defendants and their heirs, to sell to pay his debts, and the surplus to him and his heirs, in which conveyance the now plaintiff joined, and levied a fine to bar her dower, and to corroborate the security.

testator by deed and fine conveys his lands to his said trustees to sell to pay his debts, and the surplus to him and his heirs, and his wife joins in the fine and conveyance. Whether this is a revocation of the wife's 200*l.* per ann. or whether she shall have the 200*l.* a year out of the surplus of the money after the debts paid. Decreed for the wife. Quare.

VERNON v.  
JONES.

The question was, whether this conveyance should amount unto a revocation of the will as to the *two hundred pounds per ann.* thereby devised to the plaintiff for life; or whether the surplus after the debts paid, shall not be liable to the *two hundred pounds per ann.* Decreed *pro Quer.* Q. (1)

(1) The decree is, "that notwithstanding the subsequent deed of trust, the said will doth subsist as to the plaintiff's annuity, &c." Reg. Lib. 1691. B. fol. 638. Note, The circumstances of the plaintiff's joining in the

deed, and levying a fine do not appear. Vide *Perkins & Al' v. Walker*, ante 1 vol. 97. *Sparrow v. Hardcastle*, 3 Atk. 805. [*Rider v. Wager*, 2 P. Wms. 334. and cases there cited.]

[ 242 ]

CASE 226.

24 Octobris.  
Eq. Ca. Ab. 87.  
pl. 4. S. C.

Bond to a housekeeper for secret service. Equity will not relieve: otherwise if the bond was given to a common strumpet.

### BAINHAM *versus* MANNING & Al'.

BOND to a housekeeper for secret service, bill to be relieved against it dismissed. The case of *Uphill* and *Bowman* cited, where the bill was likewise dismissed. But in the case of *Hanbury* and *Matthews*, there relieved against such a bond, because the woman appeared to have been a common strumpet, and by her insinuation prevailed upon the old man. Lord Commissioner *Hutchins* cited the case of Mr. *Fortescue*, who had presented a parson to a living, and took a bond from him to resign on request at any time within seven years; Mr. *Fortescue's* housekeeper, being the parson's sister, got the bond and delivered it over to her brother. Bill to discover this matter and to be relieved. The defendants demurred, and the demurrer allowed. (1)

(1) It does not appear that any demurrer was put in: the entry of the above date, states the dismissal of the bill without costs, after proofs read, &c.

but no case stated. Reg. Lib. 1691. A. fol. 98. Vide *Whaley v. Norton*, ante 1 vol. 483.

Eodem die.  
Eq. Ca. Ab.  
373. pl. 5. S.C.

Subsequent agreement with A. by a factor of a merchant for freight at 6l. 10s. per ton, good, though A. took no notice he had made a former agreement with the merchant for freight at 3l. 10s. per ton, that agreement having been obstructed by an embargo.

### DRADDY *versus* DEACON.

THE plaintiff, a merchant in town, hired the defendant's ship to freight for a voyage to *Bordeaux*, at *three pounds ten shillings per ton*, it happened that an embargo was laid upon all merchants' ships for *six weeks*. The ship afterwards proceeds on her voyage to *Bordeaux*, and the defendant not discovering what agreement he had made with the plaintiff in *England*, the plaintiff's factors and correspondents there, agree to allow the defendant *six pounds ten shillings per ton*, upon which latter agreement the defendant had recovered at law. Bill to



be relieved against the verdict found upon the second agreement, which was obtained by fraud, in concealing the former agreement.

DRADDY v.  
DEACON.

*Per Cur.* Bill dismissed, looking upon the defendant to be at liberty to make a new agreement, by reason that the performance of the first was obstructed by the embargo, after laid upon all merchant ships. (1)

[ 243 ]

(1) But in *Hadley v. Clarke & Al'*, B. R. 28th May, 1799. 8 Term. Rep. 259. a temporary embargo "until the further order of council" and which lasted *two years*, did not put an end to

a contract between the parties, but admitted by the court (*Lord Kenyon*) that an embargo during the war would. For the principle of decision in such a case. Vide *Paradyne v. Jane*, Aleyn. 27.

### MILDMAY *versus* HUNGERFORD.

A COPYHOLD at *Newington*, being devised by Dame *Margaret Hungerford* to the plaintiff for life, remainder to his first and other sons in tail, remainder to the defendant Sir *Giles Hungerford* in fee; the plaintiff being minded to make himself absolute owner of the estate, his wife being then *privement ensient* of a son, was advised that if he bought in the reversion in fee from Sir *Giles Hungerford*, and took a surrender thereof to his own use, *that* would merge his estate for life, and by consequence destroy the contingent remainder to his son, there being then no issue born; and therefore he agreed to give Sir *Giles Hungerford* five hundred and fifty pounds for the reversion; and now brought his bill to be relieved against the security given to the defendant, for that he was deceived therein, in regard he now understood such surrender of the reversion would not bar the son since born, in regard the freehold and inheritance was in the lord, so not the like inconvenience as of freehold estates at common law, in respect of contingent remainders, where there is none against whom to bring the *præcipe*. (2) *Per Cur.* Pay principal, interest and costs, or be dismissed with costs. (3)

CASE 228.  
Eodem die.  
Tenant for life of a copyhold, with a contingent remainder to his first son in tail, takes a conveyance of the reversion in fee of the copyhold, before the birth of the son. The contingent remainder is not destroyed, the freehold being in the lord.

(2) There is not a tenant of the *præcipe* in a copyhold, for there no *præcipe* can be brought, being parcel of the manor only, and the freehold in the Lord, per *Hardwicke*, Lord Chancellor, *Lovell v. Lovell*, 3 Atk. 12. And the estate of the Lord will preserve contingent remainders against a forfeiture, where the preceding estates are expired, per *Loughborough*, Lord Chancellor, *Habergham v. Vincent*, 2 Ves. jun. 209.

VOL. II.

(3) The bill was filed against the executor of Sir *Giles Hungerford*: the plaintiff had at a court holden 13th day of *May*, 1675, surrendered to the said Sir *G. Hungerford*, the said premises, who was then admitted, and at the same time resurrendered the same to the plaintiff and his heirs, who was thereupon admitted; the plaintiff to pay costs both at law and in equity. Reg. Lib. 1691. B. fol. 47.

P

## CASE 229.

10 Novembris.

African Com-

pany hires the

defendant's

ship to freight,

defendant co-

venants not to

trade in any

of the goods

in which the

company deal,

and in such case

covenants to pay

double the value

for all such goods,

with liberty to the

company to deduct

the same out of the

freight. The company

bring a bill to discover

whether the defendant

did trade in any of the

said goods. Though this

be a penalty, yet it being

the defendant's own

agreement, the defendant

is bound to discover.

AFRICAN COMPANY *versus* PARISH & A<sup>r</sup>.

THE *African Company* hired the defendant's ship to freight; the defendant by charter-party covenants as is usual in like cases, that if the defendant traded in the goods the company dealt in, he would pay such and such particular sums to the Company in respect thereof, and deduct such sums out of the freight, that should be coming to him.

and in such case covenants to pay double the value for all such goods, with liberty to the company to deduct the same out of the freight. The company bring a bill to discover whether the defendant did trade in any of the said goods. Though this be a penalty, yet it being the defendant's own agreement, the defendant is bound to discover.

Bill by the Company to discover, whether the defendant had not traded in any such, and what goods in particular, &c. The defendant pleads the charter-party, by which it appears that the sums therein mentioned, were of double the value of the goods themselves, and so was in the nature of a penalty, and that he ought not to be compelled to make a discovery by answer touching the same, so as to subject himself to such penalties.

*Per Cur.* The defendant must be bound by his own agreement, having agreed it shall be deducted out of the freight, he ought to discover; and it hath been adjudged so several times in the case of the *East India Company*. *Quære*, If ordered to answer over? (1)

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(1) Vide *Bird v. Hardwicke*, ante 1 vol. 109.

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[ 245 ]

CASE 230.

Eodem die.

Eq. Ca. Ab.

66. pl. 6. Nel.

Ch. Rep. 174.

S.C.

Devise of a

personal thing

to one for life,

remainder to

another, the

remainder is

good, it being

the same as if

the use of a

thing was de-

vised to one

for life, the re-

mainder over.

Post. Case 316.

CLARGES MIL' *versus* ALBEMARLE DUCISSAM. (2)

CHRISTOPHER, Duke of *Albemarle*, devised several jewels of great value to the old *Dutchess* for life, and after her decease, gave the same to his son the *late Duke*. The plaintiff Sir *Thomas Clarges* brought his bill against the *Dutchess* the widow, and the other executors of the said *late Duke*, for a discovery and satisfaction for the jewels, claiming the same as administrator to the old *Dutchess*, and that she was intitled thereunto, as well for that the same were devised to her as aforesaid; as also that she was intitled thereunto as her *paraphernalia*.

To which bill the defendant pleaded the will of the old *Duke*, by which the same were devised to the *Dutchess* only for life, remainder to the *late Duke*.

For the plaintiff, it was insisted by Mr. *Attorney-General*,

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(2) Cited arg. *Hyde v. Parrott*, 1 P. Wms. 5.

CLARGES v.  
ALBEMARLE.

that it was a well known and allowed difference in law, that as to chattels real they may be disposed of for several estates and durations, viz. for life, with remainder over; but as to chattels personal, they cannot be so disposed of, but where the property first vesteth, that carrieth the absolute ownership, and cannot be granted to one for life, remainder over to another, but the remainder will be void. And to say, as has been insisted on by the defendant's counsel, that where a chattel personal is given or devised to one for life, remainder over to another, such gift and devise must be construed and taken to be only the use of it to the first devisee for life, and not a devise of the thing itself, is to confound things, and to render insignificant the distinction that has been taken, and allowed, that where only the use of a personal chattel hath been devised to one for life, with a remainder over, the remainder is good; but if the thing itself were granted or devised for life, or for any other time, with a remainder over, there the remainder is void; and yet according to this notion now taken at the bar, be the devise one way or other, it shall amount but to one and the same thing; and cited the case in *Marsh's Reports*, fol. 106. *Brooke's Abr. Tit. Devise* 13.

[ 246 ]

For the defendant it was insisted, that this being in the case of a will, made by a man supposed to be *inops concilii*, such exposition ought to be made thereof, as the whole will may stand and take effect; and therefore in this case the devise of the jewels to the *Dutchess* for life, with a remainder over, must be construed and taken to be a devise of the use of them to her for her life only, and has been so settled in several cases, and the law at this day is not so strait as formerly taken to be, as to the disposition of chattels personal; and cited the case of the Lord *Ferrars*, where goods in *Tamworth Castle* were by Sir *Robert Sherly* devised to his *Lady* for life, and after her death to his son, and held good by Justice *Ellis*, and confirmed afterwards by Lord *Nottingham*, that the devise of the goods for life must be intended only the use of them; and the case of *Spencer* and *Abell*, and the case of *Catesby* and *Nicholls*, where goods were devised to one for life, remainder over, decreed good, &c., (1) and as to the pretence of the plaintiff's claiming them as *Paraphernalia*, there was no reason for that demand; for although where *A.* dies intestate, or by will does not dispose of the jewels, his wife may claim (in case there be no debts) the jewels suitable for her quality, to be worn as the

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(1) Vide *Smith v. Clever*, ante 38. 59. *Cowper v. Williams*, Pre. Ch. 71.

CLARGES v.  
ALBEMARLE.  
Cro. Car. 343,  
4, 5, 6.  
1 Ro. Abr. 911,  
(9).

[ 247 ]  
The husband  
devises the  
wife's jewels  
to the wife for  
life, the re-  
mainder to his  
son. The wife  
makes no election or claim to have the jewels as her paraphernalia, her administrator cannot make this claim.

ornaments of her body, as her *Paraphernalia*; yet held in *Crooke's Reports*, that if the husband by will devises away the jewels, such devise shall stand good against the wife's claim of *Paraphernalia*: but in this case the old *Dutchess* in her life-time made no election or claim to have them as her *Paraphernalia*, and her administrator could not set on foot such pretence after her death, to which she had made no claim in her life-time. The plea after several arguments before the *Lords Commissioners*, and before the *Lord Keeper* was allowed. (1)

(1) 23d Oct. entry of an order to set down the plea for hearing on the 10th Nov. following: Reg. Lib. 1691. A. fol. 160. but no further entry appears.

CASE 231.  
6 Novemb.  
Eq. Ca. Ab.  
273. pl. 8.  
Pre. Ch. 31.  
S. C.

### CUNNINGHAM versus MELLISH.

One devises his lands to his nephew to pay his debts, and makes his nephew executor; but makes no disposition of the surplus, whether the devisee shall have the surplus, or whether it shall go to the heir. If an express legacy is given to the heir; in such case the devisee shall have the surplus.

The question was, whether here should be a resulting trust as to the surplus for the heir, or whether the nephew should take the surplus as devisee and executor.

For the plaintiff it was insisted, that by the devise to sell to pay debts, the intention of the testator was to make provision for the payment of his debts, and not of any benefit to the devisee, and the rather because the devisee was also made executor, whose office it is to see the debts paid. (2)

For the defendant it was insisted, that in a like devise in the case of *Crompton and North*, (3) the surplus was adjudged to the devisee against the heir. And by Mr. *Finch*, though in a conveyance, where no use is declared as to the surplus, it may result to the heir; yet in the case of a will, there the devisee is to take to his own use, if no trust is declared, and it can be no resulting trust for the heir. (4)

[ 248 ] Note, In the case of *Crompton and North*, a particular legacy was devised to the heir. *Quære* the order. (5)

(2) Vide *Foster v. Munt*, ante 1 vol. 473. and cases cited in not. there.

(3) 2 Ch. Ca. 196. cited more fully, *Gainsborough v. Gainsborough*, post 253.

(4) A devise implies a consideration

in itself, and therefore cannot be averred to be to the use of another than of the devisee, unless it be so expressed in the will. *Vernon's Case*, 4 Rep. 4, a. Vide *Hobart v. Lady Suffolk*, post 644.

(5) The decree was, "that inasmuch

"as the said testator had by his will  
 "made no devise of the surplus of his  
 "estate, nor directed the executor to  
 "have any thing for his care and pains  
 "in the executorship, but that he should  
 "sell the premises for payment of his  
 "debts, that the overplus thereof ought  
 "to go to the executor, and not to the

"heir at law, and did so decree, and  
 "that the defendant the heir, should  
 "join in the sale." Reg. Lib. 1691. A.  
 fol. 92. Note, The testator had but  
 the equity of redemption in the pre-  
 mises. Vide *Ackroyd v. Smithson*, I  
 Bro. Ch. Rep. 503.

### KING *versus* BALLETT.

**NOTE**, by the statute of *frauds* and *perjuries*, the trust of an inheritance is made assets at law, but the trust of a term is not: (1) and by clause, where judgment is obtained against the testator, the sheriff may take the trust-estate in execution.

CASE 232.  
 Eq. Ca. Ab.  
 241. pl. 4. S.C.  
 By the statute  
 of frauds, the  
 trust of a fee  
 is assets at  
 law; but the  
 trust of a term  
 is not.

(1) Vide Stat. 29 Car. 2, Cap. 3. *Davidson v. Foley*, 2 Bro. Ch. Rep. 2. Sect 10. and as to the trust of a Term, 203.

### GREAVES *versus* POWELL.

A DEVISE is to trustees for payment of debts and legacies, and trustees are made executors: the estate falling short, the question was, whether the debts are to be paid in the first place, or only in average with the legatees.

The estate falls short. The debts must be paid first, because the trustees being made executors, the money is legal assets.

*Per Cur.* No doubt in this case, trustees being also made executors, the money, when the estate is sold, becomes legal assets; and debts therefore must be preferred. Lord Commissioner *Hutchins* cited Sir *John Bowle's* case, first heard before Lord Keeper *Bridgman*, where upon a trust for payment of debts and legacies, it was decreed they should be paid *pari passu*, and bear the loss in average: but *that* cause was afterwards heard by the Lord *Nottingham*, who ordered the debts should be first paid, and said he would not make a man sin in his grave, (2) and mentioned the complaint of the prophet, where the creditor had taken away the children for satisfaction of the father's debt; and that his opinion was, that in the case of a

CASE 233.  
 31 Nov.

A devise to  
 trustees for  
 payment of  
 debts and le-  
 gacies, and  
 the trustees  
 are made exe-

(2) Vide *Gosling v. Dorney*, ante 1 vol. 482. where said that in the case of Sir *John Bowle*, Lord *Nottingham* was of opinion, that debts and legacies should be paid *pari passu*, and that Lord Keeper *North* reversed that decree. Vide *Walker v. Meager*, 2 P.

Wms. 551. And it is now the rule that in such case the debts shall be paid in the first place. *Anon.* post 405. *Bradgate v. Ridlington*, Mose. 56. Eq. Ca. Ab. 141. pl. 3. [*Deg v. Deg*, 2 P. Wms. 416. and cases in n. (2).]

**GREAVES v. POWELL.** trust for payment of debts and legacies, the debts ought to be preferred and satisfied in the first place, before the legatees should have any benefit of the trust. (1)

(1) Vide *Girling v. Lee*, ante 1 vol. 63. and cases in not. (3) p. 65. post p. 302. S. C.

## CASE 234.

SHELBERRY *versus* BRIGGS & Ux'.

30 Octobris,  
Eq. Ca. Ab. 1.  
pl. 4. S. C. 65.  
pl. 6. S. P.  
Bill for a le-  
gacy against  
Baron and  
Feme, who

THE plaintiff's bill was to have the payment of a legacy devised to him by a will, of which the defendant's wife was made executrix. The defendants answered, divers witnesses were examined, and publication passed. The husband dies. was executrix of the testator.—Defendants answer, and witnesses are examined, and publication past; husband dies. No abatement, and the wife shall be bound by the answer and depositions; but it might be otherwise, if the wife's inheritance was in question.

Ant. Ca. 180. It was insisted, that the wife was not bound by the answer, nor by the depositions taken, whilst she was under coverture.

*Sed non allocatur. Per Cur.* Here is no abatement, (2) and the wife shall be bound by the answer and depositions: but in case of the wife's inheritance it might be otherwise. (3)

(2) So where the husband and wife plaintiffs for demand in right of the wife, 3 Atk. 725. Ch. 118. where the *Master of the Rolls* seems to have admitted the answer of the husband as against the wife, in a

(3) Vide *Anon.* ante p. 197. *Quære tamen.* Et vide *Eyton v. Eyton*, Pre. matter of inheritance.

## CASE 235.

ROUS *versus* NOBLE.

Eq. Ca. Ab.  
238. pl. 22.  
S. C. 1 Ch. Ca.  
121.  
Testator gives  
a legacy to his  
child, payable  
at his age of  
23, and made  
his wife execu-  
trix and resi-  
duary legatee.  
She marries

THE testator devised a legacy to his child an infant, payable at the age of *twenty-three*, and made his wife executrix; she marries a second husband, and dies, and he takes administration *de bonis non*, with the will annexed, his wife being residuary legatee: bill suggests his insolvency, and prays that he might give security to pay the legacy when payable, and decreed accordingly. (4)

again and dies. Her second husband takes administration *de bonis non*, &c. Upon a suggestion of insolvency the second husband ordered to give security to pay the legacy when due.

(4) So *Batten v. Earnley*, 2 P. Wms. 163. *Slanning v. Style*, 3 P. Wms. 336. [The Court generally acts by the appointment of a Receiver, but it requires a strong case to be made against an Executor before it will take from him the administration, *Middleton v. Dods-well*, 13 Ves. 266, *Howard v. Papera*, 1 Mad. 142. *Scott v. Becher*, 4 Price, 346. *Langley v. Hawke*, 5 Mad. 46.]



DE  
TERM. S. HILLARII, 1691.

IN CURIA CANCELLARIÆ.

STYANT *versus* STAKER.

CASE 236.  
26 Jan.  
Eq. Ca. Ab.  
104, pl. 10.  
S. C.

The Lord enfranchises a copyhold with all common thereto belonging. Though the common be extinct at law, yet it subsists in equity.  
2. Cr. 253.  
Yelv. 189.  
Moor 667,  
1 Brownl. 173.  
230.

THE Lord of the manor enfranchises a copyhold, with all commons thereto belonging or appertaining, and afterwards buys in all the other copyholds, and then disputes the right of common with the copyholders he had enfranchised, and at law recovers against the plaintiff, because the prescription of common to the copyhold was destroyed by the enfranchisement; and the grant of the copyhold, with all common thereunto belonging and appertaining gives no right of common, because when enfranchised no common in point of law belonged or appertained thereunto. (1)

*Per Cur.* Decreed the plaintiff should hold and enjoy against the defendant, the same right of common as belonged to the copyhold, and costs against the defendant. (2)

(1) Copyholder had used to have common. The lord by deed grants and confirms to him in fee, and adjudged the common is gone, *Dorson v. Hunter*, Noy. 136.

(2) It appears in this case, that the copyhold was enfranchised by the defendant's great-grandfather, so far back as about the 20th or 21st Jac. 1st. and that soon after, viz. in the 21st Jac. 1. *John Page*, son of *Henry Page*, who had purchased the premises in question of the lord, filed a bill in this court against the defendant's said great-grandfather, on which the said *John Page* obtained a decree, that he, his heirs and assigns, owners of the said premises, should from thenceforth have, hold and enjoy such commons in the said premises, as he or his said father had at the time of the said purchase; and it further appears that the said defendant brought

an action of trespass Easter Term. 31 Car. 2d. against the plaintiff's father, in respect of the said right of common, wherein the plaintiff's father obtained a verdict and enjoyed the common till his death. That the defendant afterwards Trin. Term. 2d Jac. 2d. brought the action alluded to in the printed report against the plaintiff, to which the plaintiff pleaded his right, &c. and also that the said defendant (the plaintiff at law) taking advantage of a defect in the aforesaid deed of purchase, to the said *Henry Page*, pretends that the same was not sufficient to pass the said commons. To this plea the defendant (the plaintiff at law) demurred and obtained judgment on the demurrer in K. B. and the bill was to stay proceedings on the said judgment, and the decree was, that "upon reading the ancient decree, and the postea (in the 1st

“ action, &c.) this court doth think fit  
 “ and so order and decree that the  
 “ plaintiff *John Styant* his heirs and  
 “ assigns, owners of the aforesaid pre-  
 “ mises, shall from henceforth have,  
 “ hold and enjoy the said common of  
 “ pasture in the said premises and  
 “ estovers, &c. without the let or in-  
 “ terruption of the said defendant, &c.  
 “ according to the said ancient decree,  
 “ and the postea or verdict before  
 “ mentioned; and inasmuch as the  
 “ said defendant hath gone to law

“ against equity, and recover  
 “ judgment at law against the  
 “ plaintiff as aforesaid, the inju-  
 “ was made perpetual, and the  
 “ defendant ordered to pay the costs.  
 Reg. Lib. 1691. B. fol. 241. *I*  
*v. Evett*, ante 1 vol. 392. and in  
 cases common is destroyed, as  
 what not, by enfranchisement, *Cr*  
*v. Oldfield*, 1 Salk. 170. 2. 3  
 Raym. 1225. S. C. Et vide *Watk*  
 Copyholds.

[ 251 ]

CASE 237.

9. Feb.

Eq. Ca. Ab.

87. pl. 8.

One settles  
 land upon his  
 daughter in  
 tail, and takes  
 a bond from

her not to commit waste. Bond not binding in equity.

JERVIS *versus* BRUTON.

**JOHN MORRIS** settles lands on his daughter and the  
 of her body, (1) remainder to his own right heirs, and  
 a bond from the daughter not to commit waste; the da-  
 having levied a fine, and afterwards committing waste  
 bond was put in suit.

*Per Cur.* An idle bond, and decreed to be delivered  
 to be cancelled; and like *Poole's* case cited in the ca-  
*Tatton* and *Molleneux* in *Moor's Reports*, where a re-  
 nuzance conditioned that the tenant in tail should not  
 a recovery, is decreed to be delivered up, as created  
 perpetuity.

Moor 809,  
 810.

(1) The settlement was on the  
 daughter in fee, and on her marriage  
 with the plaintiff who had survived her  
 were settled in trust to the use of the  
 plaintiff and his wife (the daughter of  
 the said *John Morris*) for life, to the  
 use of their heirs begotten by the  
 plaintiff, and for default of such issue,  
 to the heirs of the plaintiff; the plain-  
 tiff's wife died without having had any

issue, and the decree declared that  
 bond in question had been ill obtained  
 against the said plaintiff's wife  
 that the plaintiff was seised in fee  
 decreed the bond to be delivered up,  
 defendants to pay costs at law  
 having proceeded on the bond  
 in this suit, Reg. Lib. 1691.  
 409. Vide *Freeman v. Freeman*  
 233, as to bond from tenant in tail

CASE 238.

5. Feb.

Eq. Ca. Ab.

50. pl. 5. S. C.

An award set  
 aside, the arbit-  
 rators being  
 interested in  
 the cargo,  
 touching which

EARL *versus* STOCKER & AL'.

**AN** award set aside, the arbitrator appearing to have  
 interest in the cargo touching which the award was made  
 therefore put too great a value thereon; and in five days  
 the award made, the money awarded was attached by  
 the award was made, and therefore put too great a value thereon.

arbitrators for debts owing to them by *Stocker*. (2) In the butcher of *Croydon's* case, the Lord *Bridgman* did not set aside the award, barely because the damages were excessive, but gave another reason, viz. It was agreed it should be referred to indifferent persons, and it appeared one of the referees was the butcher's cousin. In *Pitt* versus *Dawkra*, the arbitrators promised to hear witnesses, but making the award before they had so done, the award was set aside. In the case of *Smith* and *Coryton*, the arbitrator promised not to make his award until *Smith* (who was not well) should come abroad. Lord *Nottingham* inclined for that reason to set it aside: but the matter ended by compromise. (3)

EARL v.  
STOCKER.

Arbitrators  
promised to  
hear witnesses,  
but made the  
award before.—  
The award set  
aside.

[ 252 ]

(2) The case was this, the plaintiff and the defendant *Stocker*, were jointly interested in a ship called the *Happy Return*, and some differences arising between them in respect thereof, such differences were referred to four arbitrators, *Richard Champneys* and *Charles Stubbs* on the part of the plaintiff, and *Joseph Fincher* and *Erasmus Dole*, on the part of the defendant, with power to the referors to revoke such reference by deed under hand and seal. The bill seems to have been filed against *Stocker*, *Stubbs* and *Dole* only, and one *Merrick* who is stated to have attached 1800*l.* in the plaintiff's hands as a creditor of *Stocker's*. Before the award was made, the plaintiff hearing that the defendant *Stocker* had insisted before the arbitrators, that he should be paid for certain goods sent to *Bilboa*, sent to the arbitrators and informed them that the said defendant *Stocker's* share therein was assigned to him (the plaintiff) as a security for a certain debt by bond, not included in the reference, and that they ought not to meddle therewith, and the said plaintiff being likewise informed that the defendant *Dole*, one of the said arbitrators, had a part of the said ship in dispute assigned to him as a security for money he had

advanced for the defendant *Stocker*, and that the defendant *Stubbs*, another of the said arbitrators, had likewise some demands upon *Stocker*, (but it does not appear that *Stubbs* had any security on the said ship in respect of such demands) the plaintiff did thereupon before any award made by deed under his hand and seal, revoke and annul the power given the said arbitrators, the arbitrators nevertheless made an award that the plaintiff should pay the defendant a sum of money in respect of the goods sent to *Bilboa*, and otherwise to the prejudice of the plaintiff; the arbitrators by their answer, confess the notice from the plaintiff, that the award was nevertheless made and say that they had no sinister ends or demands upon the defendant *Stocker*. The decree declared that the said arbitrators had exceeded their submission in making the said award, and that the same was corrupt and not well gained, and therefore set the same aside, and ordered the bonds to be delivered up, and a perpetual injunction in the mean time with costs, Reg. Lib. 1691. A. fol. 406.

(3) Vide *Brown v. Brown*, ante 1 vol. 157.

## CASE 239.

22 Feb.

Post. Ca. 249.

Eq. Ca. Ab.

119. pl. 9. S. C.

2. Freem. 122.

Seems S. C.

RUNDLE *versus* RUNDLE.

**ALEXANDER RUNDLE** purchases a copyhold estate in a western manor for his own life, and the lives of *John* his son, and of *Alice*, who was his niece. *Alexander* and *John* his son being both dead, the plaintiff, who was the widow and administratrix of *Alexander*, brought her bill against *Alice*, setting forth the custom of the manor *Prout*, and that the name of *Alice* was made use of by *Alexander* in trust for him, who paid the whole fine, (1) &c. and prayed the same might be decreed a trust, and made liable to the debts of *Alexander*.  
*Vid Order.* (2)

(1) [In the report of this case, post 264, it is said, it does not appear the fine was paid by *Alexander*, which is material. See *Smith v. Baker*, 1 Atk. 385. *Withers v. Withers*, Amb. 151.]

(2) 1st *June*, the cause stood over for time to search precedents till this time, when the decree was as follows, "whereupon, &c. it appeared that the said *Alexander Rundle*, the plaintiff's late husband, in his life time, declared that after his, and his son *John*'s death, the defendant *Alice* should have the aforesaid tenement, and inasmuch as nothing of a trust appeared in the copy of court-roll, either for the said *Alexander*, or the

"said plaintiff his wife, and for that it could not be a resulting trust for *Alexander*, in regard the copy was granted as well in consideration of the estate surrendered by *Richard* the father of *Alexander*, who was estated therein as for the fine paid by *Alexander*, nor did there appear in proof any want of assets of the said *Alexander*'s estate, to pay his debts; their lordships declared that they could give the plaintiff no relief, &c." Bill dismissed without costs, Reg. Lib. 1691. B. fol. 540. Vide *Mumma v. Mumma*, ante p. 19. *Withers v. Withers*, Amb. 151. *Dyer v. Dyer*. [2 Cox. 92.]

## CASE 240.

27 Feb.

Eq. Ca. Ab.

230. pl. 1. S. C.

2 Freem. 188.

S. C.

One by will subjects his real estate to pay his debts, and makes his wife executrix.

Parol proof admitted, to prove testator's declarations that his executrix should have his personal estate, exempt from his debts.

GAINSBOROUGH Comitiss. *versus* GAINSBOROUGH Com'.

THE late Earl of *Gainsborough* having by his will subjected his lands and real estate for payment of his debts, made the now plaintiff, the Countess, his executrix, intending thereby, as was alledged by the plaintiff, that she should have all his personal estate to her own use, freed and discharged from the payment of his debts; but that Mr. *Bilbourne* who drew the will, either through some ill design, or ignorance, omitted to insert a devise in the will of the personal estate to the plaintiff, pretending the making her executrix amounted to as much, and was the same thing in effect. And complained that the creditors threatened to follow the personal estate, whereas a sufficient provision was made for them out of the real estate; and if the personal estate was exhausted, or applied in the

GAINSBOROUGH v.  
GAINSBOROUGH.

payment of debts, she ought to be reimbursed as much, out of the real estate, and prayed she might examine her witnesses as to the declarations of the testator, that the plaintiff his relict and executrix should have his personal estate to her own use.

As to so much of the bill as sought to examine witnesses touching the testator's intention or declaration, that the complainant, his executrix, should have his personal estate to her own use, or to examine matters *dehors*, and foreign to the will in writing, &c. the defendant demurred, for that it appeared by the bill, that there was a will in writing, and *that* will proved by the plaintiff, the Countess, and that it was of dangerous consequence to admit proof by parol, to control, vary, or alter a will in writing; and the rather, in this case, for that the Countess had not so much as attempted to prove such parol declaration, as a codicil in the spiritual court.

On the arguing of this demurrer, it was said by *Serjeant Hutchins*, then one of the *Lords Commissioners*, that he thought the bill ought to be answered, and the plaintiff admitted to the proof of her allegations. As to the objection that the plaintiff had not proved the declaration of the testator, that she should have the personal estate to her own use, as a codicil in the spiritual court, he thought it not necessary as this case was, in regard the averment was not to make a title to the plaintiff, but to rebut the defendant's equity, (1) who would have the personal estate applied to debts in exoneration of the real estate. And insisted much on the case of *Crompton and North*, (2) where the testatrix devised her lands to Mr. North to sell and dispose of for payment of her debts, the heir brought his bill, insisting, that as to the surplus after debts paid, it belonged to him by a resulting trust, being not disposed of by the will; the defendant insisted there was no resulting trust, and that the testatrix had declared, she intended the surplus for the defendant. Upon the hearing there were two questions: *First*, Whether a fee passed by the will or not? and adjudged there did. *Secondly*, Whether any resulting trust when debts paid? and adjudged there was not, without reading the depositions by which it was proved, she declared her trustee should have all: but the court there declared, that the estate in law being vested in the devisee, that he should have been admitted to his proof of the testatrix's

[ 254 ]

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(1) A man may in many cases defend himself with that which would not give him a title to sue *sic dict.* per Lord Commissioner. *Bradley v. Bradley*, ante p. 165.  
(2) 2 Ch. Ca. 196.

GAINSBO-  
ROUGH v.  
GAINSBO-  
ROUGH.  
Vol. I. Case  
462.

parol declaration, if it had been wanting and necessary. And this was in the case of land; and much rather may parol proof be admitted as to a personal estate, (1) and cited the case of *Foster* and *Munt*, and of *Pring* versus *Pring*, (2) where the executor who confessed the trust, was examined, and read against the other executor who denied it. And *Serjeant Rawlinson* cited a case of *Kingsmill* and *Ogle*, where the surplus by will was devised to the wife; averment taken that she was intended only as a trustee for her son, and that the testator so declared at the making of the will. And a decree grounded on the proof made thereof. *Per Cur.* Answer the bill. (3)

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- (1) Vide *Fane v. Fane*, ante 1 vol. 31. *Dutchess of Beaufort*, post 649. where *Cowper*, Lord Chancellor, considered the principal case, and that of *Foster v. Munt*, as an innovation of the law. [ *Rachfield v. Careless*, 2 P. Wms. 158.]
- (2) Ante p. 99.
- (3) There is merely an entry of demurrer over-ruled, Reg. Lib. 1691. A. fol. 256. Vide *Lady Granville v.*

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### WOODFORD *versus* SWAYNE.

CASE 241.  
23 Feb.  
Ant. Ca. 114.

THE plaintiff being a factor for a west-country clothier, who became a bankrupt; the question was, whether the plaintiff having clothes of the bankrupt's in his hands, might thereout retain his full debt, or must come in as creditor under the statute of bankrupt, and accept of a satisfaction in proportion with other creditors, and account for the clothes he had in his hands. (4)

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- (4) Vide *Chapman v. Derby*, ante p. 117.

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### [ 255 ] BISHOP OF WORCESTER *versus* PARKER.

CASE 242.  
Feb. 7.  
Eq. Ca. Ab.  
168. pl. 4. S.C.  
The Bishop  
brings a bill  
against one  
that was an  
assignee of a  
lease charging  
the defendant  
knew that the  
lease was

BILL to discover whether a lease made in Queen *Elizabeth's* time for *ninety* years, in trust for Doctor *Lopus*, to commence after the estates then in being were determined, was not effluxed in point of time, and charges it would so appear by deeds and writings in the hands of the defendant the assignee of the lease, and that he knew the lease was expired, but refused to discover.

expired, and that the same did appear by writing in his custody. Defendant pleads that he was a purchaser of the lease, and was then informed, that there were *fifty-seven* years to come in the lease, and therefore gave *nineteen* years purchase for it.—Allowed a good plea.



The defendant pleads the lease, and that he was informed, that in *seventy-seven* when he purchased, there were *fifty-seven* years to come in the lease, and therefore gave after the rate of *nineteen* years purchase for it, and therefore ought not to make any discovery to impeach or weaken his title. Plea allowed, and a demurrer also.

BISHOP OF  
WORCESTER  
v. PARKER.

### JESSON *versus* JESSON.

CASE 243.  
Feb. 5.

Post. Case  
244, 288, 320.  
By a marriage  
settlement a  
term for years  
expectant on  
failure of issue  
male, is raised  
for securing  
3000*l.* portions  
for daughters  
not preferred  
in the life of  
the father,  
payable at  
eighteen or  
marriage.  
There are a  
son and two  
daughters.  
The father in  
his life-time,  
by a sale of  
part of his  
estate, raises  
1800*l.* for his  
daughters,  
which by  
another deed  
was made  
payable at  
twenty-one  
or marriage  
and dies,  
leaving also

SIR *William Jesson* by settlement in 1669, (1) on his marriage with *Penelope Villars*, and in consideration of 1500*l.* portion secured to be paid by Sir *George Villars*, limited several manors and lands to himself for life, remainder to *Penelope* his intended wife for life, remainder to first and other sons of the marriage, remainder to trustees for the term of *one thousand* years, remainder to the heirs (2) of the body of Sir *William*, remainder to his own right heirs.—And as to the term for *one thousand* years, the trust thereof was declared to be that in case there should be no issue male of that marriage, or if such issue male should die without issue before *twenty-one*, or marriage, and there should be one or more daughters between them, not preferred in the life-time of the said Sir *William Jesson* and *Penelope*, then if one daughter 1500*l.* if two or more 3000*l.* to be equally divided between them at *eighteen* or marriage; if not paid, trustees after the death of Sir *William* and *Dame Penelope* without issue male, might raise it by leasing or sale, and what maintenance they thought fit in the mean time, and then the term to attend the inheritance. Provided if the next in remainder shall pay, &c. the term to cease.

a son by a former marriage, who dies an infant without issue. This 1800*l.* though payable at a different time, and though not intended to go as part of the portion, (there being a son then living) shall be taken as part of the 3000*l.* portion.

March 10, 1680, Sir *William Jesson* demises several messuages, &c. unto Sir *William Villars* and *Woollaston* for *ninety-nine* years, if Sir *William* should so long live, upon trust by rents, issues and profits, to raise (*inter alia*) 2000*l.* for the portions of *Penelope* and *Anne*, *Margaret* and *Thomas*, the *four* younger children, infants and unmarried. Thereupon Sir *William Villars* and Sir *William Jesson*, agree to sell the trust-estate being a term for *ninety-nine* years, determinable

(1) 23d and 24th *January*, 1669.

(2) Heirs Male.

JESSON v.  
JESSON.

on the death of Sir *William Jesson*, for 2000*l.* of which, two hundred pounds was to be paid to Sir *William Jesson*, and 1800*l.* to Sir *William Villars*, which he agreed to accept in lieu of the 2000*l.* by this trust provided for the two surviving daughters.

*May*, 1688, Sir *William Jesson* died, leaving issue the plaintiff his eldest son by a former venter; and *Villars Jesson*, and two daughters by his last wife; *Villars Jesson* died without issue an infant.

[ 257 ]

The question was, whether the 1800*l.* raised by Sir *William Jesson* out of his own estate for life, shall be taken in part of the 3000*l.* now become due, and payable unto the two daughters by the marriage-settlement, on failure of issue male of that marriage.

It was insisted by the defendant's counsel, that the 1800*l.* ought not to go in part of the 3000*l.* *First*, it was not declared by Sir *William Jesson* that it should go or be taken in part; and Sir *William Villars* the trustee, examined in the cause, swears it was not discoursed of nor intended to go in part. *Secondly*, by the marriage-settlement, the portion is to be paid at *eighteen* or marriage. By the later deed at *twenty-one* or marriage, and if die before, to survive.

*Per Cur.* Decree the 1800*l.* to go and be taken in part of the 3000*l.* portion. (1) It might have been a question, whether the daughters should have more than the 1800*l.* but no question whether *that* should go in part, and cited the case of *Blois* and *Blois*, (2) where even a legacy shall go in part. And all the precedents are, that there shall not be a double provision or double satisfaction, and cited *Elkenhead's* case, who having made his will, and thereby devised 1000*l.* apiece to each of his *five* daughters, and after legacies paid, gave the surplus of his lands equally amongst his *five* daughters, and gave 1000*l.* portion with one of them in marriage, she was excluded from the 1000*l.* intended by the will.

(1) Reg. Lib. 1691. A. fol. 219. the decree declaring that the court was fully satisfied that Sir *William Jesson* did not intend that the plaintiffs *Penelope* and *Anne* his daughters, should have more than the 3000*l.* devised between them for their portions.

(2) 2 Ch. Rep. 162. 2 Vent. 347. S. C. Vide *Husbands v. Husbands*, ante 1 vol. 95. and cases cited in not. (2) there. Also *Hoskins v. Hoskins*, Pre. Ch. 263. [*Goldsmid v. Goldsmid*, 1 Swan 211. and cases collected in not. (c) 221.]

DE  
TERMINO PASCHÆ, 1692.

IN CURIA CANCELLARIÆ.

DUFFIELD *versus* SMITH and MARY his Wife, and  
SARAH DUFFIELD.

CASE 244.  
6 April.  
Eq. Ca. Ab.  
204. pl. 6. S. C.

THE now defendants having formerly brought a bill, claiming a charge of 3000*l.* upon the estate, as a provision for daughters, on failure of issue male, secured by a settlement made on the marriage of *Knightly Duffield* their father; and their brother having devised the land to the now plaintiff *Duffield*, they prayed he might either pay the 3000*l.* or be foreclosed, and the now plaintiff, then defendant, insisting that his testator had by his will left an ample recompence to his sisters, by large legacies, and making them executors, by which they profited above 3000*l.* that bill upon hearing on the 27th of *October*, 1690, was dismissed with costs. And the now plaintiff brought on his bill to hearing, to have a decree to hold and enjoy the land against the claim of the 3000*l.* the plaintiff's testator having by his will given, and left an ample recompence to the defendants his sisters, exceeding the value of 3000*l.*

By a marriage-settlement, in case of failure of issue male, a remainder is limited, to the daughters until they should raise 3000*l.* for portions. There is issue a son and two daughters. The father by will gives the daughters 700*l.* a-piece, and dies. The son gives by his will to the daughters, to the amount of 7000*l.* and devises the land

to his male heirs, and dies without issue. The father or son's legacies to the daughters shall not be a bar and satisfaction of the 3000*l.* secured by the marriage-settlement. Ante Ca. 161, 223. Post. Case 288, 324.

And the case appeared to be, that *Knightly Duffield* the defendant's father, upon his marriage in 1631, conveyed the lands to the use of himself for life, remainder to his wife for life, remainder to the first and other sons in tail male, remainder to the daughters of that marriage until 1500*l.* if but one, and 3000*l.* if more than one, were raised and paid, remainder to his right heirs. There was issue of the marriage *Andrew* a son, and two daughters. *Knightly Duffield*, the defendant's father, by will devises 600*l.* to one of the daughters, and 700*l.* to the other, and dies. After his decease, *Andrew Duffield*, the son, devises 700*l.* a-piece to his two sisters, (1) and also

[ 259 ]

(1) This is not correct. *Andrew Knightly Duffield* the father paid the *Duffield* who was the executor of 600*l.* to *Mary*, the wife of the defend-

DUFFIELD v.  
SMITH

makes them executors and residuary legatees, by which they had all the residue of his personal estate, amounting to near 7000*l.* and by the same will, devises the lands comprised in the said marriage-settlement of 200*l. per ann.* to the now plaintiff (being his cousin german and heir male of the family,) for his life, remainder to his first and other sons in tail. The daughters had brought an ejectment to recover the lands, the 3000*l.* not being paid, and *that* depended on a special verdict.

The question was, whether what was given to the defendants, either by the will of their father, or by the will of their brother, or what they took as being made executors thereof, should in equity be construed, or taken as a satisfaction of the 3000*l.* in part, or for the whole.

[ 260 ] For the defendants it was insisted, that although there was a special verdict now depending at law, yet it must at the hearing of this cause be taken, that the defendants have a good estate in law, until the 1500*l.* a-piece be paid them, otherwise the plaintiff has no pretence to come for relief in equity. *Secondly*, that although the former bill brought by the now defendants, to foreclose the plaintiff, was dismissed, yet *that* is not now to be made use of; but if the now plaintiff will have a decree in this cause where he is plaintiff, it must be upon the circumstances and merits of the cause.

As to the merits of the cause, *first*, there could be no pretence that the legacy given by the father to his daughters, should be reckoned as any satisfaction of the 3000*l.* in question, as not being adequate in value; but besides the father had then a son living, and it was altogether contingent and uncertain, whether the 3000*l.* would ever arise and become payable or not, and it was but reasonable the father should make some certain provision for his daughters. And as to the will of *Andrew Duffield* their brother, though the benefit they take thereby is of greater value than the 3000*l.* yet there is nothing in the will that declares it to be in lieu or satisfaction of the 3000*l.* nor that necessarily implies, that it was so intended; and if they will pretend this was a dormant settlement, and he knew not of it; *that* destroys their pretence, that what they took by the will was intended in lieu, or satisfaction of the 3000*l.* by the settlement; and this 3000*l.* coming to the daughters in lieu of the land, of which they who are heirs at law,

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ant *Smith*, on her marriage, and the interest only of the 700*l.* to the defendant *Sarah*, and by his will left the estate in question to the plaintiff, he pay -

ing the 700*l.* only, due to *Sarah*, by virtue of *Knightly Duffield's* will, and of which he *Andrew* had only paid the interest, R. L.

are disinherited, there was no ground for the court to make a strained construction, in favour of a voluntary devisee, against the heirs at law; and *that* distinguishes this case from all the precedents cited on the other side. And although it is objected, that the brother might have barred his sisters by a common recovery, without making any compensation; and might have declared, that what they took by his will, was in lieu and satisfaction of the 3000*l.* by the settlement, yet he hath not so done; and the question is not, what he might have done, or what might have been fitting or prudent for him to have done; but the case depends on what he hath in fact done.

DUFFIELD v.  
SMITH.

[ 261 ]

*Per Lords Commissioners Trevor and Hutchinson (Rawlinson dissenting)* decreed, the provision made by the brother's will (1) to be construed and taken in lieu and compensation of the 3000*l.* by the marriage-settlement; for he having by the same will devised away the lands to his cousin, and heir male of his family, it implied, that what he had given by the same will to his sisters, was to be in lieu of their interests in the lands, and as to the point of satisfaction, the sisters are not to be considered as heirs, but as in the nature of mortgagees. And cited the cases of *Blois and Blois*, (2) *Yeoman and Brooks*, *Dekins and Powell*, *Jesson and Jesson*, *Osbaston and Strickland*, &c. (3)

*Note*, This decree was afterwards reversed upon an appeal to the *House of Lords*. (4)

(1) Together with the 1300*l.* left to the defendants by *Knightly Duffield*, the father.

(2) 2 Ch. Rep. 162. 2 Vent. 347. S.C.

(3) Reg. Lib. 1692. A. fol. 57. 25th October.

(4) 20th December, 1692. Jour. Ho.

Lords, 15 vol. p. 158. ent. *Smith v. Duffield*, Vide *Jesson v. Jesson*, ante 255, 7. and cases there referred to, *Atkinson v. Webb*, post 478. *Perry v. Perry*, post 505. [*Goldsmid v. Goldsmid*, 1 Swan 211. and cases in note p. 221.]

### HUNGERFORD & Al' versus EARLE & Al'.

THE father makes a voluntary settlement on trustees to raise money to pay his debts therein mentioned, and portion for his younger children, reserving 50*l.* per ann. to himself for life, remainder of the whole to his son for life, and to his first and other sons in tail, &c. The plaintiffs are bond-creditors to the father, for money lent *twelve* years after the making of this settlement.

CASE 245.  
14 April.  
Eq. Ca. Ab.  
148. pl. 2.  
2 Freem. 120.  
S. C.  
The father makes a settlement on trustees in trust to pay his debts therein mentioned, reserv-

ing 50*l.* a year to himself for life, remainder to his son, &c. Father continues in possession, and twelve years after contracts debts by bond, whether the settlement is fraudulent as to the bond-creditors.

HUNGERFORD  
v. EARLE.  
[ 262 ]

Question, whether the settlement fraudulent against them.(1)  
*Per Lord Commissioner Hutchins* : the settlement fraudulent, and the plaintiffs ought to have a decree ; for it is proper to be determined here, for this court determined touching charities, and frauds, long before the making of any statute concerning the same : this settlement not pursued, for the trustees did not enter and take possession according to the deed, but permitted the father to live in the house, &c. And a deed not at first fraudulent, may afterwards become so by being concealed, or not pursued, by which means creditors are drawn in to lend their money ; but the other two *Commissioners* doubting it was sent to be tried at law. (2)

A deed not fraudulent at first, may afterwards become so, by being concealed or not pursued.

(1) Vide *Sagitary v. Hide*, ante p. 44.

(2) Sed vide *White v. Hussey & Al'*, Pre. Ch. 14. where the Lords Commissioners all of opinion, they might decree a conveyance to be fraudulent, merely for being voluntary, and that without any trial at law. The principal case was this : *William Rogers*, Esq. being seised in fee of the premises in question, of about 450*l. per ann.* mortgaged the same to one *Reynardson* in fee, who by the direction of *Rogers* in 1655, assigned the mortgage to *Earle* and the other defendants, and then *Reynardson* and *Rogers* and his wife, in consideration of 4500*l.* debts owing by *Rogers* to various persons named in the deed, and of a jointure to the wife, did by lease, release and fine, convey the said premises to the use of *Earle* and the other defendants and their heirs in trust, for the payment of the said debts out of the rents, or by lease or sale of any part thereof, and until the debts paid, for payment of 100*l. per ann.* to *Rogers* and his wife for maintenance of them and their children, and 50*l. per ann.* for *Rogers*, his private expences, and after payment of the debts, for payment of 200*l. per ann.* to *Rogers* and his wife, during their lives, and after the death of the survivor of them, to the *first*, and so to the *tenth* son in tail, remainder to daughters in tail, and the said trustees were by sale or mortgage of any part of the premises, to secure the annuities or rent charges aforesaid, and the residue of the rents and profits were limited to the said *Rogers* and his heirs, so as he might

take the profits, but not dispose of them but for the full value, except it were for a jointure for another wife, or such occasion as should be allowed of by two trustees, and in case the said *Rogers* and his wife died, leaving a son and daughters, such son was to give 1200*l.* to his sisters, out of the 200*l. per ann.* to him limited with a power for the said *Rogers* and one of the trustees joining, to revoke the settlement of 200*l. per ann.* limited to the son, and to settle it upon other children. It appears that *Rogers* kept possession of the house and part of the estate from the time of the settlement until his death, and farmed it, and cut down timber, &c. and received the profits, and defendant *Earle* of the other part, and in the course of such management, about *twelve* years after the settlement, contracted debts with the plaintiffs, but of what nature does not appear. *Rogers* died without having revoked the settlement, leaving *William Rogers* his son, one of the defendants, and *three* daughters, and about *six* years after his death, one of the daughters married, and about *three* years after that, another married, and both their portions were paid or secured by defendant *William Rogers*, who had also given the third sister security for her dividend, and paid off the surviving trustee 120*l.* remaining due on the account, and took back the legal estate of the premises, being worth about 120*l. per ann.* and the said trustees and *Rogers* had sold part of the said estate, before the said plaintiff's debts were contracted, and from the time of the settlement,



the Courts Baron and Leets, were called in the names of the said *Rogers*, and the trustees as lords of the manor. Under these circumstances, a trial at law

as to the validity of the settlement was ordered, Reg. Lib. 1691. A. fol. 1026. No contrariety of opinion appears in the Register's Book.

**BATTILY & Al'**, late Churchwardens *versus* **COOKE & Al'**, late Churchwardens, and also the present Churchwardens of St. James's Bury, Com. Suffolk.

CASE 246.  
30 April.  
Bill against Churchwardens, because they refused to make a rate for reimbursing the plaintiff according to a vote and order and their successors.

**BILL** against the defendants, lately *Churchwardens*, because they refused to make a rate to reimburse the plaintiff according to a vote and order of vestry. (1) And cited *Jefferies* case in *Co. 5 Rep.* (2) that the majority may bind as to parish duties of vestry. They being out of their office, the decree was prayed against them and their successors. Q.

Objection, should have come whilst defendants were Churchwardens, that if they had been decreed to pay, they might have reimbursed themselves by a rate. *Per* Serjeant *Philips* decree against Dr. *Crowther* and successor : so here would have it against the churchwardens and successors. Q.

(1) For money laid out by plaintiffs, in repairing the church and erecting galleries, and which had been duly allowed in their accounts. By the report of this case, Pre. Ch. 42. (much better) it appears that the court refused the plaintiffs relief, they having received as much money or more than had been laid out in the repairs. As to what remained due to them for the galleries, the court said they must take their remedy against such particular parishioners as had employed them, or else in spiritual court. Note, the case of *James v. Rich & Al'*, Feb. 36 Car. 2d *Birch v. Barston & Al'*, Trin. 2d W. and Mary, were cited as precedents of decrees having been made in such a case. So decree made on a bill by executrix of a late churchwarden, against *ninety* pa-

rishioners, to be reimbursed what her testator had advanced in rebuilding the church-steeple, *Nicholson v. Masters*, E. 1715, 4 Vin. Ab. 529. pl. 9. So a parish rate decreed, *Blackburne v. Webster*, 2 P. Wms. 632. Sed vide *Greenfield v. Reynall*, cited in not. (2) there. Et vide *French v. Dear*, 5 Ves. 547. where *Eldon*, Lord Chancellor, considered such a jurisdiction as injurious, and distinguished a church rate for the repair of the church, from a parish rate for reimbursement, but the bill in that case not being signed by counsel, it was ordered to be taken off the file, and the plaintiff to pay the costs. [And a court of equity will not decree an account against a parish *ex parte Fowler*, 1 J. & W. 70.]

(2) 67. b.

**LIGO** *versus* **SMITH** and **LEIGH**.

[ 263 ]  
CASE 247.  
22 April.

**THE** plaintiff, tenant under a jointress at *forty* pounds *per ann.* for *sixty* years, if the jointress should so long live, had committed waste *sparsim*, so as at law the estate was forfeited; but insisted he had improved the estate from 40*l.* to 60*l.* *per* value; and offers to take a lease at the improved rent, and to pay for the timber cut. Quære, whether the court will relieve as to the waste.

The under tenant of a jointress commits waste *sparsim*, but had improved the yearly value.

LIGOV. SMITH  
& LEIGH.

*ann.* and offered to take a lease of it at that rent for *fifty* years absolute, and to answer the value of the timber upon a *quantum damnificatus*. Sir *Percival Hart's* Case cited, where he had voluntarily made a settlement to himself for life, then to his nephew; afterwards he committed waste *sparsim*, and the nephew recovered, so as Sir *Percival* could not go out of his house. (1) Q.

(1) There is an entry 26th *April*, of Lib. 1691. B. fol. 404. and no other dismissal of a bill in a cause of *Ligoe* entry appears. and *Leigh*, but no case stated, Reg.

CASE 248.  
25 April:

### BENSON *versus* BENSON.

An inhabitant within the Province of York, makes a settlement on his wife, in bar of what she might claim by custom of York, or otherwise

out of the personal estate. Husband dies intestate, leaving the said wife and children. How the wife's customary part shall go.

UPON the marriage, the husband being an inhabitant within the *Province of York*, provision was made by settlement for the wife in case she survived. It was thereby also agreed that she should not claim any part of her husband's personal estate, by the custom of the *Province of York*, or otherwise. The husband afterwards dies intestate, leaving his wife and *two* children.

Question, whether the whole personal estate shall be now divided between the *two* children, as if there had been no wife? Or, how the third (belonging to the wife according to the statute for settling intestate's estates, but of which she is excluded by the marriage-agreement) shall be disposed of.

[ 264 ]

*Per Mr. Finch*: The husband is in the nature of a purchaser of his wife's share, and without doubt might have disposed of it by will, and what he might have disposed of by will, the statute has disposed of for him, and is in the nature of a will for all intestates. As was resolved in the case of *Travell* and *Pecock*, and in *Ryder's* case. But it was observed by Lord Commissioner *Hutchins*, that the agreement being in 1669, and the act of parliament in 1670, she could not by the agreement be excluded from the right that accrued to her by the statute, made subsequent to the agreement. *Quære.* (2)

(2) Vide *Benson v. Bellasis*, ante 1 vol. 15. 369. S. C.

RUNDLE *versus* RUNDLE. (1)

THERE being no custom within the manor where the copy is to three for their lives *successivè*, that the first taker may surrender the copy, and dispose of the estate, the court would not decree the remaining life to be a trust for the first taker, and to go to his executor or administrator, as had been done in other cases where there was such custom. And also for that upon looking into the copy, it appeared there was a former copy to *Richard Rundle* the father, and *Alexander* the son, and the surrender is by them both *sub conditione*, that the lord make a new grant for three lives *prout*. And it is *dant domino de fine*, &c. So in truth the estate moved rather from *Richard* the father, than from *Alexander* the son; nor does it appear the fine was paid by *Alexander*. (2) And also for that it was proved in the cause, that it was intended that the son of *Alexander* should have married the now defendant; and that *Alexander* declared the now defendant should have the estate, whether she married his son or not, and therefore dismissed the bill: but it was agreed *per Cur.* That if it had been a trust, the administrator should have had the benefit thereof, though an estate for lives, and whether freehold or copyhold, or an office; and it had been so adjudged, as to a *Prothonotary's* office. The cases of *Thyn* and *Brompfield*, *Clark* and *Davis*, *How* and *How* (3) cited.

CASE 249.  
25 Apr. and  
1 Junii.  
Ant. Case 239.  
A copyhold is granted to three successively, but no custom proved that the first taker had the power of disposing of the whole, nor that the first taker paid the purchase-money. This shall not go to the executor of the first taker, but shall go in succession.

[ 265 ]  
An estate in a copyhold *pour autre vie*, shall go to executors or administrators, as well as a freehold *pour autre vie*.

(1) The settlement was in full of all dower and thirds out of the estate of the intestate, and there was a proviso that if Dame *Dorothy* the wife of the intestate should after his decease have or claim to have any of his real or personal estate by the custom of the province of *York* or otherwise, other than what he in his life-time should especially give her, then the said trustees to stand seised of the said jointure for 60

years after his decease, if Dame *Dorothy* should live so long, out of the rents and profits thereof, to make satisfaction to such person or persons as should be damnified by her intermeddling with his personal estate, R.L. The cause stood over for a case to be stated, Reg. Lib. 1691. A. fol. 950. but no entry of a decree appears afterwards.

(2) [Ante p. 252.]

(3) [Ante 1 vol. p. 415.]

STAFFORD *versus* SOUTHWICK.

CASE 250.  
4 Maii.

THE defendant intrusted *Tyms* a scrivener to lend out 100*l.* at interest, he lends it to the plaintiff, from whom he takes bond, and also a warrant of attorney to confess a judgment in debt for 100*l.* both in the name of the defendant, to whom he delivers a copy of the judgment, but keeps back the bond. The client's name, and keeps the bond and gives the client the copy of the judgment, and afterwards receives the money and delivers up the bond. Whether *B.* liable to pay the money over again.

A Scrivener lends 100*l.* his client's money to *B.* and takes a bond and warrant of attorney for a judgment, in judgment, and afterwards receives the money and delivers up the bond. Whether *B.* liable to pay the money over again.

STAFFORD v.  
SOUTHWICK.

plaintiff afterwards pays *Tyms* the money, and takes up the bond unknown to the defendant; the defendant suing the judgment at law, the plaintiff's bill was to be relieved against it.  
Q. (1)

(1) The bond of even date with the warrant of attorney was produced and cancelled, but how or by whom does not appear: a trial at law was ordered in K. B. upon this issue, "whether or not the plaintiff or any for him did pay the said 100*l.* principal money and interest, or how much thereof if

"any due on the before mentioned bond to the said *Robert Tyms* or his order, and when he paid the same." Reg. Lib. 1691. B. fol. 411. no further entry appears: Vide *Roberts & Al' v. Matthews & Al'*, ante 1 vol. 150. and cases cited in not. there.

CASE 251.  
3 Maii.

Eq. Ca. Ab. 410. pl. 10.  
Pre. Ch. 32.  
2 Freem. 17. S. C.  
One devises his copyhold being *Burrough English*, to his eldest son, and devises houses to his youngest son. The houses are soon afterwards burnt, and were never entered upon by the younger son. The court as this case was circumstanced, would not supply the want of a surrender.

COOPER *versus* COOPER.

THE father having devised a copyhold of the tenure of *Burrough English*, to his eldest son, and devised houses in *London* to his youngest son, but had made no surrender to the use of his will: the question was, whether the defect of a surrender should be supplied in equity, to make good a provision for a child, and the case of *Bradley and Bradley* was cited, as a case in point, and that this was rather a stronger case, because that it appears that the father before his death intended, and would have gone down into the country, to have made a surrender to the use of his will; but it being in the time of the great plague, was prevented from so doing. But in regard the provision intended for the youngest son, was a devise of some houses in *New-street*, which within *twelve* months after were burnt down in the great fire of *London*, and the younger son then an infant, and never entered thereon, nor received any of the profits. The court therefore, as this case was circumstanced, would not supply the defect of a surrender. (2)

(2) Bill dismissed without costs, Reg. Lib. 1691. A. fol. 605. Vide *Hardham v. Roberts*, ante 1 vol. 132.

[ 266 ]

THE ATTORNEY-GENERAL *versus* GUISE.

CASE 252.

13 Maii.  
Charity,  
though given  
to an illegal  
or superstiti-  
ous use shall

*JOHN SNELL*, by his will, charged his real and personal estate, with an annual sum or exhibition for the maintenance of *Scotchmen*, in the university of *Oxon*, (3) to be sent into

not be void, for the benefit of the executor or heir but be applied *cy pres*, &c.

(3) To enter into holy orders as soon as capacitated by the canons of the Church of *England*, R. L.

*Scotland*, to propagate the doctrine and discipline of the *Church of England* there. Now by the late act of parliament, *Presbyters* are settled in *Scotland*; and it was insisted, that although the charity cannot now take place according to the letter and express direction of the will, yet it ought to be performed *cy pres*; and the substance of it may be pursued; that is to propagate the doctrine and discipline of the *Church of England*, though not in the form and method intended by the testator, and shall not be void, so as to fall into the estate, and go to the heir; and cited *Syderfen's Case*, where 1500*l.* was devised to be disposed to such charities, as he by writing had appointed; the writing being lost, the application of the charity left to the King; and *Gates* and *Jones's Case* in the *Exchequer*, affirmed upon an appeal to the House of Lords; where a charity was given to maintain popish priests, applied to other uses by the *King*, and not to turn to the benefit of the heir. (1)

THE ATTOR-  
NEY-GENERAL  
v. GUISE.

Vol. 1. Case  
223.

The case of Mr. *Combes* decreed in 1679, where he devised a salary for maintenance of independent lectures in *three* market towns, and devised the estate thus charged, to his nephew, who afterwards devised it for payment of his debts. Bill was brought to have the lands sold for payment of the debts; afterwards upon an information for the charity, the growing payments and arrears were decreed, and the *independent* lectures changed into *catechistical* lectures, in the same *three* market towns; and this, though there were not sufficient to pay the debts. (2)

[ 267 ]

(1) Vide *Attorney-General v. Syderfen*, ante 1 vol. 224. *Attorney-General v. Baxter*, ibid. 251, 2.

(2) In the principal case an account was directed as to the personal estate, and the rents and profits of the real, the cause in the mean time to stand over, Reg. Lib. 1691. A. fol. 586. Afterwards in Trin. Term. 1693, the cause came on again, and the decree as to the charity was, that the trustees named in the will, should convey over the estate in question to the six senior fellows of *Baliol College, Oxford*, (one of the colleges mentioned in the testator's

will) subject to mortgages, annuities, &c. as therein mentioned, to be disposed of as in the said decree particularly mentioned, the end of the decree being for "the effectual execution of " the said trust as near as can be to the " said will and intention," the heir at law, &c. to have their costs, Reg. Lib. 1692. A. fol. 1074. It appears that on the 5th April, 1790, the plaintiffs had brought a bill in the House of Commons of *England*, to establish the charity for the benefit of the University of *Oxford*, and that the same was thrown out on the first reading, R. L.

ELIZABETH JAMES, DOROTHY HUM-  
PHRYS, and Dame ANNE STEPHENS,  
Sisters and Coheirs of RICHARD COL-  
LINS deceased, } Plaintiffs;

CASE 253.

2 Maii.

Eq. Ca. Ab.

117. pl. 4. Pre.

Ch. 44. S. C.

JOHN HALES Arm' &amp; Al',

Defendants.

*A.* devises  
lands incum-  
bered with  
debts, to *B.*  
for life, re-  
mainder to  
*C.* in fee. *B.*  
cuts down

*RICHARD COLLINS*, being seised in fee of several lands,  
by his will of *Jan.* 17, 1683, devises the same to his dear  
friend *John Hales* the defendant for life, and devises one-third  
part of the reversion to each of his *three* sisters respectively,  
and her heirs.

timber from the estate. *B.* decreed to pay *two* fifths of the debts, and *C.* the remaining  
*three* fifths, and *B.* to account for the timber which he had cut; and this to be taken as part  
of the *three* fifths, which the remainder-man was to pay. Post Case 289.

[ 268 ]

The bill was to discover the incumbrances upon the estate,  
and compel the defendant to bear his share and proportion  
thereof, complaining the defendant increased the debts by  
non-payment of interest, so that their reversion might in a  
little time become charged with as much as it is worth, and  
the defendant go away with all the profits during his life,  
without paying so much as interest upon the mortgages, and  
charged he had cut down timber, for which he ought to be  
accountable.

*Per Cur.* Decree the defendant Mr. *Hales* the devisee for  
life, to pay *two* parts in *five* of the debts, and the plaintiffs the  
reversioners, the other remaining *three-fifths*, and the de-  
fendant to account for the timber, being but barely tenant for  
life, and not with power to do or commit waste; and what he  
hath raised by timber to be taken as so much in part of what  
the reversioners are to pay, by the direction before given  
towards the discharging of the incumbrances. (1)

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(1) Reg. Lib. 1691. *A.* fol. 612. v. *Batteson*, *ibid.* 404. *Anon.* 1 P.  
Vide *Brent v. Best*, ante 1 vol. 70. and Wms. 650.  
cases cited in not. (2) there. *Clyat*



DE

## TERM. S. TRINITATIS, 1692.

IN CURIA CANCELLARIÆ.

GODDART *versus* GARRETT.

THE defendant had lent money on a *bottom-rhea bond*, but had no interest in the ship or cargo, the money lent was 300*l.* and he insured 450*l.* on the ship; the plaintiff's bill was to have the policy delivered up, by reason the defendant was not concerned in point of interest, as to the ship or cargo.

CASE 254.  
16 Junii.  
Eq. Ca. Ab.  
371, pl. 2. S. C.  
One having no  
interest in the  
ship, lends  
300*l.* on a

*bottomry bond*, and insures 450*l.* on the ship; policy decreed to be delivered up.

*Cur.* Take it that the law is settled, that if a man has no interest, and insures, the insurance is void, although it be expressed in the policy *interested or not interested*, (1) and the reason the law goes upon, is that these insurances are made for the encouragement of trade, and not that persons unconcerned in trade, nor interested in the ship, should profit by it; and where one would have benefit of the insurance, he \*must renounce all interest in the ship. And the reason why the law allows that a man having some interest in the ship or cargo, may insure more, or *five* times as much, is that a merchant cannot tell how much, or how little, his factor may have in readiness to lade on board his ship. And it was said, that the usual interest allowed on *bottom rhea*, was 3*l.* *per cent.* *per mensem*, and you may insure at 6 or 7 *per cent.* for the voyage: So if this practice might be allowed, a man might be sure to gain 30*l.* or more *per cent.* *Per Cur.* Decree the policy of insurance to be delivered up to be cancelled.

One having no  
interest in a  
ship insures it,  
the insurance  
is void, though  
the policy  
runs, *interest*  
*or no interest.*  
But if he is  
interested in  
the ship, he  
may insure  
more than the  
value of his  
interest.  
Where one  
insures a ship,  
if he would  
have any be-  
nefit of the  
insurance, he  
must renounce  
his interest in  
the ship.

[\*270]

*Note*, That in this case, notice was taken in the policy, that it was to insure money on *bottom-rhea*.

*Note* also, That in this case, the ship survived the time limited in the *bottom-rhea bond*, and was lost within the time limited in the policy. So if insurance good, defendant might be intitled to the money on the bond, and also on the policy.

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(1) Quære tamen. Et vide *Harman v. Van Hatton*, post 717. Stat. 19. Geo. 2d. Cap. 37. Sect. 3. *Sadler's Company v. Badcock*, 2 Atk. 554. *Park on Insurance*, 260. *Depaba v. Ludlow*, Comyns 360. [*Camden v. Anderson*, 5 T. R. 709.]

## CASE 255.

1 Junii.

Eq. Ca. Ab.

58. pl. 4. Prec.

Chan. 419.

S. C.

The first husband assigns a term for the separate use of the wife.

The second husband may sell or dispose of it, though he

TUDOR *versus* SAMYNE. (1)

DOCTOR *SERMON*, the defendant's first husband, being possessed for the residue of a term of *thirty-one* years, granted by Doctor *Lamplugh*, in the year 1676, conveyed it over to trustees for the separate use and benefit of the defendant his wife. She marries *Samyne* a second husband, who first mortgages this term to *Venner*, and he and *Venner* assign to the plaintiff.

has made no provision for his wife.

Husband may dispose of the trust of a term which he has in right of his wife, as well as of the legal estate of a term which he has in her right. 3 P. Wms. 201. (a) Vol. I. 7. quod vide.

[ \*271 ]

The bill was against the wife and her trustees, to compel them to assign over the legal estate to the plaintiff. And decreed accordingly; for as the husband may \* dispose of a term for years, where the legal estate was in his wife; so he may of the trust of a term, without either the wife or the trustees joining; and Sir *Edward Turner's Case* (a) cited, that a term assigned by the first husband for the separate use of the wife, may be sold or disposed of by the second husband.

It was objected that the husband in this case had made no settlement or provision for the wife; (2) and if he was plaintiff, the court would not decree the trustees to assign to him, without making some settlement on the wife; and the plaintiff who derives under the husband, ought not to be in any better condition. *Sed non allocatur.* (3)

(1) Reg. Lib. 1691. B. fol. 530. The bill prayed an account of rents and profits received by the defendant the wife, but the court would not decree that nor costs to the plaintiff.

(2) [See *Bosvil v. Brander*, 1 P. Wms. 458, and cases.]

(3) In *Jewson v. Moulson*, 2 Atk. 421. Lord *Hardwicke* said, there was some dispute at the bar how "*non allocatur*" at the end of this case, is to be applied, whether to the whole case, or to the words immediately preceding. So early as 14 Car. 1. in *Tanfield v.*

*Davenport*, reported by *Tothill*, it is noticed as a rule in equity that this court will not suffer the husband to take the wife's portion, until he has made a reasonable provision for her, from which it should seem that "*non allocatur*" is applicable only to the last preceding words. It seems however now settled, that the husband and all claiming under him must make a suitable provision if he sues for his wife's fortune, though equity will not interrupt the legal title of the husband, unless he calls for its assistance.

## CASE 256.

3 Junii.

Eq. Ca. Ab.

323. pl. 6.

A purchaser or mortgagee shall not protect himself by taking a conveyance from a trustee after notice of the trust, for by taking such conveyance he becomes the trustee himself.

SAUNDERS *versus* DEHEW.

*ANNE BAYLY*, being possessed of a term for years, makes a voluntary settlement thereof, in trust for herself for life, remainder to her daughter *Isabella Barnes*, for life, remainder

to the children of *Isabella*, by Mr. *Barnes*, her then husband. *Isabella* for 200*l.* mortgages the lands in question to the plaintiff, who pretends he had no notice of the settlement; *Isabella* in the mortgage-deed, being called the daughter and heir of *John Bayly*. The plaintiff hearing of it, gets an assignment of the term from the trustees.

SAUNDERS v.  
DEHEW.

*Per Cur.* Though a purchaser may buy in an incumbrance, or lay hold on any plank to protect himself, (1) yet he shall not protect himself by the taking a conveyance from a trustee after he had notice of the trust, for by taking a conveyance with notice of the trust, he himself becomes the trustee, and must not, to get a plank to save himself, be guilty of a breach of trust. (2) And the plaintiff's bill being brought against the children of *Isabella* to foreclose them, the court refused so to do, saying, if he might be suffered to protect himself, by thus getting in the legal estate, they would not carry it on by a decree in equity to foreclose.

[ 272 ]

*Note,* In this case it was objected, that the plaintiff could not be an innocent purchaser without notice, because *Isabella*, who made the mortgage, had no title but under the settlement; and as to her being called daughter and heir of *John Bayly*, it was known that the estate was only a chattel; if it had been pretended to be an inheritance, some deed or settlement must have been produced to make it so.

*Note,* In this case, the plaintiff had also bought in a mortgage made by *Anne Bayly* herself, which though subsequent to the settlement, *that* being voluntary, was a good mortgage. (3)

(1) Vide *Edmunds v. Povey & Al'*, ante 1 vol. 187.

p. 159. [And see *Brace v. Marlbro'*, 2 P. Wms. 491.]

(2) And yet a purchaser has been allowed to defend himself by buying in an old statute or mortgage, though nothing was due upon it, or though he came unduly by it, *Lord Huntington v. Greenville*, ante 1 vol. 49. and cases cited in *Hitchcox v. Sedgwick*, ante

(3) And yet after a voluntary settlement, a man cannot devise the same estate, though for the payment of debts, nor is such a settlement revocable, *Bale v. Newton*, ante 1 vol. 464. Et vide *Villers v. Beaumont*, *ibid.* 100.

### WHITCHURCH & Al' versus D'NAM BAYNTUN.

CASE 257.  
27 Junii.

ON the marriage of Mr. *Henry Bayntun* with the defendant, then the lady *Ann Willmott*, by articles of *July* 14, 1685, Mr. *Bayntun* agrees to settle 1900*l.* per ann. jointure, and 1500*l.* per ann. more on the issue male, &c. And Lady *Anne*

Debt on bonds for payment of sums certain to be preferred in payment to demands on articles sounding in damages.

WHITCHURCH  
v. BAYNTUN.

[ 273 ]

agreed, when of age, to levy a fine and settle her lands on Mr. *Bayntun*, and the issue of the marriage, her lands being valued at 21,000*l.* Mr. *Bayntun* when of age confirms the article by an indorsement, and afterwards a settlement was made by Mr. *Bayntun*, which was approved of by the Countess of *Rochester*, the defendant's mother, but in fact, though the jointure was near 1900*l. per ann.* the lands upon the issue male did not hold out to be 1500*l. per ann.* and great part of that too in reversion. Mr. *Bayntun*, by purchasing Sir *Edward Hungerford's* estate of *Farley Castle*, became greatly indebted, and in *June* 1691, devised all his lands unsettled to be sold for payment of his debts.

The bill was brought by the creditors of Mr. *Bayntun*, against the widow, his infant son and trustees, to have the lands sold for payment of debts, complaining it was obstructed by the defendant's setting up so many pretended claims by the marriage-agreement, &c. The defendant disclosed the articles, and the settlement after made, and the deficiency thereof in point of value.

*Per Cur.* There is no covenant that the estate shall continue of the value in the articles, nor that it should be of that value in present possession, and therefore the settlement ought to stand, the articles being sufficiently performed.—And if the settlement is deficient; yet in regard there is no covenant in the articles, nor mention of any particular lands, the widow and infant must come in for a satisfaction after the bond-creditors, whose debts are ascertained and fixed, and their demands on the articles only sound in damages. (1)

(1) The *Countess of Rochester* and *John Bayntun*, the infant son of the testator, had filed a cross-bill to have the defect in value supplied, which was dismissed without costs, Reg. Lib. 1691. B. fol. 601. entered *Whitchurch v. Warneford*. Note, the simple-contract creditors of the testator coming in and contributing were ordered to be allowed the benefit of the decree, but

nothing is said in the decree of the widow and infant coming in for a satisfaction after the bond-creditors. Vide *Eeles v. Lambert*, cited in *Lancy v. Fairechild*, ante 101. where said to have been resolved that a contingent security should not stand in the way of a debt by simple contract as to the administration of assets by an executor.

CASE 258.  
13 Julii.

FLETCHER & Al'. *versus* STONE.

One dies indebted by mortgage, with a bond to perform

covenants and owes other debts on bond. The personal estate shall be applied to pay off the bond-debts in the first place.

*THEOPHILUS TILDEN* mortgaged his lands to *Weldes* for 550*l.* and gave bond for performance of covenants, and became also indebted to the plaintiffs by bond, and by will

devises his lands to the defendant and his heirs, (the defendant having married his daughter) and also makes him executor, who would exhaust the personal estate to pay off the mortgage, so as to leave no assets liable to the plaintiff's bond.

FLETCHER v.  
STONE.

Account decreed of the personal assets, and no allowance to be thereout made in respect of the bond for performance of covenants in the mortgage-deed. (1)

(1) There was also a mortgage to one *Reader*. *Weldesh* had received of *Tilden* before his death, 240*l.* which was ordered to be brought into the account, and to be taken as assets of *Tilden's* estate, and the judgment on the bond for performance of covenants, "and the mortgages to *Weldesh* and " *Reader* are not to be allowed as paid " by the defendant, to sink the assets,

" but the lands ought to bear the " same." And the defendant was ordered to pay the plaintiffs their costs both at law and in equity, out of his own estate, 14th *June*, Reg. Lib. 1691. A. fol. 737. On the head of marshalling assets, vide *Sagittary v. Hide*, ante 1 vol. 455. *Porey v. Marsh*, ante 182.

### GUDGEON *versus* RAMSDEN.

THE intestate being an inhabitant in the *Province* of *York*, left issue a son and daughter only, and no widow, the daughter had a portion given her in marriage, in lieu and full satisfaction of what she might claim by the custom of the *Province* of *York*; the son was also advanced by a settlement of lands.

no wife, and in his life-time gives his daughter 1000*l.* portion, in bar of what she might claim by the custom of *York*. This being said to be in bar of her customary part, shall be no bar of her distributory part on statute of distribution, nor shall she bring the said 1,000*l.* into Hotch-pot.

[ 274 ]  
CASE 259.  
29 Junii.  
Eq. Ca. Ab.  
161. pl. 5. S. C.  
An intestate-  
being an in-  
habitant in  
the *Province*  
of *York*, has  
a son and  
daughter, and

The question was, how this estate should be distributed. For the heir it was insisted, that now the custom of the *Province* of *York* is to be quite laid out of the case, and the same distribution made of the estate, as of any other intestate's estate, and by consequence the daughter to bring her portion into *Hotch-pot*; but the heir to have a full share without regard to what lands had been settled upon him.

*Per Cur.* The daughter must not bring back her portion into *Hotch-pot*, for that came in lieu of the customary part, and was as the price the father thought fit to give her for the same. (2)

(2) The plaintiffs were the representatives of the daughter, the son does not appear to have been advanced by the intestate in his life-time, but entered on the real estate as heir at law, and took out letters of administration of

the personal estate, and the decree declared " that both the said son and " daughter of the intestate were ex- " cluded by the custom of the *Province* " of *York*, and that the portion given " to the daughter ought not to be

GUDGEON v.  
RAMSDEN.

*Vide Beckford's* case, (1) where a child is advanced, what is to be brought into Hotch-pot shall not go into the whole estate, but only into the share belonging to the children, and not to augment either the widow's or legatory part.

3 Mod. Rep.  
58. Skin. 212,  
218.

*Vide Palmer and Allicot's* case in *K. B.* (2) adjudged, though the child die before distribution, the estate vested immediately, and shall go to the administrator of the child; for it is an act not only for the distribution, but for the better settling of intestate's estates.

"brought back into the account of  
"the intestate's personal estate, or  
"esteemed or taken as any part there-  
"of." And then ordered an account  
of the personal estate, and decreed the  
clear residue thereof, after payment of  
debts, &c. to be equally divided, one  
moiety thereof to the representatives  
of the daughter, without allowing  
any thing for her said portion, and  
the other moiety thereof to the repre-  
sentatives of the son, according to the  
statute of distributions, Reg. Lib. 1691.  
*A. fol. 1036.* entered *Goodgeon v.*  
*Rigby*, afterwards 22d February, 1693,  
the cause came on for rehearing on  
petition of the heir, but went off on a

compromise, the heir consenting to  
pay plaintiff 600*l.* and 150*l.* for costs,  
in lieu of their claim, which was  
ordered accordingly, Reg. Lib. 1693.  
*A. fol. 359.* entered for the rehearing.  
*Gudgeon v. Gudgeon.* So *Whithill v.*  
*Phelps*, Pre. Ch. 325. But where set-  
tlement made in bar of all wife's de-  
mands on personal estate of husband,  
by the custom of the Province of *York*,  
or otherwise, wife debarred of her  
distributive as well as customary part.  
*Benson v. Bellasis*, ante 1 vol. 15.  
Et vide note (1) p. 16. there.

(1) Ante 1 vol. 345. post 281. S.C.

(2) Cited in *Earl of Winchelsea v.*  
*Norcliffe*, ante 1 vol. 403.

[ 275 ]

DE

## TERM. S. MICHAELIS, 1692.

IN CURIA CANCELLARIÆ.

CASE 260.

Nov. 4.

LORDS COM-  
MISSIONERS.

Eq. Ca. Ab.

47. pl. 6. S. C.

Lessee for  
years of a  
brewhouse,  
with cove-  
nants to re-  
pair, assigns  
it by way of  
mortgage to

*B. B.* was never in possession; brewhouse much out of repair, the mortgagee, though it was his folly to take an assignment, and not an underlease; yet equity will not compel him to repair. Post Case 336.

### SPARKES versus SMITH & A<sup>r</sup>.

*JOHN SPARKES*, the plaintiff's father, seised in fee of a  
brewhouse, and two other houses in *Southwark*, in 1688,  
demised them to *Richard Gwin* for seven years, at 30*l.* per  
ann. with covenants that the lessee should repair, &c. *Gwin*  
the lessee died; *Berisford* married his widow and executrix,



and having borrowed money of the defendant *Smith*, for securing the repayment thereof, did assign the lease of the said houses to *Smith*, defeasable on the payment of the money with interest.

SPARKES v.  
SMITH.

The houses being greatly out of repair, the plaintiff's bill was to compel the defendant to discover whether the lease was not assigned to him, and to compel him to perform the covenants on the lessee's part.

The defendant by answer, insisted he never was in possession, nor received any of the rents; that in 1690, *Berisford* gave him an order on one of the tenants for 20*l.* which was paid him in part of what was due on the mortgage, and not as rent.

[ 276 ]

*Per Cur.* It was the mortgagee's folly to take an assignment of the whole term, whereby to subject himself to the covenants in the original lease, and not to take a derivative lease of all the term, but a month, or week, or a day, as he might have done; yet inasmuch as he is only a mortgagee, who never was in possession, we will not assist the plaintiff to charge him, or decree him to perform the covenants in *specie*, but leave the plaintiff to recover at law as well as he can, and therefore dismissed the bill. (1)

(1) There is merely an entry of dismissal of the bill with costs, Reg. Lib. 1692. B. fol. 34. Sed vide *Pilkington v. Shaller & Al'*, post 374. contra on covenant to pay rent, *Eaton v. Jacques*, Doug. 460. and for the authority of that case, Powell Law Mort. p. 241. Et vide further on this head *Goddard v. Keate*, ante 1 vol. 88. and note (3)

there. Note, the old cases in which it has been held that an action of covenant might be brought by him for whose benefit the covenant was made, as well as by him in whose name it was made, are not now considered as law, dict. per *Eldon*, Lord Chancellor, *ex parte Peele*, 6 Ves. 604.

### SHERMAN *versus* SHERMAN.

THE plaintiff's late husband and defendant had dealings together as merchants, the bill was for an account; and although it was agreed that the length of time was no bar, yet the plaintiff's husband living many years after the trade and dealings between them ceased, and after some differences and disputes had arisen between them, and acquiesced to the time of his death; the court therefore dismissed the bill, (2) and left the plaintiff to recover at law, if she could. and the surviving merchant brings a bill for an account, the court will not decree an account, but leave the plaintiff to his remedy at law.

CASE 261.  
9 Nov.  
Eq. Ca. Ab.  
12. pl. 10. 375.  
pl. 2. S. C.  
Though  
length of time  
no bar betwixt  
merchant and  
merchant;  
yet if dealings  
betwixt them  
have ceased  
for several  
years, and one  
of them dies,

(2) Without costs; no case stated. Reg. Lib. 1692. B. fol. 127.

**SHERMAN v. SHERMAN.** *Per Lord Hutchins*; amongst merchants it is looked upon as an allowance of an account current, if the merchant that receives it does not object against it, in a second or a third post. (1)  
 Among merchants, if an account current be sent from one to the other, who receives it and makes no objections for two or three posts, this is looked upon as an allowance of the account.

(1) As to length of time permitted cases cited in not. there. *Tickel v. Short* 2 Vez. 239.  
 to bar the opening of settled accounts, vide *Roberts v. Kuffin*, 2 Atk. 113. and

[ 277 ]

## HALL versus HALL.

**CASE 262.**  
 Nov. 11. **THE** plaintiff was the widow of a freeman of the city of London, and brought her bill against the defendants the children, to discover the estate, and to have her customary part paid her. The defendants pleaded, that their father by deed executed in his life-time, had given his goods to them. *Eq. Ca. Ab. 152, pl. 5. S.C.*  
 If a freeman of London absolutely gives away his goods in his life-time to any of his children, this is good. But if he keeps the deed of gift in his own power, or continues in possession of the goods, then it is a fraud upon the custom.

For the plaintiff it was insisted, that such pretended deed was a fraud on the custom, and in truth was but in the nature of a will, the words of it being, I give and devise, and so cannot prevent the custom's taking place; as was resolved in the *Lady Dethick's* case, and in the case of *Green and Lambert*.

For the defendant it was insisted, it was not a will, but a deed under hand and seal, and delivered as his act and deed, and therefore the words give and devise will not make it a will.

*Per Cur.* If goods are absolutely given away by a freeman in his life-time, this will stand good against the custom. But if he has it in his power, as by the keeping of the deed, &c. or if he retains the possession of the goods, or any part of them, this will be a fraud upon the custom. (2)

(2) The defendants answered, stating gifts in writing, under the hand of *John Hall*, and that he made a will: and an account of the real and personal estate of the testator was directed, but no further entry appears, *Reg. Lib. 1692. A. fol. 117.* So in the case of a voluntary judgment, *Fairebeard v. Bowers*, ante 202. So where Freeman by deed executed assigns his personal estate in trust for himself for life, and then for the benefit of his grandchildren, *Turner v. Jennings*, post 612.

So where absolute gift made by deed, but the deed not delivered, *Edmundson v. Cox*, 7 Vin. Ab. 202. pl. 11. So where release obtained by Freeman unduly from his child, *Heron v. Heron*, 2 Atk. 159. *Barnard. Rep. 450. S. C.* So where Freeman makes a voluntary settlement by deed in consideration of love and affection only, and yet keeps possession and receives the rents, *Smith v. Fellowes*, 2 Atk. 62. 377. So where Freeman purchases a leasehold estate in the joint names of himself and

his wife, *Coomes v. Elling & Ux'*, 3 Atk. 676. and said by *Hardwicke*, Lord Chancellor, to have been held, if a freeman disposes of his property in such a manner as not to take place till after his death, it is a fraud on the custom, *ibid.* 679. So where gift by

deed, but not absolute; the deed being considered in the nature of a testamentary act, *Tompkins v. Ladbroke*, 2 Vez. 591. Et vide *Ambrose v. Ambrose*, 1 P. Wms. 321. *Jones & Ux' v. Martin*, 3 Anstr. 890.

### LANE versus WILLIAMS & A<sup>r</sup>.

*J. S.* and defendant *Williams's* testator were partners as woollen-draperies, *J. S.* gives a note to the plaintiff\* for 150*l.* received and borrowed of him, which he promises to repay, and subscribed it for himself and partner. The bill was for a discovery and satisfaction out of the assets against *Williams* the executor of the surviving partner, to oblige him to pay, it being insisted for the defendant at the *Rolls*, that this money was never brought into trade, nor was contracted upon the account of the partnership; and therefore, although one partner signed it, as for himself and partner, *that* could not bind the partner that was not privy nor consenting thereunto; and the master of the *Rolls* dismissed the bill. (1)

partnership, nor the note given with the privity of the other partner; yet held this would bind the other partner. Post Case 282.

Now upon an appeal, the court declared they took it that both partners were bound; but the note being of pretty long standing, therefore ordered the defendant to admit assets in an action at law to be brought, and not plead the statute of limitations, otherwise would decree for the plaintiff. (2)

CASE 263.  
15 Nov.  
Eq. Ca. Ab.  
370. (B.) pl. 3.  
S. C.  
RAWLINSON,  
HUTCHINS.  
Lords Com-  
missioners.  
*A.* and *B.*  
partners as  
woollen-dra-  
pers. *A.* bor-  
rows money of  
*C.* and gives a  
note for the  
same for him-  
self and part-  
ner. Though  
this money  
was not  
brought into

[ \*278 ]

(1) With costs. Vide post 292. S. C.

(2) The note was of rather more than a year standing, and the defendant *Williams* had received from the other partner, a bond of indemnity against all demands relating to the said partnership, and the decree was, that *Richard Newberry* and the defendant *Williams's* intestate, being partners at the time of borrowing the money and giving the note in question, and the said money being lent on the credit of such partnership, that either of the said partners was liable to pay the same, *and the rather* for that the defendant *Williams* took such bond from *Newberry* as afore-said, and therefore that the defendant *Williams* do pay to the plaintiff the said 300*l.* (which was the money lent, and not 150*l.*) and interest from the date of the note, discounting what had

been paid him in part of the said debt, and what was due from plaintiff to the co-partnership, and it was referred to the Master to take the account, &c. Reg. Lib. 1692. B. fol. 46. It is clear that the law of merchants is part of the law of the land, and that in mercantile transactions one partner may bind the rest, *Style*, 370. *Pinkney v. Hall*, 1 Salk. 126. 1 Raym. 175. S. C. *Harrison v. Jackson*, 7 Term Rep. 207. but not by deed, *ibid.* unless under a particular power, per *Lord Kenyon*, *ibid.* it seems however that one partner may bind the rest by deed or bond, if executed in the presence of the others, *Ball v. Dunster-ville*, 4 Term Rep. 313. *Burn v. Burn*, 3 Ves. 578. How far to make a partnership liable in respect of a separate transaction with one partner, an express agreement must appear, vide

*Sheriff v. Wilks*, 1 East. Rep. 48. *Ex parte Neele*, 6 Ves. 602. And in a late case of *Williams v. Bingley*, not reported on motion for injunction against partner accepting or negotiating bills of exchange, &c. for or in the name of

the partnership, *Eldon*, Lord Chancellor, granted the injunction, except so far as the same should be given or negotiated by such partner for the purposes of the partnership.

CASE 264.

22 Nov.

2 Freem. 191.  
S. C.

Bill brought  
to be relieved  
*pro certo Letæ*.

### CHAFFEN *versus* GAWDEN.

THE bill was to be relieved *pro certo letæ*; for the plaintiff it was said, that the tenants owing suit and service to the sheriff's turn, the lord for ease of the tenants purchased a leet, and for that ease the tenants of each tithing agreed to pay the lord a sum certain; and the surmise was that the tithing-man being to collect and pay over to the lord, the lord in this case had no remedy but in equity. *Cur. Advis' vult.*

[ 279 ]

CASE 265.

25 Nov.

### WALTON *versus* Com' STAMFORD & è contra.

One buys a reversion expectant on an estate for life to *A.* *A.* shall enjoy it in equity against the purchaser, though *A.* had no title to the estate for life.

*WALTON'S* bill was to be quieted in the enjoyment of a messuage and lands during the continuance of a lease for *two* lives, supposed to have been made thereof; and it appearing that upon a partition of a considerable estate between the Lord *Stamford* and Sir *Boucher Wray*, the lands in question were allotted to the Lord *Stamford*, as a reversion expectant on the determination of *two* lives then in being, and if the lease was lost, or was defective and not good in law; yet it ought to be made good as against the defendant, who had an allowance upon the partition, as if a good estate for lives were then in being; and so it was adjudged in the case of one *Prettyman*, who purchased a reversion expectant on the determination of an estate granted to *J. S.* by a copy of court-roll for his life; and although in truth there was no copy nor grant of an estate for life, yet decreed *J. S.* should enjoy *pour vie*. But in this case the parties were sent to law, to try whether any such lease in being at the time of the partition.

CASE 266.

6 Dec.

Eq. Ca. Ab.  
229. pl. 10.

S. C.

Third mortgagee buys in the first, and brings bill to foreclose the second.

He need not prove the money actually lent on the third mortgage, the producing an acquittance being sufficient.

### Lord Chief Justice HOLT *versus* MILL & Al'.

THE plaintiff having lent *J. S.* 600*l.* on mortgage, and afterwards discovering that the estate was premortgaged to the defendant, got in an old satisfied incumbrance, and now brought his bill to compel the defendant to redeem or foreclose.

It was objected, that the plaintiff in this case (as between **HOLT v. MILL.** him and the defendant who was a purchaser) ought to have proved the actual lending and payment of the consideration-money, and the producing the deed or an acquittance was not sufficient. *Sed non allocatur.*

**CASS versus RUDELE & Al'.**

**THE** defendant, on the behalf of *Jeremiah Tilly*, articles to purchase of the plaintiff *four* houses at *Port Royal*, in *Jamaica*, by which articles the plaintiff covenants to convey, and the defendant on behalf of *Tilly* covenants to pay 800*l.* for the purchase thereof by articles dated *Aug. 6, 1690*, afterwards 100*l.* is paid in part. The bill was for a specific performance of the articles. The defendant insisted he had not sufficient effects of *Tilly's* in his hands, and that the plaintiff had not made out a good title to the houses, by which means the agreement had not been performed, and pending this suit, the great earthquake happened at *Jamaica*, in which the *four* houses in question (*inter alia*) were entirely destroyed and swallowed up; and therefore such agreement ought not now to be decreed in *specie*, but the plaintiff rather left to recover what damages he can at law.

But the court, notwithstanding the estate *pendente lite* was destroyed and gone, and notwithstanding defendant had not sufficient effects of *Tilly's* in his hands, decreed a specific execution of the articles. And the same was afterwards affirmed upon an appeal to the *House of Lords*. (1)

CASE 267.  
Eq. Ca. Ab.  
25. pl. 8. S. C.  
*A.* articles on behalf of *B.* to purchase four houses in *Jamaica*, and to pay 800*l.* for the same. The houses are soon afterwards swallowed up by an earthquake; and *A.* had no assets of *B.* yet decreed to pay the purchase-money.

(1) By agreement 6th *August, 1690*, *Cass* who claimed under one *Elizabeth Waterhouse*, agreed in consideration of 800*l.* to be paid to him in *England*, to convey two houses at *Port Royal* in *Jamaica*, to *Tilly* and his heirs. *Rudele* was agent to *Tilly*, who lived in one of the houses, and paid 2*s.* 6*d.* in part of the purchase money, and covenanted that the remainder should be paid in *England*, and that the conveyance should be executed on or before the 1st *Sept.* then next ensuing, and plaintiff delivered to defendant one part of the deed under which he claimed title, and the other part was sent to *Jamaica*, to be enrolled, together with an account of the transaction: *Cass* applied to *Rudele* for the money;

he desired time to pay it; 5th *Nov.* *Rudele* paid 100*l.* and only objected to the title that Mrs. *Waterhouse's* conveyance had not been recorded in *Jamaica*. *Cass's* receipt was produced. In *January, 1691*, *Cass* executed a conveyance to *Jeremiah Tilly*, and gave it to *Rudele*, the earthquake happened in *June, 1692*, and *Tilly* died soon after, and the decree was, that *Rudele* should specifically perform the agreement, and pay the remaining 700*l.* with interest from the date of the agreement, it being admitted by *Rudele* in his answer, that he had that sum of money of *Tilly's* in his hands, and this decree was affirmed on appeal to the Lords, 25th *January, 1692-3.* Journal House of Lords, 16

vol. p. 458. Vide note to *White v. Nutt*, 1 P. Wms. 62. Note. In the case as stated in the Register's Book, 1692. *A.* fol. 93. nothing appears to turn upon the circumstance of the earthquake, nor is it at all stated.

[ 281 ]

CASE 268.

19 Dec.

Eq. Ca. Ab.

143. pl. 14.

S. C.

*A.* purchaseslands of *B.*

and mortgages

back those

lands for part

of the pur-

chase money,

and gives a note to *B.* for 200*l.* the other part thereof. *A.* devises those lands to be sold for payment of his debts. This 200*l.* note, though for part of the purchase money, shall not be preferred to other debts, nor be a charge on the land in equity.BOND *versus* KENT.

*KENT* purchased of *Bond* the lands in question, and re-mortgaged them for securing part of the purchase-money, and for other part thereof, gave a note payable on demand, on which 200*l.* remained unsatisfied. *Kent* devises his lands to be sold for payment of his debts, and dies not leaving sufficient assets.

and gives a note to *B.* for 200*l.* the other part thereof. *A.* devises those lands to be sold for payment of his debts. This 200*l.* note, though for part of the purchase money, shall not be preferred to other debts, nor be a charge on the land in equity.

The question was, whether this 200*l.* remaining due on the note, being for part of the consideration-money, shall have a preference to other debts, and be looked on in equity as a charge upon the land; and the rather, for that the plaintiff as mortgagee hath the real estate in him.

*Per Cur.* Can have no preference, but must accept satisfaction in proportion only with the other creditors. (1)

(1) Reg. Min. Book, 19th Dec. 1692. This cause comes on to be heard on the Master's report, the Master having certified that the 200*l.* is part of the purchase money.

—*Cur.* We cannot charge the 200*l.* on the mortgage, but the plaintiff may come in with the rest of the creditors

for the 200*l.* we enlarge the time to redeem till the last day of the next term, but in default hereof the defendant to be foreclosed, and the Master to carry on interest, &c. Vide *Chapman v. Tanner*, ante 1 vol. 267. and cases cited in not. there.

CASE 269.

7 Dec.

1 Jac. 2. Lord  
*Jefferies.*

Eq. Ca. Ab.

155. pl. 6. 2 Ch.

Ca. 119. 2 Ch.

Rep. 359. S.C.

Money

brought into

hotch-pot by

an orphan, is

to be brought

into the

orphanage

part only, and

not to increase

the widow's

customary

part, or the testamentary part.

BECKFORD *versus* BECKFORD.

WHERE a freeman of *London* dies, leaving a wife and children, some whereof were only in part advanced, and others fully advanced. The children who were in part advanced, must bring in what they have respectively received into hotch-pot: but it shall be brought into the children's third only, and not \* to increase the widow's or executor's third, (*viz.*) the estate left by the testator at his death shall be first divided into three parts, *viz.* the widow's third part, the orphanage-part, and the legatory or testamentary part, and then what the children in part advanced had received, shall be brought into the orphanage-part only, and not to increase the whole estate.

[\*282 ]

(2) Vide ante 1 vol. p. 345. S. C.



DE  
TERM. S. HILLARII, 1692.

IN CURIA CANCELLARIÆ.

CHRIST-COLLEGE in CAMBRIDGE *versus* WIDDRINGTON.

CASE 270.  
25 Feb.

RAWLINSON,  
HUTCHINS,  
Lords Com-  
missioners.  
Where there  
is a single wit-  
ness against

THE cause heard and referred to an account ; as to one article of the account, there was a single witness against the defendant's oath.

the defendant's oath, this is not sufficient evidence for a decree, nor will the court direct a trial at law.

*Per Cur.* Not sufficient evidence to decree against the defendant, and the plaintiff having had the benefit of a discovery on the defendant's oath, we will not send it to be tried at law, where one witness is sufficient ; although it was insisted by the defendant's counsel, that it might be tried at law. (1)

(1) Reg. Lib. 1692. B. fol. 251. *Hobbs v. Norton*, ante 1 vol. 136.

PAPWORTH *versus* MOORE.

CASE 271.  
Eodem die.  
MASTER of the  
ROLLS.  
Eq. Ca. Ab.  
299. pl. 2. S.C.  
Legacy of  
A. dies before 23,

A LEGACY of 300*l.* devised to *J. S.* to be paid at *twenty-three* years of age, if he die before, to go over to *A. B.* *J. S.* died an infant.

300*l.* to be paid to *A.* at his age of 23, if he die before, to go over to *B.* *A.* dies before 23, *B.* shall have it presently.

Question, whether it should be paid to *A. B.* presently, or [ 284 ] not until such time as *J. S.* would have been *twenty-three*.

*Per Cur.* Decreed to be paid presently. (2)

(2) Vide *Anon.* ante p. 199. and cases cited in not. there.

ABBOTT *versus* LEE and CUTHBERT & A<sup>r</sup>. (3)

CASE 272.

Devise.

*GEORGE CUTHBERT*, having issue *William, Edward, Jane* and *Mary*, May 17, 1681, by his will devised to his said two daughters, 550*l.* apiece, and ordered the same should be laid out in land as land.

(3) Cited arg. in *Walker v. Denne*, 2 Ves. jun. 174.

ABBOT v.  
LEE.

laid out in the purchase of lands by his executors within one year after his decease, to the use of his said two daughters, and the heirs of their two bodies, and in case either of them should die before marriage, that the sum of 150*l.* part of the portion of her so dying, or if the 1100*l.* should be laid out in land, that so much land that should be of the value of 150*l.* should go to the surviving sister, and the other 400*l.* being the residue of the legacy of her so dying, or land to that value, if such purchase should be then made, should go to his two sons equally to be divided betwixt them and their heirs, and made *Jane*, his relict, and *Henry Lee* his executors; *William* and *Edward*, the two sons, died without issue, *Jane* also died unmarried, *Mary* survived, and married *Thomas Abbot*, the plaintiff, and died without issue. The plaintiff took administration to his wife, and in *Trin.* 1685, exhibited a bill against the executors, and *William Cuthbert* the heir at law, to have the 550*l.* and 150*l.* paid to him as administrator to his wife.

[ 285 ] The defendant *Cuthbert* insisted, that the money by the direction of the will, being to be invested in lands, within a year after the testator's decease, the money ought now to be looked upon as land; and if a purchase had been made according to the direction of the will, it would have descended to him, he being heir at law to the testator, and to his four children the legatees. But the court decreed the 550*l.* and 150*l.* the whole 700*l.* to *Abbot* as administrator to his wife. (1)

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(1) Vide *Symons v. Rutter*, ante p. 227.

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Case 273.

4 Mar.

GARTH *versus* EGERTON.

After two nonsuits and a verdict for defendant on an issue of *deins age*, on debt on bond, bill was brought suggesting the register on which the verdict was given, to answer the bill.

ON debt on a bond and *deins age* pleaded, there were two nonsuits, and at last a verdict for the defendant. Bill surmised that the evidence at the trial was a church-book, which the plaintiff had since discovered, was rased and altered, and *Egerton's* name put in the place of another person, and likewise that there was a picture in the house of Major-General *Egerton*, that would help to make out his age.

Defendant pleaded the nonsuits and verdict. Ordered

Defendant pleaded the nonsuits and verdict on full evidence, and by answer set out that the church-book was given in evidence on the trial, and the pretended rasure then observed and insisted on; and that the witness who made the affidavit annexed to the bill, and swears to have made this alteration in the church-book, by the direction of the Lady *Egerton*, was a

witness at those trials, and that the first nonsuit was in 1655, the verdict *twelve* years ago, and that after such trials, and length of time, he ought not to be farther troubled in equity.

GARTH v.  
EGERTON.

But the court ordered him to answer the bill, (1) and mentioned the case of *Harder* and *Syse*, where after *five* trials lease or no lease, it was at last discovered that in an office *post mortem*, the lease was found and set out in *hæc verba*.

(1) Entry of plea and demurrer overruled, Reg. Lib. 1692. A. fo. 643.

### POPE *versus* ONSLOW.

[ 286 ]

CASE 274.

20<sup>th</sup> Mar.

At the Rolls.

Eq. Ca. Ab.

325. pl. 8. S.C.

One makes

is deficient in

THE plaintiff as assignee of a statute of bankrupt, brought his bill to redeem a mortgage of the manor of *Newington* in *Kent*, made by the bankrupt to the defendant.

two mortgages of several estates, for several sums, and one of the mortgages value. If the mortgagor brings his bill to redeem one, he must redeem both.

The defendant by answer insisted, that he first lent the bankrupt 200*l.* on a mortgage of a particular tenement, and afterwards lent him 300*l.* on a mortgage of the manor of *Newington*, which was of better value than the money due, but the first mortgage was deficient in point of value. *Per Cur.* If the plaintiff will redeem one, he shall redeem both. (2)

(2) So *Margrave v. Le Hooke*, ante 207. *Purefoy v. Purefoy*, ante 1 vol. 29. Et vide *Shuttleworth v. Laycock*, ibid. 245. *Ex parte King*, 1 Atk. 300. and cases cited in not. there respectively. No entry of this cause appears in the Register's Book, but in the minute book, 10th *March*, 1692, is the following entry, *Veneris 10 die Martii*, 1692. "At the Rolls: Master of the

"Rolls, Dr. *Edisbury*, *Cur.* Declare  
"that the plaintiff must redeem all *three*  
"mortgages or none, and therefore  
"decree an account of what due for  
"principal and interest on all *three*  
"mortgages and costs, and on pay-  
"ment, decree a reconveyance of the  
"*three* mortgages, and the Master to  
"make all just allowances to either  
"side."

DE

[ 287 ]

## TERMINO PASCHÆ, 1693.

### IN CURIA CANCELLARIÆ.

### ASHFIELD *versus* ASHFIELD DOMINAM.

CASE 275.

27 April.

The plaintiff having obtained a decree for his portion, out of the assets of Sir *John Ashfield*, the defendant's late husband; belonging to his wife as executrix, in trust for such uses as he by deed or will should appoint; and in default of such appointment in trust for himself, his executors, &c. He afterwards devises this estate to his wife and children. This is assets, and the devise to the wife and children is only a legacy, and it must be liable to the debts of the husband in the first place.

ASHFIELD v.  
ASHFIELD.

on the Master's report it appeared, that Sir *John Ashfield* by deed, had assigned the personal estate, to which the defendant was intitled, as executrix to her former husband, to trustees, upon trust for such uses, intents and purposes, and for such person and persons, as he by deed or will should direct or appoint, and in default of such appointment in trust for himself, his executors, administrators and assigns; and afterwards by his will devises this estate to his wife and children.

*Per Cur.* This assignment alters the property of the estate, and the trust being general, as he should direct or appoint, he was owner in equity, and had the power and disposal of this estate during his life; and the disposition and appointment he hath made by his will to his wife and children, is but in the nature of a legacy, and the rather in this case, because no notice is taken in the will of the power of appointing, and therefore decreed it to be assets, and liable to the plaintiff's demands. (1)

(1) There are several entries of proceedings for contempt against defendant, for not performing decree, Reg. Lib. 1692. A. fol. 815, 911, 1006, but

the editor has not been able to find any entry of the decree. Vide Sir *Edward Turner's* case, ante 1 vol. 7. *Thompson v. Towne*, post 319.

CASE 276.  
May 1.  
In Court.  
One for 300l.  
grants a rent  
of 60l. per ann.  
for seven  
years. Whe-  
ther redeem-  
able.

#### FAWCET *versus* BOWERS.

THE plaintiff for 300l. had granted to the defendant 60l. *per ann.* for seven years, payable half yearly, and secured by demise and redemise.

The *Master of the Rolls* decreed a redemption on payment of what was in arrear of the annual payment without interest or costs. On an appeal the court took time to consider of it. (2)

(2) After a decree and two rehearings, Reg. Lib. 1692. A. fol. 614. afterwards 18th *May*, defendant being in possession, it was agreed that upon plaintiff's having possession, he should

give security to redeem at a short day to be allowed by the Master, and to pay defendant his principal, interest and costs, and that was to be in lieu of the 60l. *per ann.* Reg. Lib. 1692, A. fol. 534.

CASE 277.  
May 8.  
In Court.  
Eq. Ca. Ab.  
36. pl. 5. 380.  
pl. 5. S. C.  
Plaintiff for  
80l. conveys

#### HAMPTON *versus* SPENCER & à contra.

*HAMPTON* in consideration of 80l. paid by the defendant *Spencer*, conveys an house, and surrenders a copyhold estate to the defendant and his heirs; the bill was for a reconveyance on payment of the remainder due of the 80l. and interest. Defendant insists the conveyance was absolute, but confesses that after the 80l. paid with interest, it was to be in trust for the plaintiff's wife and children. Plaintiff replies to the answer, and no proof of the trust; yet decreed the trust for the benefit of the wife and children.

The defendant by answer insisted, that the conveyance was absolute to him and his heirs, without any proviso, clause, or agreement, that the plaintiff might redeem, &c. But confessed it was in trust, that after the 80*l.* with interest was paid, defendant should stand seised for the benefit of the plaintiff's wife and children, although no such trust was declared by writing.

HAMPTON v.  
SPENCER.

For the plaintiff it was insisted, that he having replied to the defendant's answer, who had not made any proof of such pretended trust; he was bound by his confession, that he was not to have the estate absolutely to himself, and no regard ought to be had to the matter set forth in avoidance of the plaintiff's demand, because the defendant had not proved it; Ant. Ca. 175. yet the court decreed the trust for the benefit of the wife and children. (1) [ 289 ]

(1) The plaintiff by an order for that purpose, sued *in forma pauperis*, and by an order 17th April, 1688, Reg. Lib. 1688, A. fol. 275. the cause was to be heard the first day of pauper causes, in Trinity Term then next. No entry however appears till the 8th May, 1693, where the cause appears to have received a hearing before the Master of the Rolls, 4th July preceding, who by the decree as there stated, ordered an account as in the usual way in case of redemption, and also of monies due to *Spencer*, for the maintenance of the plaintiff *Hampton's* children, and afterwards the court was to give directions touching the conveyance to be made by *Spencer* to *Hampton* of the premises in question. The cause came on the said 8th May, for a rehearing, when the counsel for the plaintiff insisted that the account ought not to have been so ordered, and that it ought not to be inquired into before the Master, whether the consideration money were paid or not, being not only acknowledged by the plaintiff in the deeds, but also sworn in the defendant's answer, and it was stated that by the order, the trust reposed by the plaintiff in *Spencer* for the benefit of the children, is annulled and discharged. The deed and the circumstances of the trust are not stated: the decree, *int. al.* is, "that the court saw no cause to put the

" said defendant *Spencer* to prove  
" actual payment of the said 80*l.* con-  
" sideration money in the said deeds,  
" after fourteen years standing, but  
" that the same ought to be taken and  
" admitted as paid by him, and that  
" there was no reason at the time the  
" said deed was made, for *Spencer*  
" to declare any trust, though the  
" same had been voluntary, and so  
" there can be no resulting trust to  
" the plaintiff, but the said estate  
" ought to go as the said *Spencer* hath  
" declared it in his answer; and after  
" he is reimbursed what he hath  
" paid and expended, the said estate  
" to be for the benefit of the said  
" *Hampton's* children, and in taking  
" the account the Master is hereby  
" directed to allow the said defendant  
" *Spencer* the said 80*l.* and interest,  
" and what monies he hath expended  
" for and on behalf of the said *Hamp-*  
" *ton's* children, and after the said  
" *Spencer* is satisfied what shall be  
" found due to him on the said ac-  
" count, he the said *Spencer* and his  
" heirs are to stand seised of the said  
" premises, to the use of the plaintiffs,  
" the children of the said plaintiff  
" *Hampton*, and of their heirs and  
" assigns for ever." Reg. Lib. 1692.  
A. fol. 549. As to the doctrine of  
courts of equity considering absolute  
conveyance as mortgage, vide *Powell's*  
*Law of Mort.* 190, 204.

CASE 278.

Eodem die.

In Court,

*A.* on the marriage of *B.*his son settles a lease on *B.*

for life, to his wife for life,

and then to the issue of the marriage.

*B.* covenants from time to

time to renew the lease, and to assign it on the same trust.

He renews the lease, but does not assign it to the trustees, and dies greatly indebted. This lease is bound by the marriage-agreement, and is not assets for payment of *B.*'s debts.PLOWMAN Widow *versus* PLOWMAN & è contra.

ON the son's marriage, the father settles a lease for years, held of the *Queen Dowager*, on the son for life, to the wife for life, and then to the issue of that marriage; the son covenants from time to time to renew the lease, and to assign it to trustees to keep the lease on foot, as long as the wife, or any child of the marriage should live. The son renews the lease in his own name, and makes no assignment thereof to trustees, and dies greatly indebted, without assets.

*Per Cur.* The lease is bound by the marriage-agreement, and shall not be assets, nor liable to debts. (1)

(1) The bill in this case was filed by the widow of the son against the settlor and another whom the son had made his executors, and states that by indenture 27th *May*, 1672, the settlor in consideration of the marriage of his son with the plaintiff, of natural affection, and of 1000*l.* portion with the plaintiff, assigned the premises in question to trustees on such trusts as in the printed report. That after the death of the son, the father the defendant had entered into possession, and then the bill prayed the execution of the settlement; the answer of the defendant the father stated, that the son renewed the lease twice, but that the latter renewal was at the expence of the defendant to the amount of 234*l.* and that he was bound for the plaintiff's husband in 300*l.* and sought to charge the estate therewith, and with other disbursements made by him for the maintenance of the plaintiff's family; and the defendant also insisted on an agreement entered into between him and the plaintiff, whereby he was to pay the plaintiff 40*l. per ann.* and should let her have part of the house and several orchards, and two dovecotes, and the benefit of the yard in lieu of the

settlement. And the decree was, "that the defendant should deliver up possession of the premises, and assign the same to the other defendants, the trustees in the marriage-settlement, upon the trusts thereof, and should account for the rents, &c. and that it should be referred to the Master to take an account of the personal estate of the plaintiff's late husband, and if on the taking such account it shall appear there is not assets sufficient of the personal estate to pay the debts due and owing by him at the time of his decease, then such of the debts of the plaintiff's husband, as the defendant the father hath paid or secured since the said agreement insisted on by the defendant, and the death of the plaintiff's husband before the exhibiting of the said bill, and as the personal estate shall not extend to pay, are to be allowed him upon his account, and to be a charge upon the said estate, if not sufficient assets in his hands to answer the same." But nothing in the decree extends to the point of debts in general. Reg. Lib. 1692. *B.* fol. 429.



DOMINA HOLLES *versus* WYSE.CASE 279.  
May 9.

THE plaintiff lent the defendant money on a mortgage at 5*l.* *per cent.* interest, but if not punctually paid, (1) then to answer interest at 6*l.* *per cent. per ann.* There being a great arrear of interest, the question was, whether it should be computed after the rate of 5*l.* or 6*l.* *per cent.*

Interest reserved at 5*l.* *per cent.* but if not duly paid, then to answer interest at 6*l.* *per ann.* Great arrear of interest. Mortgagor decreed to pay but 5*l.* *per cent.* the reservation at 6*l.* *per cent.* being only as a *Nomine pænæ*.

Decreed the defendant should pay but 5*l.* *per cent.* and the court looked upon the reservation of 6*l.* *per cent.* but as a *nomine pænæ*, to oblige the defendant to the more punctual payment. (2) But the case of Lord *Hallifax* was cited, where interest reserved at 6*l.* *per cent.* but if duly paid, agreed to accept 5*l.* *per cent.* and because not punctually paid, interest allowed at 6*l.* *per cent. per ann.* (3)

[ 290 ]

But where interest was reserved at 6*l.* *per cent.* and if duly paid, then agreed to take 5*l.*; interest not duly paid, and court allowed 6*l.* *per cent.* Ant. Case 131. Post. Case 303.

(1) Every six months, R. L.

(2) The defendant *Wyse* filed a cross bill, praying time to redeem, and to be relieved against the proviso for payment of interest at 6*l.* *per cent.* and the decree was for payment of interest at 5*l.* *per cent.* only, but with this further, that he was on or before a short day therein mentioned, to pay 200*l.* of the interest in arrear, and to

sign the Register's Book forthwith, and in default of such payment, and signing, and also payment of what should be certified due as therein mentioned, then the said *Wyse's* bill was from thenceforth to stand absolutely dismissed with costs, Reg. Lib. 1692. A. fol. 259.

(3) Vide *Lord Hallifax's* case, ante p. 134. *Strode v. Parker*, post 316.

COTTON *versus* COTTON & ASHTON.CASE 280.  
Eq. Ca. Ab.  
63. pl. 2. Ch.  
Rep. 138. Pre.  
Ch. 42. S. C.  
Plaintiff being  
an executor  
and residuary  
legatee of her  
former hus-  
band, lends  
100*l.* to *A.* and  
afterwards

THE plaintiff being executor and residuary legatee to her former husband, lends 100*l.* to *A.* and *B.* for which she took a note in her own name, and as a farther security took also a bond from *A.* and *B.* in the name of *J. S.* in trust for herself, and afterwards married *B.* one of the obligors, who died. The bill was to compel payment of 100*l.*

*B.* and took a note for it in her own name, and a bond in a trustee's name, and afterwards marries *B.* one of the obligors; the bond is not extinct.

It was insisted by the defendant's counsel, that the bond being a trust for the wife, and she marrying one of the obligors, the marriage was a release of the debt, and it was extinguished, as it would have been in case the bond had been in her own name. *Sed non allocatur.* (4)

(4) 30th April, 1691. The bill in this case was filed by one of the obli- gors in the bond against the obligee and his trustee, to be relieved against

it, and it appears from the statement in the Register's Book, that the plaintiff was bound with her son *Isaac Cotton*, in the bond in question, to the defendants *Mary Cotton* and *Thomas Ashton* for the sum of 150*l.* which was in fact the property of *Mary Cotton*, as executrix of her former husband, and that *Thomas Ashton's* name was only used in the bond in trust for her, and that afterwards the said *Mary Cotton*, married *Isaac* the son of the plaintiff, and one of the obligors. The 150*l.* was paid into court, and the decree was, "that the defendant *Mary Cotton* ought to be paid the money due on the said bond, together with the interest and costs at law, and in this court, and that the court could give the plaintiff no further relief against the said defendant, but

"that she should be reimbursed or repaid the same, so far only as the defendant *Cotton* hath assets of her said husband's estate, which if the said plaintiff shall think fit to have an account of, it shall be on peril of costs, the said defendant having by answer denied assets." Reg. Lib. 1691. A. fol. 579. Afterwards 13th May, 1692, on a re-hearing, *Somers*, Lord Chancellor, affirmed the decree, Reg. Lib. 1692. A. fol. 496. If the feme obligee take the obligor to husband, this is a release in law. The like law is, if there be two femes obligees, and the one take the debtor to husband, Co. Litt. 264. b. Vide note 210. there. Sir *John Needham's* case, 8 Co. Rep. 136. *Wankford v. Wankford*, 1 Salk. 306. *Fursor v. Penton*, ante 1 vol. 408. and cases cited in not. p. 409. .

[ 291 ]

DE

## TERM S. TRINITATIS, 1693.

IN CURIA CANCELLARIÆ.

WOODROFFE *versus* FARNHAM.

CASE 281.

17 Junii.

Eq. Ca. Ab.

308. pl. 5.

One apprentice gives a bond to another apprentice for 50*l.* won at play. Bond decreed to be delivered up.—Gaming among apprentices being of the worst consequence.

By the custom of *London*, a master may justify turning away his apprentice, if he frequents gaming.

THE bill was to be relieved against a bond of *one hundred* pounds penalty for payment of *fifty* pounds and interest. The case appeared to be that the plaintiff and defendant being both of them apprentices, the defendant at *two* sittings at *Whist*, had won of the plaintiff about *one hundred* pounds in the whole; for the securing *fifty* pounds, part thereof, the bond in question was given. The defendant by answer, acknowledged the money won at play, and though he was unwilling and declined playing for so much; yet the plaintiff would not suffer him to give over.

*Per Cur.* Gaming ought to be discouraged in all cases, and much more in this, where it is between apprentices; by the custom of *London*, it is a sufficient cause for a master to turn away his apprentice, because he frequents gaming, and may justify it before the chamberlain; and the custom seems

to be grounded on good reason, the Master being in danger to have his cash wasted, and his shop and house robbed, to supply the extravagances of an apprentice who frequents gaming. Decreed the bond to be delivered up and cancelled. (1)

WOODROFFE  
v. FARNHAM.

(1) Vide Stat. 16 Car. 2. Cap. 7. 9 Ann. Cap. 14. But the above reasoning does not appear applicable to the case of marriage, for if an apprentice in *London* marries without his

master's consent, the master cannot turn him away, but must sue his covenant, *Stephenson v. Houlditch*, post p. 492.

### LANE *versus* WILLIAMS.

ONE *Newberry* and *Williams* the defendant's late husband, being woollen-drapers and partners, *Newberry* survived, and some years after *Newberry* also died, and the plaintiff sought to recover the debt against the executors of *Newberry*, who signed the note; but there being a deficiency of assets, he now brought this bill to have satisfaction out of the estate of *Williams*.

stock, or used in trade; yet this note being given in the shop by one of the partners, it shall bind both; and though this note at law binds only the executor of the surviving partner, yet in equity the creditor may follow the estate of the other.

CASE 282.  
30 Junii.  
*A.* and *B.*  
partners as  
woollen-dra-  
pers, *A.* re-  
ceives money  
in the shop,  
and gives his  
note for it.  
Though no  
proof that this  
money was  
brought into

For the defendant it was insisted, that it does not appear that *Williams* was privy or consenting to the borrowing of this money, or that it was brought into stock, or used in the trade: and had the plaintiff demanded it in the life-time of *Newberry*, or before his estate was wasted and assets exhausted, the defendant might have had recourse to the bond of copartnership, to repair the loss sustained by *Newberry*'s taking up this money, and giving such note, without the consent or privity of her husband; but she had now lost that remedy, by the plaintiff's laches in not demanding the debt sooner; and therefore the plaintiff ought not to have the assistance of a court of equity to charge her. The *Master of the Rolls*, before whom the cause was first heard, dismissed the bill.

*Per Cur.* The money being paid at the shop, the note of one partner binds both: and though at law the note stands good only against the executor of the surviving partner, who was *Newberry*, who received the money, and signed the note, yet proper in equity to follow the estate of *Williams* for satisfaction; and decreed it accordingly. (2)

[ 293 ]

## CASE 283.

14 Julii.

In Court.

*A.* and *B.* partners in trade; *A.* embezzles the joint-stock, and contracts private debts and becomes bankrupt, and the partnership estate is assigned by the commissioners: first out of the joint stock all the partnership debts are to be paid; then whether out of *A.*'s share, satisfaction is not to be made for what he has embezzled of the Stock.

RICHARDSON *versus* GOODING & Al'.

*RICHARDSON* senior, and *Richardson* junior, and one *Gonson* were partners together in the trade of a *Dry-salter*; *Gonson* embezzles and wastes the joint-stock, contracts private debts, and becomes a bankrupt. The commissioners assign the goods in partnership. Bill by the plaintiff for an account, and to have the goods sold to the best advantage; and insisted that out of the produce of the goods, the debts owing by the joint trade ought to be paid in the first place, and that out of *Gonson*'s share, satisfaction must be made for what *Gonson* had wasted or embezzled; and that the assignees could be in no better a case than the bankrupt himself, and were intitled only to what his third part would amount unto clear, after debts paid, and deductions for his embezzlement; and the court seemed to be of that opinion. But sent it to a Master to take the account, and state the case. (1)

(1) Reg. Lib. 1692. *B.* fol. 538. Afterwards 7th *Dec.* following, the cause came on upon the Master's report, of monies received by the assignees and received on account of the partnership stock, and the decree was, "that the creditors in the said joint trade, do come in before the said Master, and prove their debts, and such of the said debts as the said Master shall find do carry interest, the said receiver and the assignees are to pay the same off in the first place, and the rest of the said creditors are to be paid in proportion, so far as the monies in their hands will extend to pay, but the said creditors are first to give security to be allowed of by the said Master, to be answerable for what they shall receive, as this court upon the said Master's further report to be made in this cause shall think fit to direct."

Reg. Lib. 1693. *B.* fol. 98. And this decree was afterwards, 1st *March*, 1694, affirmed on a petition of defendant to be heard against the same; and the creditors of the partnership proving their debts and being in the country, were to be at liberty to give such security as aforesaid, before a Master extraordinary, to be approved of by the said Master, Reg. Lib. 1693. *B.* fol. 200. There are two orders afterwards, 3d *June*, and 2d *August* following, on the Master's report in confirmation, Reg. Lib. 1693. *B.* fol. 550. 563. Vide *West v. Skip*, 1 *Vez.* 242. [S. C. by name of *Skipp v. Harwood*, 2 *Swan.* 586.] *Fox v. Hanbury*, *Cowp.* 445. *Eddie v. Davidson*, *Doug.* 650. *Taylor v. Fields*, 4 *Ves.* 396. [*Barker v. Goodair*, 11 *Ves.* 78. *Exparte King*, 17 *Ves.* 115. 1 *Rose*, 212. *Exparte Reid*, 2 *Rose*, 84.]

## CASE 284.

14 Julii.

In Court.

One devises 3000*l.* to his daughter at 21, or marriage, provided she marry with the consent of *A. B.* and if she married without such consent, then she was to have but 500*l.* and the 3000*l.* legacy to cease. The daughter marries without consent, yet she shall have her whole 3000*l.* because it is not devised over, but only to fall into the surplus.—Post 323.

GARRET & Ux' *versus* PRITTY & Al'.

Mr. *Pritty* by his will devised three thousand pounds to his daughter the plaintiff *Garrett's* wife, at \*twenty-one, or

[ \*294 ]

marriage, and recommended her to the care of one Mr. *Scriven*, his friend. Provided if she married without the consent of *Scriven*, her legacy of *three thousand* pounds to cease, and (1) she to have but *five hundred* pounds, and made the defendant his son executor, and residuary legatee. The plaintiff intermarried without the consent of *Scriven*; yet the court decreed her the whole *three thousand* pounds with interest from the marriage, and principally because it was not expressly devised over, but to fall into the surplus. (2)

GARRET v.  
PRITTY.

(1) And in lieu thereof he gave unto the plaintiff, 500*l.* only, R. L. residue. Vide *Jarvis & Ux' v. Duke*, ante 1 vol. p. 20. and cases cited in not. (1) there. *Scott v. Tyler*, 2 Bro. Ch. Rep. 431. [2 Dick. 712.]

(2) The decree is so, but no reason stated, Reg. Lib. 1692. A. fol. 821. Note, there is a bequest over of the

### BELLASIS DOMINA *versus* COMPTON and FRANKLAND & Al'.

THE defendant *Compton* made a mortgage for a term for years to the Lord *Bellasis*, for securing *one thousand eight hundred* pounds and interest; the Lord *Bellasis* assigns it over to the defendant *Frankland*, and some time afterwards gave instructions for the drawing of a declaration of trust, that *A.* and *B.* should have *twenty* pounds *per ann.* apiece for life, out of the interest-money, then to his grand-daughter, the daughter of the Lord *Dunham*, if she attained *twenty-one*; but if she died before, then to the Lady *Abergavenny* and *three* others of his daughters: but before this deed was executed, the Lord *Bellasis* dies, having made his will, and the Lady *Bellasis* executrix. She brought her bill, alleging the assignment was made in trust for the testator. The defendant *Frankland* confessed the assignment, and that he was to take no benefit to himself, and set forth the trust to be *ut supra*.

CASE 285.  
Eq. Ca. Ab.  
381. pl. 5. S. C.  
Eodem die.  
A mortgagee assigns over his mortgage to *J. S.* and declares a trust by parol for other persons. *J. S.* acknowledges the trust. There being an express trust declared, though by parol only, shall prevent a resulting trust to the assignor.

The counsel for the plaintiff would have this to be a resulting trust; but for the defendant it was answered, that there being an express trust declared, though but by parol, there could be no resulting trust, for resulting trusts are saved indeed by the *Statute of Frauds and Perjuries*; but are only saved and left as they were before the act: now a bare declaration by parol, before the act, would prevent any resulting trust.

The statute of frauds and perjuries which saves resulting trusts extends only to such as were resulting trusts before the statute.

[ 295 ]

The court seemed to be of that opinion, that there could not in this case be any resulting trust, and inclined to decree for the defendant. But it being insisted on by the plaintiff's counsel, that the Lord *Bellasis* was not *compos mentis*, when

**BELLASIS v. COMPTON and FRANKLAND.** he gave instructions for the deed of trust, and there being some proof to that purpose, the court directed that matter to be tried at law. (1)

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(1) For the leading cases on the doctrine of resulting trusts, vide *Foster v. Munt*, 1 vol. 473. *Mumma v. Mumma*, ante p. 19. and cases cited in not. there respectively.

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CASE 286.  
14 Julii.

Vol. I. Case 293, 458.  
Money by marriage articles is agreed to be laid out in land, and settled on the husband and wife and their issue, remainder to the right heirs of the husband. Though the money at first is bound by the articles; yet when husband and wife are dead without issue, the money is considered as in the disposal of the husband, and will be assets and go to his executor or administrator; and *a fortiori* to his residuary legatee.

**CHICHESTER, Bart. versus BICKERSTAFF Mil' & Al'.**

THE plaintiff was brother and heir to Sir *John Chichester* deceased, who married Sir *Charles Bickerstaff's* daughter, and by articles on the marriage, Sir *Charles* was to pay *one thousand five hundred* pounds in part of the portion, which together with *one thousand five hundred* pounds more, to be advanced by Sir *John*, within *three* years after the marriage, was to be invested in lands, and settled on Sir *John*, for life, his intended wife for life, to first and other sons in tail, remainder to daughters, remainder to Sir *John's* right heirs. Sir *John* and his *Lady* within a year after the marriage fall sick of the small pox, the wife dies first, and Sir *John* in *three* days after, without issue; Sir *John* having made a will, and the defendant Sir *Charles* executor; and devised the residue of his personal estate after debts, &c. paid, to the defendant *Frances Chichester* his sister.

[ 296 ]

The plaintiff's bill was to compel the defendant Sir *Charles*, to pay him the *one thousand five hundred* pounds, insisting that by virtue of the marriage-articles, the money ought to be looked on and considered in equity as land, and therefore belonged to him as heir to his brother.

*Per Cur.* This money, though once bound by the articles, yet when the wife died without issue, became free again, and was under the power and dispose of Sir *John*, as the land would likewise have been, in case a purchase had been made pursuant to the articles, and therefore would have been assets to a creditor, and must have gone to the executor or administrator of Sir *John*; and this case is much stronger where there is a residuary legatee, and therefore dismissed the bill.

Money shall in many cases be considered as land, when bound by articles in order to a purchase, but whilst it remains still money, and no purchase made, the same shall be



deemed as part of the personal estate of such person, who might have aliened the land in case a purchase had been made. (1)

(1) Vide *Symons v. Rutter*, ante p. 227. [and *Kettleby v. Attwood*, ante 1 vol. 298. and cases there cited.] In *Lechmere v. Earl of Carlisle*, 3 P. Wms. 221. the authority of this case is somewhat questioned by Sir Joseph Jekyl, the Master of the Rolls, and on the same ground by Talbot, Lord Chancellor, *Lechmere v. Lechmere*, Forr. 90. Sed vide dictum in favour of it, per Thurlow, Lord Chancellor, *Pultney v. Lord Darlington*, 1 Bro. Ch. Rep. 238.

### DOMINA STOWELL & Al' versus COLE.

THE now defendant *Cole* brought a bill against the Lord *Stowell*, the father of the late Lord *Stowell*, to redeem a mortgage. The cause was heard, and an account decreed, a report made, and divers proceedings thereon, and orders made for *Cole* to pay costs, and to deliver possession. The Lord *Stowell* died, and \*made the late Lord *Stowell* his son executor, who brought a bill to revive the former suit, and several proceedings were thereupon had, and (*inter alia*) an appeal to the *House of Peers*, from some order made touching the account in question: but before the matter was finally determined, the Lord *Stowell* the son also dies. The now plaintiff as executor to her late husband, brought a bill to foreclose, as likewise to revive the decree and proceedings in the cause wherein *Cole* was plaintiff, and to have the benefit of orders for costs, and for delivery of possession.

It was insisted by the defendant *Cole's* counsel, that as this case was, the now plaintiff who stood in the place of the defendant in the former cause, could not revive, the bill being only to redeem, and in such case, if upon the event of the account it should be found too heavy, and the estate not worth redeeming, all that could be done was to dismiss the bill with costs, and the court could not decree the plaintiff to pay what should appear to be due upon the account. But where a mutual account is decreed upon a dealing in trade, or the like, there possibly the plaintiff shall not be admitted to dismiss his bill after an account decreed; but shall upon his own bill be decreed to pay what shall be found due upon the account; so in that case there may be reason that a defendant may revive.

*Per Cur.* If this question was *res integra*, and came in the first instance before the court, possibly a defendant as this

CASE 287.  
23 Julii.

Mortgagor brings a bill to redeem. An account is decreed, a report made, divers proceedings are had in the cause, and the plaintiff is ordered to pay costs and deliver possession. The defendant, the mortgagee dies. Whether his executor can revive the suit.

[ \*297 ]

Where there is a decree for a mutual account, plaintiff on his own bill may be decreed to pay the balance of the account, and defendant may revive as well as the plaintiff in case of an abatement.

ASHFIELD v.  
ASHFIELD.

on the Master's report it appeared, that Sir *John Ashfield* by deed, had assigned the personal estate, to which the defendant was intitled, as executrix to her former husband, to trustees, upon trust for such uses, intents and purposes, and for such person and persons, as he by deed or will should direct or appoint, and in default of such appointment in trust for himself, his executors, administrators and assigns; and afterwards by his will devises this estate to his wife and children.

*Per Cur.* This assignment alters the property of the estate, and the trust being general, as he should direct or appoint, he was owner in equity, and had the power and disposal of this estate during his life; and the disposition and appointment he hath made by his will to his wife and children, is but in the nature of a legacy, and the rather in this case, because no notice is taken in the will of the power of appointing, and therefore decreed it to be assets, and liable to the plaintiff's demands. (1)

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(1) There are several entries of proceedings for contempt against defendant, for not performing decree, Reg. Lib. 1692. A. fol. 815, 911, 1006, but the editor has not been able to find any entry of the decree. Vide Sir *Edward Turner's* case, ante 1 vol. 7. *Thompson v. Towne*, post 319.

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CASE 276.

May 1.

In Court.

One for 300l. grants a rent of 60l. per ann. for seven years. Whether redeemable.

FAWCET *versus* BOWERS.

THE plaintiff for 300l. had granted to the defendant 60l. *per ann.* for seven years, payable half yearly, and secured by demise and redemise.

The *Master of the Rolls* decreed a redemption on payment of what was in arrear of the annual payment without interest or costs. On an appeal the court took time to consider of it. (2)

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(2) After a decree and two rehearsings, Reg. Lib. 1692. A. fol. 614. afterwards 18th *May*, defendant being in possession, it was agreed that upon plaintiff's having possession, he should give security to redeem at a short day to be allowed by the Master, and to pay defendant his principal, interest and costs, and that was to be in lieu of the 60l. *per ann.* Reg. Lib. 1692, A. fol. 534.

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CASE 277.

May 8.

In Court.

Eq. Ca. Ab. 36. pl. 5. 380. pl. 5. S. C. Plaintiff for 80l. conveys

HAMPTON *versus* SPENCER & è contra.

*HAMPTON* in consideration of 80l. paid by the defendant *Spencer*, conveys an house, and surrenders a copyhold estate to the defendant and his heirs; the bill was for a reconveyance on payment of the remainder due of the 80l. and interest. an estate absolutely to the defendant, and brings a bill to redeem. Defendant insists the conveyance was absolute, but confesses that after the 80l. paid with interest, it was to be in trust for the plaintiff's wife and children. Plaintiff replies to the answer, and no proof of the trust; yet decreed the trust for the benefit of the wife and children.

The defendant by answer insisted, that the conveyance was absolute to him and his heirs, without any proviso, clause, or agreement, that the plaintiff might redeem, &c. But confessed it was in trust, that after the 80*l.* with interest was paid, defendant should stand seised for the benefit of the plaintiff's wife and children, although no such trust was declared by writing.

HAMPTON *v.*  
SPENCER.

For the plaintiff it was insisted, that he having replied to the defendant's answer, who had not made any proof of such pretended trust; he was bound by his confession, that he was not to have the estate absolutely to himself, and no regard ought to be had to the matter set forth in avoidance of the plaintiff's demand, because the defendant had not proved it; Ant. Ca. 175. yet the court decreed the trust for the benefit of the wife and children. (1) [ 289 ]

(1) The plaintiff by an order for that purpose, sued *in forma pauperis*, and by an order 17th April, 1688, Reg. Lib. 1688, A. fol. 275. the cause was to be heard the first day of pauper causes, in Trinity Term then next. No entry however appears till the 8th May, 1693, where the cause appears to have received a hearing before the Master of the Rolls, 4th July preceding, who by the decree as there stated, ordered an account as in the usual way in case of redemption, and also of monies due to *Spencer*, for the maintenance of the plaintiff *Hampton's* children, and afterwards the court was to give directions touching the conveyance to be made by *Spencer* to *Hampton* of the premises in question. The cause came on the said 8th May, for a rehearing, when the counsel for the plaintiff insisted that the account ought not to have been so ordered, and that it ought not to be inquired into before the Master, whether the consideration money were paid or not, being not only acknowledged by the plaintiff in the deeds, but also sworn in the defendant's answer, and it was stated that by the order, the trust reposed by the plaintiff in *Spencer* for the benefit of the children, is annulled and discharged. The deed and the circumstances of the trust are not stated: the decree, *int. al.* is, "that the court saw no cause to put the

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conveyance as mortgage, vide *Powell's*  
*Law of Mort.* 190, 204.

ASHFIELD v.  
ASHFIELD.

on the Master's report it appeared, that Sir *John Ashfield* by deed, had assigned the personal estate, to which the defendant was intitled, as executrix to her former husband, to trustees, upon trust for such uses, intents and purposes, and for such person and persons, as he by deed or will should direct or appoint, and in default of such appointment in trust for himself, his executors, administrators and assigns; and afterwards by his will devises this estate to his wife and children.

*Per Cur.* This assignment alters the property of the estate, and the trust being general, as he should direct or appoint, he was owner in equity, and had the power and disposal of this estate during his life; and the disposition and appointment he hath made by his will to his wife and children, is but in the nature of a legacy, and the rather in this case, because no notice is taken in the will of the power of appointing, and therefore decreed it to be assets, and liable to the plaintiff's demands. (1)

(1) There are several entries of proceedings for contempt against defendant, for not performing decree, Reg. Lib. 1692. A. fol. 815, 911, 1006, but

the editor has not been able to find any entry of the decree. Vide Sir *Edward Turner's* case, ante 1 vol. 7. *Thompson v. Towne*, post 319.

CASE 276,  
May 1.

### FAWCET *versus* BOWERS.

In Court.  
One for 300l.  
grants a rent  
of 60l. per ann.  
for seven  
years. Whe-  
ther redeem-  
able.

THE plaintiff for 300l. had granted to the defendant 60l. *per ann.* for seven years, payable half yearly, and secured by demise and redemise.

The *Master of the Rolls* decreed a redemption on payment of what was in arrear of the annual payment without interest or costs. On an appeal the court took time to consider of it. (2)

(2) After a decree and two rehearsings, Reg. Lib. 1692. A. fol. 614. afterwards 18th *May*, defendant being in possession, it was agreed that upon plaintiff's having possession, he should

give security to redeem at a short day to be allowed by the Master, and to pay defendant his principal, interest and costs, and that was to be in lieu of the 60l. *per ann.* Reg. Lib. 1692, A. fol. 534.

CASE 277.  
May 8.

### HAMPTON *versus* SPENCER & è contra.

In Court.  
Eq. Ca. Ab.  
36. pl. 5. 380.  
pl. 5. S. C.  
Plaintiff for  
80l. conveys  
an estate absolutely to the defendant, and brings a bill to redeem. Defendant insists the conveyance was absolute, but confesses that after the 80l. paid with interest, it was to be in trust for the plaintiff's wife and children. Plaintiff replies to the answer, and no proof of the trust; yet decreed the trust for the benefit of the wife and children.

HAMPTON in consideration of 80l. paid by the defendant *Spencer*, conveys an house, and surrenders a copyhold estate to the defendant and his heirs; the bill was for a reconveyance on payment of the remainder due of the 80l. and interest.

Defendant insists the conveyance was absolute, but confesses that after the 80l. paid with interest, it was to be in trust for the plaintiff's wife and children. Plaintiff replies to the answer, and no proof of the trust; yet decreed the trust for the benefit of the wife and children.

The defendant by answer insisted, that the conveyance was absolute to him and his heirs, without any proviso, clause, or agreement, that the plaintiff might redeem, &c. But confessed it was in trust, that after the 80*l.* with interest was paid, defendant should stand seised for the benefit of the plaintiff's wife and children, although no such trust was declared by writing.

HAMPTON v.  
SPENCER.

For the plaintiff it was insisted, that he having replied to the defendant's answer, who had not made any proof of such pretended trust; he was bound by his confession, that he was not to have the estate absolutely to himself, and no regard ought to be had to the matter set forth in avoidance of the plaintiff's demand, because the defendant had not proved it; Ant. Ca. 175. yet the court decreed the trust for the benefit of the wife and children. (1) [ 289 ]

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*Per Cur.* This assignment alters the property of the estate, and the trust being general, as he should direct or appoint, he was owner in equity, and had the power and disposal of this estate during his life; and the disposition and appointment he hath made by his will to his wife and children, is but in the nature of a legacy, and the rather in this case, because no notice is taken in the will of the power of appointing, and therefore decreed it to be assets, and liable to the plaintiff's demands. (1)

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(1) There are several entries of proceedings for contempt against defendant, for not performing decree, Reg. Lib. 1692. A. fol. 815, 911, 1006, but the editor has not been able to find any entry of the decree. Vide Sir *Edward Turner's* case, ante 1 vol. 7. *Thompson v. Towne*, post 319.

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CASE 276.

May 1.

In Court.

One for 300l. grants a rent of 60l. per ann. for seven years. Whether redeemable.

FAWCET *versus* BOWERS.

THE plaintiff for 300l. had granted to the defendant 60l. *per ann.* for seven years, payable half yearly, and secured by demise and redemise.

The *Master of the Rolls* decreed a redemption on payment of what was in arrear of the annual payment without interest or costs. On an appeal the court took time to consider of it. (2)

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(2) After a decree and two rehearsings, Reg. Lib. 1692. A. fol. 614. afterwards 18th *May*, defendant being in possession, it was agreed that upon plaintiff's having possession, he should give security to redeem at a short day to be allowed by the Master, and to pay defendant his principal, interest and costs, and that was to be in lieu of the 60l. *per ann.* Reg. Lib. 1692, A. fol. 534.

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CASE 277.

May 8.

In Court.

Eq. Ca. Ab. 36. pl. 5. 380. pl. 5. S. C. Plaintiff for 80l. conveys

HAMPTON *versus* SPENCER & è contra.

HAMPTON in consideration of 80l. paid by the defendant *Spencer*, conveys an house, and surrenders a copyhold estate to the defendant and his heirs; the bill was for a reconveyance on payment of the remainder due of the 80l. and interest. an estate absolutely to the defendant, and brings a bill to redeem. Defendant insists the conveyance was absolute, but confesses that after the 80l. paid with interest, it was to be in trust for the plaintiff's wife and children. Plaintiff replies to the answer, and no proof of the trust; yet decreed the trust for the benefit of the wife and children.



The defendant by answer insisted, that the conveyance was absolute to him and his heirs, without any proviso, clause, or agreement, that the plaintiff might redeem, &c. But confessed it was in trust, that after the 80*l.* with interest was paid, defendant should stand seised for the benefit of the plaintiff's wife and children, although no such trust was declared by writing.

HAMPTON v.  
SPENCER.

For the plaintiff it was insisted, that he having replied to the defendant's answer, who had not made any proof of such pretended trust; he was bound by his confession, that he was not to have the estate absolutely to himself, and no regard ought to be had to the matter set forth in avoidance of the plaintiff's demand, because the defendant had not proved it; Ant. Ca. 175. yet the court decreed the trust for the benefit of the wife and children. (1) [ 289 ]

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CASE 277.  
May 8.

### HAMPTON *versus* SPENCER & è contra.

In Court.  
Eq. Ca. Ab.  
36. pl. 5. 380.  
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Plaintiff for  
80l. conveys  
an estate absolutely to the defendant, and brings a bill to redeem. Defendant insists the conveyance was absolute, but confesses that after the 80l. paid with interest, it was to be in trust for the plaintiff's wife and children. Plaintiff replies to the answer, and no proof of the trust; yet decreed the trust for the benefit of the wife and children.

HAMPTON in consideration of 80l. paid by the defendant *Spencer*, conveys an house, and surrenders a copyhold estate to the defendant and his heirs; the bill was for a reconveyance on payment of the remainder due of the 80l. and interest.

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For the plaintiff it was insisted, that he having replied to the defendant's answer, who had not made any proof of such pretended trust; he was bound by his confession, that he was not to have the estate absolutely to himself, and no regard ought to be had to the matter set forth in avoidance of the plaintiff's demand, because the defendant had not proved it; *Ant. Ca. 175.* yet the court decreed the trust for the benefit of the wife and children. (1) [ 289 ]

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**FOX v. CRANE.** payment of the money, and bond for performance of covenants, brought his bill that he might either redeem the first mortgage and hold the estate, until he received what was due on both the mortgages, or that the personal estate of *Wight* the father, might be applied to satisfy his debt, and that what *Crane* the administrator had paid in discharge of the first mortgage, might not be allowed out of the personal assets, but remain a charge upon the lands.

[ 306 ] For the defendant it was insisted, that the defendant *Wight*, the issue in tail coming in under the marriage-settlement, was a purchaser as well as the plaintiff, and prior in time, and if they were both plaintiffs before the court to redeem the first mortgage, it would be decreed to the defendant *Wight*; for in this case, *qui prior est tempore potior est jure*, and much less would the court take that advantage from him, when, without the assistance of the court, he had got that mortgage assigned in trust for himself. And as to the personal estate, it was as reasonable to apply it to pay off the first mortgage, as to pay off the latter; and where there were creditors in equal degree, the administrator might prefer which of them he thought fit; and that this was not within the reason of the case between *Knight* and *Keyme*: (1) there the personal estate was applied, in prejudice of a bond creditor, to satisfy a statute which bound the lands, and the bond could not affect them, and the court usually marshals the assets, so as all creditors may have a satisfaction, but never to prevent any creditor from obtaining satisfaction of his debt, nor a purchaser from protecting his purchase; and in this case the issue in tail is certainly in the nature of a purchaser; and though the father had a power to bar the intail, yet not having done it, the issue was in *per formam doni*, and now the settlement was become as effectual, as if it had been limited to the first son, and was so intended by the statute, until that fiction in law of a common recovery was invented; and the case of *Weale* and *Lower* was cited, where tenant in tail had sold at a full value, and received the consideration-money, and had covenanted to levy a fine, and was decreed to do it; yet dying (though in prison in contempt for not performing the decree,) the issue in tail could not be bound by it. (2)

Tenant in tail sells for a full value, receives the money, and covenants to levy a fine, and was afterwards decreed to do it, yet dying, (though in prison for not performing the decree) his issue could not be bound.

(1) Cited in *Porey v. Marsh*, ante 182. under the name of *Knight v. Gay*.

(2) Probably S. C. cited also in *Powell v. Powell*, Pre. Ch. 78. And so (if tenant in tail does not by some act confirm the agreement) is *Ross v. Ross*, 1 Ch. Ca. 171. *Jenkins v. Keymes*, 1 Lev. 239. for the heir comes in by the Stat.

The *Master of the Rolls* decreed the plaintiff's debt to be *FOX v. CRANE*. satisfied as far as assets of *Wight* the father, and directed that in taking of such account, *Crane* the administrator should not, as against the plaintiff, be allowed the 150*l.* by him paid to *Barnes* on his assigning of the mortgage. (1)

tute *de Donis* singly, and not as deriving from the ancestor who contracted, *ibid.* And as to the force and operation of covenant by tenant in tail, vide *Mackel v. Clark*, 7 Mod. 18. So *Wharton v. Wharton*, ante 5. Sed vide as to a covenant by tenant for life, with power to settle a jointure, and in pursuance thereof a particular delivered in; the lands in the particular prove deficient; issue in tail, decreed to make it good according to the covenant, *Lady*

*Clifford v. Lord Burlington*, post 379.

(1) "And the plaintiff is to be at liberty in the said defendant the administrator's name to sue for and recover such debts owing to the intestate, as are now standing out, towards raising her said debt, interest and costs as aforesaid, the said plaintiff first indemnifying the said defendant the administrator to the satisfaction of the Master, in respect thereof." Reg. Lib. 1693. A. fol. 124.

### LYNES *versus* BROWN.

CASE 296.  
5 Dec.

A COPYHOLD estate is surrendered to *J. S.* who resurrendered the same, provided if *A.* paid not 20*l.* *per ann.* to *J. S.* without any charges or deductions *J. S.* to re-enter, and the surrender to be void. Question, whether a deduction to be out of the 20*l.* *per ann.* for Parliament taxes. This being neither properly a rent-annuity, nor interest-money. (2)

[ 307 ]

(2) In this case the plaintiff in the year 1680, purchased of the defendant and her late husband, the copyhold estate in question, for a sum of money down, and an annuity of 54*l.* during the lives of the defendant and her said late husband, and the longer liver of them, and was on the 5th October, 1680, admitted to the said estate, and then resurrendered the same to the defendant and her husband, and their heirs, for securing the payment of the said annuity, but remained in possession; the answer admitted the purchase, but stated that it was settled and agreed between the parties that the annuity should be a clear sum, and that it was conditioned that the same should be paid by half yearly payments, free and clear of all deductions for parliament taxes, charges, impositions, assessments, or other matter, cause or thing whatsoever, then charged or imposed, or thereafter to be charged or imposed on the said premises, or any part thereof; the

answer then stated that the annuity had been paid without any deduction till *Michaelmas*, 1690, and submitted that the said 54*l.* *per ann.* was neither an annuity or rent-charge issuing out of the premises, but merely a sum in gross in nature of a mortgage, and the decree 19th Dec. was, "that the said annuity or yearly payment of 54*l.* was subject and charged by act of parliament with taxes, and that the plaintiff ought to have a deduction for the same, and that the Master should compute the arrears of the said 54*l.* *per ann.* then due, deducting thereout all parliament taxes charged on the said premises, and that the said Master do tax the said defendant her costs at law" (she having brought ejectment) and of this suit, and also make her an allowance for such fine and other charges of her admission as shall be found due to the defendant" (she having procured herself to be admitted on the refusal of the plaintiff, to pay



the annuity without the aforesaid deduction) "and upon payment thereof" by the plaintiff, the defendant is to "resurrender the said copyhold premises to the plaintiff and his heirs at the plaintiff's charges, according to the tenor and effect of the condition of the former surrender, for securing the said annuity to the said defendant as aforesaid, but upon failure by the plaintiff, to pay such money as the Master shall find due to the defendant, the plaintiff's bill is thenceforth to stand dismissed out of this court with costs to be taxed by the said Master." Reg. Lib. 1693. B. fol. 111. And it is clear that where covenant to pay an annuity, the covenantor shall not deduct for taxes, for the charge is on the person of the covenantor, and not on the land, *Robinson v. Stevens*, 2 Salk.

616. Et vide *Legate v. Sewell*, Gilb. Rep. 141. And where a lease rendering 80*l.* per ann. rent, free and clear from all manner of taxes, charges and impositions whatsoever, the word *render* makes a covenant, and the lessor is discharged of all taxes before or after the commencement of the lease, *Giles v. Hooper*, Carth. 135. *absente Holt*, Ch. Jus. So a covenant to pay a rent charge without any deduction for taxes, can have no other respect but to parliamentary taxes, *Brewster v. Kidgell*, Carth. 438. *Brewster v. Kitchin*, 1 Lord Raym. 317. S. C. In *Countess of Arran v. Crispe*, 1 Salk. 221. *Holt*, Ch. Just. of opinion that a covenant that had not the word *parliamentary*, did not extend to parliamentary taxes, but the other judges contra.

## CASE 297.

6 Dec.

Eq. Ca. Ab.

258. pl. 1. S.C.

A conveyance by deed and fine gained without consideration and indirectly. Court relieved against it.

WILKINSON *versus* BRAYFIELD.WOODHOUSE *versus* BRAYFIELD.

THE defendant *Brayfield* having by the means of *Fogg* an attorney, prevailed on *Elizabeth Corie* to levy a fine of some houses in *Norwich*, and to execute a deed leading the uses thereof to *Brayfield* and his heirs; and it being proved, that she at the time of levying the fine declared, she must make use of some friend's name in trust, and afterwards by will declaring she had levied such fine only in trust, (1) and the better to enable her to dispose of the estate, and thereby devised it to *Wilkinson* and his heirs, subject to the payment of her debts. And although *Brayfield* proved a great familiarity between them, and that she had declared he should have her estate; yet decreed, not only that the estate should be liable to the creditors' debts; but that *Brayfield* should convey the estate to the devisee (2) *Wilkinson* and his heirs. (3)

(1) Not by the will, but in the presence of the witnesses to the will, at the time of the execution, R. L.

(2) [As to the right of a devisee to sue in such case, vide *Blake v. Johnson*, Pre. Cha. 142. *Drew v. Merry*, 1 Eq. Ca. Ab. 175.]

(3) The suit *Woodhouse v. Brayfield*, was the suit of the creditors, the decree as above with costs as against *Brayfield*, in the cause *Wilkinson v. Brayfield*, Reg. Lib. 1693. B. fol. 93. 20th

*January*, 1694. That this court will relieve against a fine fraudulently obtained, vide also *Coleby v. Smith*, ante 1 vol. 205. *Attorney-General v. Vernon*, ibid. 390. Sed vide *Clark v. Ward*, Pre. Ch. 150. which seems contra the doctrine of the principal case, but in which nevertheless *Wright*, Lord Keeper, took a clear distinction between irregularity in passing the fine, and fraud in obtaining it.



DE  
TERM. S. HILLARII, 1693.

IN CURIA CANCELLARIÆ.

SYMONDS *versus* GIBSON.

CASE 298.

Jan. 29.

BILL to be relieved against *four* bonds entered into by the plaintiff's testator to the defendant for quitting his pretence, and procuring the plaintiff to be admitted *purser* of one of the *King's* men of war.

Eq. Ca. Ab.  
85. pl. 8. S. C.  
Bond given by  
A. to B. for  
B.'s quitting  
his pretence,  
and procuring

A. to be admitted purser to one of the King's ships. Court will relieve on payment of principal, without interest or costs.

*Per Cur.* We cannot set aside the bonds, but will relieve on payment of the *four hundred* pounds principal, without interest or costs. (1)

(1) In a note with the editor of *Purdey v. Stacey*, Hil. 11 Geo. 3d. B. R. and reported 5 Burr. 2698. Lord Mansfield, Chief Just. is said to have doubted whether this part of the decree *without interest* was truly taken, it being contrary to the practice to relieve without interest. And Loughborough, Lord Chancellor, in giving judgment in the case of *Parsons and Thompson*, Hill. Term. 30 Geo. 3d. not reported, (after speaking of the case of *Berrisford v. Done*, ante 1 vol. 98. which he thinks may be supported) says, "the next case is 2 Vern. 308. "and if true, is a decision undoubtedly contrary to what we now decide, "and I think contrary to an evident "principle of law. On the state of the "report, the bonds are directly and "plainly given for brokerage of an office "of trust and profit which is not an object of sale, I therefore have no difficulty to say, that I hold that case to "be extremely ill determined, if the "note of it be at all correct: the case "of *Ive v. Ash*, Pre. Chan. 199. and "Colles, P. C. 267, I think rightly determined." The principal case is shortly as follows: the defendant by his answer admitted that the bonds in

question were for no other consideration than barely for the purchase of the defendant's interest in procuring the said purser's place, and it stated that the defendant having been *twenty* years and upwards a clerk in the *Navy Office*, and for several years a clerk of the *Cheque* at *Deptford*, had applied by letter to *Samuel Pepys*, Esq, the then secretary of the *Admiralty*, for the place of *purser* on board his Majesty's ship *St. George*, for himself, and that he had procured from the said Mr. *Pepys*, the promise of the said situation on board that ship, and that he really intended to have executed the said purser's place himself, and had done several things in order to his disposing of all his other concerns for that end, but that on the application of *Henry King*, (the plaintiff's intestate) it was agreed between him and the defendant, that the defendant should procure the warrant to be made, authorising the said *King* to be purser of the said ship in the defendant's stead, and that the said *King* in consideration thereof, should pay the defendant 400*l.* that the warrant was accordingly procured, and *King* was admitted purser of the said

ship *St. George*, 17th Nov. 1688, and so continued until the month of *April*, 1691, when he exchanged the same for the like place in the ship *Coronation* for which he paid the former purser of that ship *eighty* guineas, and the decree was, "that an account be taken of the personal estate of plaintiff's intestate, and that the plaintiff *Symonds* do pay unto the

"said defendant *Gibson*, the sum of "400*l. without interest and costs*, being "the principal money for which the "said four bonds of 200*l. penalty* "a-piece were entered into by the said "intestate, so far as he the said *Symonds* "hath or shall have assets of the said "intestate's estate come to his hands." Reg. Lib. 1693. B. fol. 209. Vide *Berrisford v. Done*, ante 1 vol. 98.

CASE 299.  
Jan. 26.

### BARTON al' STONE versus BARTON.

One devises, after debts and legacies paid, the surplus of his estate to his wife and son *John* equally, whom he makes his executors, but if she should marry, that then she

should render the right of being executrix, to the testator's son *Roger*, he to be partner with his brother *John* in the executorship. The wife marries again, she thereby loses her right to the surplus, and to the executorship.

[ \*309 ]

*BARTON* by will devised the surplus of his estate (his debts and legacies being paid) to the plaintiff his wife, and *John* his eldest son, equally to be divided \*betwixt them; and then adds, *whom I make my executors*: and further wills, that she should continue his true widow, but if she marry again, *my will is, she shall render the right of being my executrix to my son Roger, to be partner with his brother John in the executorship.*

The plaintiff, the widow of the testator, married one Colonel *Stone*, but surmised by the bill she was never actually married to him; but upon a libel in the Spiritual Court, it was sentenced she was married, and *that* confirmed upon an appeal, and *Stone* being also dead;

The question was, taking that she had been married to *Stone* whether by that marriage she had forfeited her share of the surplus.

Ant. Ca. 291. The case of *Wilkinson*, and of *Cutler* and *Coxeter* cited, where upon like devises, it was decreed the wife should take as executor, and not as legatee. The Master of the Rolls was of opinion that she had as well lost her share of the surplus, as her right to the executorship, and dismissed the bill. (1)

(1) Where widow and another appointed executors, but if the widow married again, her executorship to cease; the executors filed a bill, and several proceedings, and after an order by consent, to refer the subject of the suit for final determination; widow

married, and held by *Bridgman*, Ch. Just. that a bill of revivor was necessary, *Hampden v. Brewer*, 1 Ch. Ca. 77. Note, it did not appear by the original bill that the executorship to the widow was conditional.

MILL *versus* DARREL & Al'.

CASE 300.

7 Mar.

THE case was, that the father died intestate, leaving younger children unprovided for, being indebted by mortgage, with a covenant for payment of the money, and having entered into a recognizance as a farther security. The mortgagee by virtue of the recognizance came upon the personal estate for satisfaction of his debt, so that there was nothing left for the younger children.

One dies intestate leaving younger children and indebted by mortgage with a covenant for payment of the mortgage-money. Whether the mortgagee shall be

permitted to exhaust all the personal estate by the covenant, and leave the younger children destitute.

The question was, whether the younger children who were plaintiffs against the heir and the mortgagee, should have a recompence for their shares of the father's personal estate, exhausted in payment of the debt secured by mortgage, out of the mortgaged lands.

[ 310 ]

For the plaintiff it was insisted, that the statute for settling intestates' estates has made a will for those that die intestate; and they have the same right to their respective shares, as if such shares had been respectively devised to them: now when the personal estate is devised away, it shall not be applied in exoneration of the real estate, and though the heir and mortgagee should agree to charge the debt on the personal estate, yet the legatees shall be reprised out of the real estate.

*Cur' advisare vult.* (1)

(1) There had been a decree by which the debt is directed to be charged on the real estate, and not on the personal estate; and this came on for rehearing, 7th March 1692. Reg. Lib. 1692. B. fol. 347. when it stood over for a case to be made, but no further entry appears. The rights as between heir and personal representative are

purely legal rights, per Lord Loughborough, Chancellor, *Walker v. Denne*, 2 Ves. jun. 176. So *Flanagan v. Flanagan*, before Lord Camden, there cited. As to marshalling in such a case, in favour of a legatee, vide *Lutkins v. Leigh*, Forr. 53. *Forrester v. Lord Leigh*, Amb. 171.

SHELDON & Ux. *versus* DORMER.

CASE 301.

10 Mar.

Lord Keeper SOMERS.

By settlement on Sir John Dormer's marriage, the lands in question were limited to Sir John for life, remainder to his first and other sons in tail, with other remainders over to the heirs male of the family. Proviso that Sir John Dormer might charge the premises with five thousand pounds for daughters' portions. Sir John Dormer having issue a son

Where there is a trust for raising portions out of rents and profits, the lands may be sold. (2)

(2) [*Trafford v. Ashton*, 1 P. Wms. 415.]

SHELDON v.  
DORMER.

[ 311 ]

and a daughter, by deed, reciting his power in his marriage-settlement, charged the premises with *five thousand* pounds for his daughter's portion, payable at *eighteen* or marriage; and for the more effectual raising thereof, doth appoint that certain trustees shall have the possession immediately from and after his decease, until they shall by rents and profits raise and receive the *five thousand* pounds; part of the estate supposed to be liable to this charge was evicted, as being copyhold; other part, as being by a prior settlement intailed, and what remained was not worth above 4000*l.* to be sold.

And the question in this case was, in regard the lands were by the settlement intailed on the son, who was a *Lunatick*, with remainders over to the heirs male of the family, and the charge upon the estate being only by virtue of a power reserved in that settlement, and Sir *John* having in a particular manner directed the way of raising it, viz. that the trustees should receive and take the profits until the 5000*l.* were raised; whether the court, as this case was, ought to decree a sale.(1)

*Lord Keeper.* We are here upon a construction of a trust, where the intent of the party is to govern; and courts of equity have always in cases of trusts, taken the same rule of expounding trusts, and of pursuing the intention of the parties therein, as in cases of wills; and that even in point of limitations of estates where the letter is to be as strictly pursued, as in any case. Now in the case of a will, where an estate is charged with the raising of a sum of money though it be by rents and profits, there the court has frequently decreed sales; (2) and this case is stronger than many of those cases, because here is a time prefixt for the raising of the portion, which cannot be done by annual rents and profits by the time limited: nay, in this it can never be done, because the estate charged is defective in value, and the annual profits will not pay the interest. That this case was not at all like the case of an *Elegit*, where the party is to hold until paid by profits; there he has such an interest as the law gives him, and a court of equity has nothing to do to intermeddle: nor

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(1) Sir *John Dormer* by indenture dated 13th *July* 1674, for the better raising the said portion, and also maintenance in the mean time, granted the said premises in the said Counties of *Gloucester* and *Worcester*, to the trustees therein named, to hold to them their executors and assigns (after the

limitations therein mentioned) for so many years and so long time, until out of the rents, issues and profits thereof, they should raise and pay the said 5000*l.* portion.

(2) Vide on this subject the cases cited in note to *Anon.* ante 1. vol. p. 104. *Berry v. Askham*, ante 26.

like the case, where a term for years is allotted for the raising of the portion, and it effluxes in point of time, before the portion is raised, there a court of equity cannot enlarge the estate, nor charge the inheritance. In this case it is agreed, if Sir *John Dormer* had only said, that pursuant to his power he charged the premises with 5000*l.* without going further, that the court might have decreed a sale. Now in the first part of his deed, he does execute his power, and expressly declares the estate shall stand charged: then he proceeds and says, that for the more effectual raising of the 5000*l.* the trustees shall enter and hold until the money be raised by rents and profits. It would be an unnatural construction, to say that he meant by this to restrain what he had before done; what he says for the more effectual raising, you would construe to hinder and restrain the raising of it; but the truer construction of that clause is, that no part of the profits should be diverted, or otherwise applied, until the 5000*l.* were raised; and the remainder men in trust contend for nothing, since the estate can never answer the charge laid thereon, and therefore decreed a sale and all parties to join. (1)

SHELDON v.  
DORMER.

[ 312 ]

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(1) Reg. Lib. 1693. B. fol. 704. vide *Talbot v. Duke of Shrewsbury*, Pre. this case mentioned to be cited by Mr. Ch. 395-6.  
*Vernon* as a precedent for a like decree

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PEYTON & A<sup>r</sup> versus AYLIFFE.

THE case was, Sir *Robert Peyton* the plaintiff's father, being possessed of several houses in the *Old Bailey*, for long terms of years, granted to him by the city of *London*, made a mortgage of the premises, and being intitled to the equity of redemption, was in the reign of King *James* the second, outlawed for high treason. An inquisition was afterwards sued out, and found *Peyton's* title to the houses in question, and the same were thereupon seised into the *King's* hands: the *King* being thus intitled, by *letters patent*, in consideration of one hundred pounds, grants the premises to the defendant *Ayliffe*, who had also got an assignment of the mortgage. The outlawry was afterwards reversed for error. The plaintiff as executor to his father, to whom he was also heir, brought this bill to redeem the mortgage.

CASE 302.  
10 Mar.  
In Court.  
LORD  
KEEPER.  
A. possessed  
of a lease for  
years, is out-  
lawed for trea-  
son, the King  
grants away  
the term, the  
outlawry is  
reversed, the  
term ought to  
be restored.

[ 313 ]

The question was, whether by the reversal of the outlawry, he ought to be restored to his equity of redemption, not-

PEYTON v.  
AYLIFFE.

withstanding the seisure into the *King's* hands, and grant made by letters patent as aforesaid. (1)

Moor 269.

5 Co. 90. b.  
1 Roll. Abr.  
778.

It was insisted by the plaintiff's counsel, that only the profits during the time the outlawry stood in force were forfeited, and not the lease itself, and consequently the equity of redemption was not forfeited. The lease being the principal, is to be restored upon the reversal, although the profits be forfeited and lost; and for that purpose cited the case of *Eyre* and *Woodfine* in *Cr. Eliz.* 278. upon reversal of an outlawry for recusancy, the party was restored to a chattel lease, and *Beverley* and *Cornwall's* case in *Moor*, the party upon reversal restored to the right of presenting to a living; and the case of *Pinfold* and *Northey* in the *Exchequer*, (2) the party restored to *East-India* stock, though granted away by *Privy Seal*, and transferred pursuant thereunto in the Company's books. And the case of *Garret* and the Earl of *Holland* in the court of — about the year 1668, where a man that had a debt due to him by judgment, and was outlawed, *Progers* the grantee from the crown, acknowledges satisfaction upon the record of the judgment; and yet upon reversal, that acknowledgement of satisfaction set aside, and restitution made; and also the case in 2 *E.* 4. put in *Hoe's* case in the *fifth report*; they admitted that as to the profits received there could be no restitution. The judgment upon the reversal being to be restored to what was not answered to the *King*; but the party was always restored to the principal thing forfeited, which in this case was the lease; and seemed to doubt whether an equity of redemption of a term for years was forfeited by the outlawry or not. (3)

[ 314 ] For the defendant it was answered, that as to the case of *Eyre* and *Woodfine*, that would not be much to the present question; for there was a great difference between an outlawry for treason, and an outlawry for recusancy, where although the outlawry be regular, and no error to be found in it; yet if the party at any time conforms, the outlawry is to fall; and yet in that case, the Lord Chief Baron *Periam* differed in opinion from the other *Barons*. And as to the case of *Pinfold* and *Northey*, there the grant was made to the person,

(1) Vide *Hale's* P. C. 205.

(2) 2 Lev. 49. by the name of *Pinfold v. East India Company*

(3) Mortgagee in fee after forfeiture was attainted, and the King seised, and whether mortgagor should redeem

dubitatur. *Pawlett v. Attorney-General*, Hard. 465. In *Attorney-General v. Sudell & Al'*. Pre. Ch. 215. it is said arg. that this court helps the King to an equity of redemption, being intitled by forfeiture for treason.



PEYTON v.  
AYLIFFE.

at whose suit the party was outlawed; and do take it that the person who sues and outlaws the defendant, has a right to be satisfied in the first place; and if whilst the estate remains in his hands, the outlawry be reversed, there may be reason the party shall be restored: as where a term is taken in execution, if delivered over to the party, on reversal of the judgment, the defendant shall be restored to the term; but if the term was sold to a stranger, there, though the judgment should be afterwards reversed, the party shall not be restored to the term. And here in this case, the defendant has not purchased from the sheriff, but from the *King* himself; and insisted, there is no case in the books where a term for years after an outlawry being actually sold, was ever restored to the party upon the reversal of the outlawry. Lands of inheritance, or a freehold shall be restored, but not the mesne profits. And as the profits are forfeited and lost, so is a term for years, when taken into the *King's* hands and disposed of, being but a personal thing; and cited the case of *Wilkinson and Rockley* in *Keble's* reports, (1) where after seisure into the *King's* hands, upon reversal of the outlawry, the party was not immediately restored, but put to plead it off in the Exchequer, and ought so to do, at least in this case, the seisure being not only of the equity of redemption, but of the term itself; and cited the case of *Goodier and Ince*, in 2 *Crook*, where upon a reversal after an *elegit*, there shall be restitution from the party, but not from the *King*.

2 Keb. 871.

2 Cr. 246.  
1 Roll. 778, 3, 4.  
[ 315 ]

The *Lord Keeper* decreed the plaintiff should be admitted to redeem. (2) The judgment upon the reversal is, that the party shall be restored to all that has not been answered to the *King*, which in all cases has been understood of the mesne

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(1) 'The *King* has no interest in the lands by the outlawry, but only preception of the profits, *Sir Thomas Jones*, 100. S. C.

(2) " His Lordship declared that  
" the aforesaid attainder and outlawry  
" being legally reversed and set aside  
" before *Sir Robert Peyton's* death,  
" the said *Sir Robert Peyton* became  
" thereby well intitled to the equity of  
" redemption, and that the plaintiffs  
" his executors ought to be admitted  
" to a redemption upon payment to  
" the defendant of his principal, in-  
" terest and costs, discounting the  
" mesne profits received by him, but  
" whether the defendant ought to

" account for the same from the time  
" of his entry, or from the reversal  
" of the outlawry, (he having been in  
" possession of the premises under the  
" grant a considerable time before he  
" took in the mortgage,) was reserved  
" until the Master should make his  
" report on the matters therein di-  
" rected." Reg. Lib. 1693. B. fol.  
288. Afterwards 22d April, 1694, the  
cause came on upon the Master's re-  
port, when the defendant was decreed  
" to account for the profits of the said  
" premises received by him or for his  
" use, since his entry thereon." Reg.  
Lib. 1694, B. fol. 302.

PEYTON v.  
AYLIFFE.

profits answered to the *King*, and not as to the principal thing itself, though seised into the *King's* hands, and that is undoubtedly so as to a freehold or inheritance; and he saw no substantial difference in the case of a leasehold, and took notice that the case of *Northey* and *Pinfold* was ended by compromise; but the Lord Chief Baron *Hale* was of opinion, that there ought to have been restitution in that case. (1)

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(1) And adjudged that action of trespass for mesne profits, after reversal of outlawry lay, for that by the reversal, it is as if no outlawry had been, and there is no record of it, *Ognell's Case*, Cro. Eliz. 270. Et vide the same principle recognized in Dr. *Drury's Case*, 8 Rep. p. 143. at the top.

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[ 316 ]

DE

## TERMINO PASCHÆ, 1694.

IN CURIA CANCELLARIÆ.

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CASE 303.

27 April.

In Court.

LORD

KEEPER.

A mortgage is made with interest at 5*l.* per cent. provided that if the interest be not paid within two months after due, then to pay 5*l.* 10*s.*

this is in nature of a penalty, and the court will relieve against it; otherwise if 5*l.* 10*s.* per cent. be reserved originally, and to be lessened to 5*l.* per cent. if duly paid within two months after due.

STRODE *versus* PARKER.

THE bill being to foreclose a mortgage, the interest by the deed was to be 5*l.* per cent. per ann. and made payable half-yearly, and if not paid by the space of *two* months after the time of payment, then to pay after the rate of 5*l.* 10*s.* per cent. per ann. for increase of interest, the interest being run greatly in arrear; the question was, after what rate the interest should be computed upon the redemption of the mortgage.

The court decreed interest to be computed at the rate of 5*l.* per cent. per ann. only, (1) and took a difference where the interest was reserved at 6*l.* per cent. but to be reduced to 5*l.* per cent. if paid half-yearly; there if the party will have the benefit of lowering or reducing the interest, he must comply with the times of payment; and so decreed in the

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(1) Reg. Lib. 1693. B. fol. 383.

Lord *Hallifax's* Case; (1) but where the interest is to be increased, if not paid at the day, *that* is but in the nature of a penalty and relieveable in equity.

STRODE v.  
PARKER.

*Quære tamen*, for the agreement of the parties seems to be the same in either case, and whether interest is to be reduced upon compliance with the times of payment, or to be advanced in default thereof, seems only to be a difference in the expressing one and the same thing. (2)

(1) Ante p. 134.

(2) But the distinction taken in this case, is also recognized in *Holles v. Wyse*, ante 289. *Nicholls v. Maynard*, 3 Atk. 519. *Bonafous v. Rybot*, 3 Burr. 1374. 3 Bl. Comm. 432. Et vide *Jory v. Cox*, Pre. Ch. 160. [*Brown v. Barkham*, 1 P. Wms. 652. In *Seton v. Slade*,

7 Ves. 273, *Eldon* Lord Chancellor is reported to have said, that in either way of reserving the higher interest it would be regarded in equity as a penalty, and be relieved against on payment of the lower rate of interest with interest thereon.]

### PILKINGTON Mil' versus STANHOPE.

CASE 304.  
3 Maii.

In Court.

Eq. Ca. Ab.

349. B. 3.

1. Sid. 314.

S. C.

Bill against an Ambassador to redeem; court ordered all proceedings to stay for a year and a day, unless the defendant should return

THE plaintiff having brought a bill to redeem an old mortgage against the defendant, who was then an *Ambassador*, at the Court of *Spain*; the defendant obtained an order, that all proceedings should cease, until his return from his *Embassy*: the plaintiff moved to discharge the order; and upon debate it was agreed a *protection* lies for an *Ambassador*, *quia profecturus*, or *quia moraturus*, and may at law cast an *Essoin* for a year and a day, and may afterwards renew it, if the occasion continues.

sooner.—An Ambassador, when defendant, has a right to an *Essoin* for a year and a day, and afterwards to renew it, if the occasion continues.

The Court ordered a stay of proceedings for a year and a day from this time, unless the defendant should sooner return into *England*. (3)

(3) From his embassy, Reg. Lib. suits must be suspended for a convenient time, Co. Litt. 130. (a).  
1693. B. fol. 381. In the case of an Ambassador, private men's actions and

### DOWDESWELL versus NOTT.

CASE 305.

18 Maii.

Eq. Ca. Ab.

225. pl. 12.

S. C.

Where there is a dispute touching money given

THE suit being touching the loss and misapplication of a sum of money given for the benefit of the parishioners: the question was, whether any inhabitant of the parish ought to be admitted as a witness.

to parishioners, none of the inhabitants of the parish ought to be witnesses.

DOWDESWELL  
v. NOTT.

For the plaintiff it was insisted, that the interest was so minute and inconsiderable, that it could not be presumed to influence the witness, or bias him in his evidence, and cited the case in *first Siderfin*.

1 Sid. 192.

*Per Cur.* The cases, where the party was concerned in interest though never so small, have always prevailed, and it was so resolved upon great debate in the case of the City of *London*, concerning the *Water Bailiff*. (1)

(1) There is merely an entry of dismissal of a bill with costs in a cause of this name, 18th *May Reg. Lib.* 1693. *Corporation v. Wilson*, ante vol. 1. 254. *Townsend v. Row*, 2 Sid. 109. —*Attorney General v. Wyburgh*, 1 P. A. fol. 659. vide *Sutton Coldfield Wms.* 599.

[ 319 ]

DE

## TERM. S. TRINITATIS, 1694.

### IN CURIA CANCELLARIÆ.

CASE 306.

9 Julii.

Pre. Ch. 52.

Eq. Ca. Ab.

242. pl. 6. 2.

Eq. Ca. Ab.

466. pl. 8. S. C.

Where a man has a power to dispose of money by his will, this is assets, and liable to his debts.

### THOMPSON *versus* TOWNE.

*J. S.* on sale of lands, takes a bond from the purchaser to pay any sum or sums of money not exceeding 500*l.* as he should by will appoint, and *J. S.* by will distributes it, and appoints payment of it to several of his relations. The bill was brought by creditors of *J. S.* for satisfaction out of assets, and (*inter alia*) to have the 500*l.* applied towards payment of their debts.

*Per Cur.* *J. S.* having power to dispose, the 500*l.* must be looked upon as part of his estate, and decreed it to be assets liable to the plaintiff's debts. (2)

(2) The cause came on the 24th *Nov.* preceding, and it then appeared that the defendant's testator *William Thompson*, being indebted to the plaintiff in the sum of 300*l.* secured by bond dated in *Jan.* 1684, and another sum of 77*l.* 17*s.* 2*d.* and being a single

person, and minded to continue his manor of *Boothby*, in the County of *Lincoln*, in his name and family, and having a kindness for the plaintiff his relation, did, about *Oct.* 1687, by deed and fine, settle the manor of *Boothby* and other lands in the County of *Lin-*

*coln*, which it appears were of the yearly value of 220*l.* (subject to an annuity of 120*l.* during the life of one *Mrs. Bowles*) to the use of himself the settlor for life, remainder to the plaintiff and his heirs; and that in consideration thereof, the plaintiff did about the 5th Nov. 1687, give the said *William Thompson* a bond in 1000*l.* penalty in trust, to pay such legacies and sums of money as the said *William Thompson* should by his last will give away and dispose of, so as the same did not exceed the sum of 500*l.* And the bill was brought by *Anthony Thompson* only for an account of the assets of *William Thompson*, and that the said bond for 500*l.* might be subject to the plaintiff's aforesaid demands. An issue was directed to try whether the said bond of 300*l.* was agreed between the plaintiff and the defendant's testator to be discharged or sunk on the making of the settlement on the plaintiff or not, Reg. Lib. 1693, B. fol. 115. on this issue a verdict was obtained for the plaintiff, that the said

bond of 300*l.* was not agreed between the plaintiff and the defendant's testator, to be discharged or sunk on making the said settlement on the plaintiff, and thereupon this cause coming on this day again on the equity reserved, the decree declared "that the said 500*l.* was assets of the testator liable to the satisfaction of the debts due to the plaintiff, and that the plaintiff ought to retain the same out of the said 500*l.*" Reg. Lib. 1693, B. fol. 646. and affirmed on appeal in *Dom. Proc.* 11th March, 1694. Jour. Ho. Lords, 15 vol. p. 516. So *Lassells v. Lord Cornwallis*, post. 465. Pre. Ch. 232. S. C. *Hinton v. Toye & Al'*. 1 Atk. 465. *Bainton v. Ward*, 2 Atk. 172. *Lord Townshend v. Windham*, 2 Vez. 1. [And see *Buckland v. Barton*, 1 H. Black. 136. *Grise v. Goodwin*, 2 Freem. 265, and *Holmes v. Coghill*, 7 Ves. 505.] So where power to charge on land by deed or will, and executed by deed, *Pack & Al' v. Bathurst*, 3 Atk. 269. *Troughton v. Troughton*, *ibid.* 656.

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[ 320 ]

## TERM. S. MICHAELIS, 1694.

IN CURIA CANCELLARIÆ.

ST. JOHN'S COLLEGE *versus* FLEMING Mil' & Al'.

THE *Dean and Chapter of Carlisle* made a lease to *J. S.* for three lives, *Habend'* to him, his executors, administrators and assigns, for three lives; the lessee dying, the question was, whether this should be looked upon as a descendible estate and go to the heir, or whether the executor should have it.

This was held to be a descendible estate, and to belong to the heir, and not the executor.

CASE 307.  
Eq. Ca. Ab.  
275. pl. 12.  
S. C.  
Dean and  
chapter make  
a lease to a  
man, his ex-  
ecutors and  
administrators  
for three lives.

The court decreed it to be in its nature an inheritable estate,

ST. JOHN'S COLLEGE  
v. FLEMING. and that it should go to the heir, and the cause afterwards ended by compromise. (1)

(1) Reg. Lib. 1694. B. fol. 219. But the question there is not as above, but of survivorship, and depended on the construction of articles and other particular circumstances: as to the question in the printed report, vide *Baker v. Bayley*, ante 225. *Duke of Devon v. Kinton*, Post. 720. 2 P. Wms. 381. S. C. *Oldham v. Pickering*, Carth. 376. 2 Salk. 464, 1. Raym. 96. S. C. *Bradburn v. Kennerdale*, Carth. 164. 3 Mod. 318. 321. S. C. *Witter v. Witter*, 3 P. Wms. 99. but by Stat. 14 Geo. 2. Cap. 20. Sect. 9. it is enacted that the estate, *pur autre vie* shall go, be applied and distributed in the same manner as personal estate of the testator or intestate. [*Ripley v. Waterworth*, 7 Ves. 425.]

[ 321 ]

CASE 308.  
6 Nov.

In Court.

By a marriage settlement, a freehold estate was settled on husband and wife for their lives, remainder to the first, &c. son in tail, remainder to trustees for 500 years, to raise portions for daughters, remainder over. Covenant from the husband to settle his copyhold estate to the same uses. A surrender is made, but no term is limited. The freehold estate not being sufficient to raise the daughters' portions. Decreed the copyhold estate should be charged, and liable to raise the portions.

SHOULDHAM *versus* SHOULDHAM & AL'.

By a marriage-settlement, the freehold estate was settled to the husband and wife for life, and to the first and other sons in tail; and in default of issue male, a term of *five hundred* years was limited to trustees to raise portions for daughters, with remainder over to the defendant, the heir male of the family; and this was part of the husband's estate who made the settlement. There was a covenant in the deed, that for the better stay of livelihood for the wife, and more ample provision for the issue of the marriage, he would settle the copyhold estate to the same or the like uses, and subject to the same trusts or provisoes, &c. as far as the custom of the manor would allow of it. There was afterwards a surrender made to the use of the husband and wife for life, and first and other sons in tail with remainder over. There being no issue male of the marriage, and the freehold estate not sufficient to raise the daughters' portions, they brought a bill to have the copyhold subjected and made liable thereunto. And for the defendant it was insisted, it was not the intention of the parties to the settlement that the copyhold should be liable thereunto; nor would the custom of the manor allow of the raising such term in failure of issue male, for raising of daughters' portions.

The cause was first heard at the rolls, (2) where the bill was dismissed, but upon an *appeal* to the Lord *Keeper*, he decreed the copyhold estate to stand charged and liable to the raising of the portions. (3)

(2) 12th May preceding, Reg. Lib. 1693, B. fol. 394.

(3) The Master to see what the 500 years was worth, to be sold, there

having been a decree for the sale thereof, 23d Nov. 1691, and what it should fall short, the copyhold to supply. Reg. Lib. 1694. B. fol. 90.



WANKFORD *versus* FOTHERLEY.

THE defendant was decreed to pay 3000*l.* as his daughter's portion in marriage with the plaintiff *Wankford*, who after his wife's decease took administration to her. The chief evidence for the supporting of which decree was a letter, proved to have been writ by his direction, wherein it was said he would give 3000*l.* portion with his daughter; and that he was afterwards privy to the marriage, and seemed to approve thereof. (1) And this decree was afterwards affirmed upon an appeal to the House of Lords. (2)

and husband administers. Father decreed to pay the 3000*l.* portion.

CASE 309.  
3 Nov.  
In Court.  
Eq. Ca. Ab.  
22. pl. 17. S. C.  
One by letter,  
says he will  
give 3000*l.*  
portion with  
his daughter.  
The daughter  
marries, and  
the father is  
privy to it, and  
seems to ap-  
prove of it;  
daughter dies,  
daughter dies,

(1) No letter appears to have been written by the defendant himself, and the bill does not put in issue, the fact of the defendant being privy to the marriage, although it states many circumstances of previous encouragement on the part of the defendant: there were two letters written by a friend of the plaintiff's, by the order or with the consent of the defendant; one of which, and a copy of the other were in proof. The bill was by the husband as administrator of the wife deceased, and prayed payment of the portion and interest, and to this bill, besides the answer, the defendant

pleaded the Statute of Frauds, and demurred to the equity; the benefit of the plea was reserved to the defendant to the hearing, and the decree was, that the defendant should pay the portion without interest or costs, if paid by a given day, if not, then with interest and costs, Reg. Lib. 1694. B. fol. 128. Vide *Moore v. Hart*, ante 1 vol. 110, 201. S. C. *Douglas v. Vincent*, ante 202.

(2) 4th April, 1695, and the appellant *Fotherley* ordered to pay 20*l.* costs. Journ. Ho. Lords, 15th vol. 531.

HOLT *versus* HOLT & A<sup>r</sup>.

*JAMES HOLT*, the defendant's late husband, and father to the plaintiff, articles with *J. S.* touching the building of an house, and covenants to pay *J. S.* 1000*l.* for the building of it, and before the house was built dies intestate. The plaintiff the son and heir, on whose inheritance the house was to be built, brought his bill against the widow and administratrix, to compel her specifically to perform this agreement, and decreed accordingly. (1)

The plaintiff the heir, may compel the builder to build it, and his father's executor to pay for it.

CASE 310.  
19 Nov.  
Eq. Ca. Ab.  
85. pl. 5. 274.  
pl. 11. 1. Ch.  
Ca. 190. S. C.  
Plaintiff's  
father seised  
in fee of land,  
articles to pay  
*J. S.* 1000*l.* to  
build an house  
on the pre-  
mises, and  
dies before the  
house is built.

(1) The matter stood over for the Master's report, Reg. Lib. 1694. A. fol. 63. Afterwards 13th July, 1695, the cause came on upon the Master's report, when some dispute having arisen as to the proportions of the

money the house would require, over and above the 1000*l.* between the heir and administratrix, the 1000*l.* was in the first place ordered to be laid out pursuant to the articles, but did not contain any direction whether to be

paid out of the real or personal estate, Reg. Lib. 1694. A. fol. 444. this however appears to be the meaning of the order, for afterwards Trin. Term 1696, the matter came on again, when it was ordered that the plaintiff the heir should be at liberty to prosecute the suit against the defendants the administratrix and the builder, for the building the said house, and laying out the 1000*l.* thereon, pursuant to the

said articles, Reg. Lib. 1695. A fol. 294. Vide *Osgood v. Strode*, 2 P. Wms. 245. *Vernon v. Vernon*, ibid. 594. *Lechmere v. Earl of Carlisle*, 3 P. Wms. 223. *Rook v. Warth*, 1 Vez. 460. So on the other hand where A. articed, to sell land, and died before the conveyance made, the heir was decreed to convey, and the purchase money to be paid to the executor, *Baden v. Countess of Pembroke*, ante 215.

CASE 311.  
Eq. Ca. Ab.  
69. pl. 11. S. C.

Baron and  
feme joint-  
tenants for  
their lives.  
Baron sows  
the land and  
dies before  
severance.  
Who shall  
have the corn.

[ 323 ]  
Where stran-  
gers are joint-  
tenants, the  
emblems  
will go to the  
survivor.

### ROWNEY'S CASE.

*JOHN ROWNEY*, on his marriage, settles the lands in question to the use of himself and wife for their lives, and of the survivor of them, remainder to the heirs of their two bodies, &c. The husband dies, leaving the ground sown with corn. The question was, whether the emblements on the land settled as aforesaid, should go to the wife, or to the executors of the husband. It was admitted, that where strangers are joint-tenants, it would survive; but being between husband and wife, they would have it to be within the reason of the case, where the husband is seised in right of the wife; and there by the opinion of my Lord *Rolle*, the emblements shall go to the executor of the husband. The court proposed to each to take a moiety, which was agreed to. (1)

(1) If husband and wife be joint-tenants of the land, and the husband sow the land, and the land survive to the wife, it is said, that she shall have the corn, Co. Litt. 55. b. Vide *Dyer*, 316. a. pl. 2. like the principal case.

CASE 312.  
Nov. 29.  
Eq. Ca. Ab.  
291. pl. 5. S. C.  
Devise to two,  
equally to be  
divided, and  
to the survivor  
of them, they  
are joint-  
tenants.

### CLERK *versus* CLERK & DOMINAM TURNER.

*SIR Philip Warwick*, conveys his house of *Frognall*, and four farms to trustees upon trust, that his sisters, the Lady *Turner* and *Arabella Clerk*, might cohabit in the capital house, and equally divide the rents and profits of the four farms betwixt them, and the whole to the survivor of them. *Arabella Clerk*, in her life time makes a lease of her moiety to her daughter for eighty years, to commence upon her decease, if the Lady *Turner* should so long live, and soon after dies.

First, it was resolved, that this was a joint-estate, and not a tenancy in common; for although the words (*equally to be divided betwixt them*) sometimes in a will may make a

tenancy in common only by way of construction, and that it was the intent of the testator that there should be a division or partition; yet if afterwards in the will it is declared, as in this case, it should go to the survivor, *that* would oust such construction, and it would be a joint estate, even in the case of a devise by will. (1)

CLERK v.  
CLERK.

*Secondly*, taking it to be a joint-estate, the lease made by *Arabella*, though to commence after her decease, is a severance of the joint-tenancy; and the lease of her moiety will be good against the survivor. (2)

*A. and B. are joint-tenants. A. makes a lease for years of his moiety, to commence*

upon his death if *B.* shall so long live. This is a severance of the joint-tenancy, and the lease will bind *B.* if he survives.

(1) Vide *Kew v. Rouse*, ante 1 vol. 353. *Lady Shore v. Billingsly*, ib. 462. So a mortgage severs the joint-tenancy of a trust of a term, *Jones v. Simpson*, Salk. 158.

(2) *Dyer*, 187. a. Co. Litt. 186. a.

DE

[ 324 ]

## TERM S. MICHAELIS, 1695.

### IN CURIA CANCELLARIÆ.

#### SNELL versus CLAY.

THE plaintiff as *tenant by the courtesy*, brought his bill to be relieved against a term for years that was assigned in trust to attend the inheritance, and had been set up by the heirs at law in bar to his title, and decreed accordingly, that the term should not be made use of against him by the heirs at law. (1)

CASE 313.  
30 Octobris,  
Sh. P. C. 69.  
Tenant by  
courtesy shall  
have the aid  
of equity  
against a trust  
term assigned  
in trust to  
attend the in-  
heritance.

(1) So decreed at the Rolls with costs at law and in equity, 19th Nov. 1694, the defendants not appearing, the defendants to be at liberty to shew cause against the said decree on paying 5*l.* to the plaintiffs for that day's attendance. Reg. Lib. 1694. *B.* fol. 250. afterwards 30th Oct. as above, the cause came on upon appeal to the Lord Keeper who affirmed the decree. Reg. Lib. 1695. *B.* fol. 31. Vide on the nature of right of tenant by the courtesy judgment of Sir Joseph Jekyl Master of the Rolls in *Banks v. Sutton*, 2 P. Wms. 700. though as to a dowress the determination in that case has been since over-ruled, vide note (2) p. 719. there. *Otway v. Hud-*

son, post. 585. *Lady Radnor v. Rotham*, Pre. Ch. 65. [2 Freem. 211. where *Lord Keeper* says, with reference to the principal case, "he had " looked upon his notes and now found

" that that point was stirred in the " case." As to a dowress, see *Maundrell v. Maundrell*, 7 Ves. 567, 10 Ves. 246.]

## CASE 314.

Nov. 15.

Gilb. 320. S. C.

An house, together with the furniture thereof, is limited to a feme, and such heir of her body as should be living at her death; and in default of such, remainder over. The feme has an estate-tail in the house, and the absolute property in the furniture.

## RICHARDS &amp; Al' versus DOMINAM BERGAVENNY.

AN estate, together with the furniture of the house, being limited to the lady *Bergavenny*, and such heir of her body as should be living at her death, and in default of such the remainder over. The question was, whether the goods go over to the remainder-man, or whether the absolute property thereof vested in the Lady *Bergavenny*.

[ 325 ]

Devise to A. for life, remainder to the heir of his body, (though in the singular number) is an estate-tail. 1 Co. 66. b.

The words (heirs of the body) cannot in the same clause, be

construed words of limitation, as to lands, and as to goods words of designation of the person.

*Per Cur.* The limitation of the estate to the Lady *Bergavenny*, and such heir of her body as should be living at her death, with a remainder over for want of such, is an estate-tail: a devise to a man for life, remainder to the heir of his body, though in the singular number, or to the issue of his body is an estate-tail: (1) but if the limitation is as in *Archer's* case to *J. S.* for life, remainder to the heir of the body of *J. S.* in the singular number, and to the heirs of the body of such heir, there *J. S.* is but tenant for life. (2) But in the principal case, the limitation making an estate-tail in the land, the goods disposed in the same clause, must go in the same manner, and consequently the absolute property is in the first devisee, and no remainder of goods after an estate-tail is good; for the words (*heir of her body*) must not as to the land, be construed to be words of limitation, and make an estate-tail, and as to the goods, to be only words of

(1) And this now clearly considered as law, *King v. Melling*, 1 Vent. 215, 225. 2 Lev. 58, S. C. for the word "issue," is *nomen collectivum*, *Dubber v. Trollope*, Amb. 453, where see this point much discussed by Lord Chief Justice *Eyre*; *Doe v. Laming*, 2 Burr. 1100. 1110. et vide *White v. Collins*, Com. Rep. 289. Robinson on Gavelkind, 90. So in the devise of a fee the word heir though in the singular number will do, being *nomen collectivum*, there can be but one heir at a time, and it shall go from heir to heir,

1 Roll. Ab. 832. *Clark v. Day*, Cro. Eliz. 313. Shep. Touch. P. 444. Qy. whether such limitation in a deed would give a fee? That it would, seems to be the inclination of *Eyre*, Ch. Just. opinion, in his judgment in *Dubber v. Trollope*, Amb. 456, 7.

(2) And for the reason of this, see *King v. Melling*, 1 Vent. 215. *Bowey v. Lowdal*, 1 Rol. 627. Style 249. S. C. cited in *Dubber v. Trollope*, ub. sup. et vide *Fearne* Cont. Rem. 279. et seq.

*designation* of the person intended to take the goods; (1) and besides his intention appears, that the goods should go along with the house, and the devisee to have like interest in both. (2)

RICHARDS v.  
BERGAVENNY.

(1) [*Porter v. Bradley*, 3 T. R. 143. But that the same words as applied to different subjects may receive different construction, vide *Forth v. Chapman*, 1 P. Wms. 667. *Crooke v. De Vandes*, 9 Ves. 204. *Daintry v. Daintry*, 6 T. R. 307. *Roe v. Jeffery*, 7 T. R. 589. *Doe v. Cooke*, 7 East. 271, note (e). *Marshall v. Holloway*, 2 Swan. 446.]

(2) The bill in this case was filed by the executors of the late Lord *Bergavenny* against Lady *Bergavenny* his

widow, for goods under the above limitation, and decreed that on the death of Lady *Bellasis* (who was the mother of Lady *Bergavenny*, and had by her will limited the estate and goods as stated in the printed report) the said goods belonged to Lord *Bergavenny* and on his death to the plaintiffs his executors, to whom the defendant was by the decree ordered to deliver the same. Reg. Lib. 1695. B. fol. 108. vide *Danvers v. Lord Clarendon*, ante 1 vol. 35.

### STEPHENSON *versus* WILSON.

CASE 314.  
15 Nov.

Eq. Ca. Ab.  
336. pl. 9. S. C.

BILL by the plaintiff, an administrator, to be relieved, after a special *plene Administravit* pleaded, and verdict and judgment thereon, upon pretence that the attorney at law without direction, pleaded that the defendant had not notice of the original until the 12th of *March*, and had then fully administered. Issue taken, that the defendant had notice before the 12th, viz. on the 6th of *March*, whereas in truth he had fully administered before the 6th of *March*, and in truth before the original purchased, so that the right was never tried at law. (3)

An action at law by a creditor against an administrator; defendant by mistake of his attorney pleads a false plea, and verdict for the plaintiff, though merits never tried; yet equity will not relieve.

Bill dismissed at the *Rolls*, (4) and the dismissal affirmed upon an appeal to the *Lord Keeper*. (5)

(3) Vide *Anon.* ante 1 vol. 119.

(4) 28 *February* preceding, R. L.

(5) With costs at law and in equity: and the plaintiff submitting to pay what was due on the defendant's bond prin-

cipal, interest, and costs, an account was ordered to be taken accordingly. Reg. Lib. 1695. B. fol. 34. vide *Robinson v. Bell*, ante p. 146.

## CASE 315.

Eodem die.

Husband conveys lands to a trustee in fee, in trust out of the rents, to pay 6*l.* per ann. for the separate use of the wife, and to be at her disposal, then to the use of the husband for life, after his decease, to the use of the heirs of the wife, until the heirs or assigns of the husband should pay to the executors, administrators or assigns of the wife, 100*l.* with interest from the death of the husband, then to the wife for her life, for her jointure remainder over. The wife dies first, having by her will disposed of this 100*l.* Held the wife had no power to dispose of this money.

[\*329]

Though plaintiff's bill is dismissed on the merits; yet if by the plaintiff's gaining the legal estate, defendant is forced to be plaintiff; the cause is open, and the merits of the cause are before the court.

If a wife has a power to dispose of money in the life of her husband, she may dispose of it by a writing in nature of a will, though not so provided.

SAWYER *versus* BLETSOE.

**RICHARD BAYLY**, by deed and fine, conveys to *Sawyer* and his heirs, several lands therein mentioned, to the intent he might receive and take out of the rents and profits 6*l.* per ann. during the joint lives of him the said *Richard Bayly* and his wife, as a separate provision for the wife, so as the husband might not intermeddle, but to be at her sole and separate dispose, then to the use of *Richard Bayly* for life, and after his decease, to the heirs of the wife, until the heirs or assigns of the husband should pay unto the executors, administrators or assigns of the wife, 100*l.* with interest,\* from the death of *Richard Bayly*, then to the wife for her life, for her jointure, with other remainders over. The wife dies in the life-time of her husband, but takes upon her to make a will, and disposes of the 100*l.* amongst her relations, and made *Sawyer* executor. *Richard Bayly* afterwards by will, devised the lands to *Bletsoe*, who had married his daughter. *Sawyer* had formerly brought an ejectment in the name of the heirs of the wife, and recovered at law. *Bletsoe* the devisee of the lands by the will of *Richard Bayly*, brought his bill to be relieved; and on the hearing of the cause, was decreed to pay the 100*l.* with interest, from the death of *Richard Bayly*; or in default of payment, his bill was to stand dismissed with costs, and for non-payment the bill was dismissed accordingly, and the costs taxed and paid. And the ejectment lease being expired, *Bletsoe* got a conveyance from the heirs of the wife, by which he had gained the title at law; so that *Sawyer* was now become plaintiff in equity, to have the 100*l.* with interest, paid; and by his bill, set forth the proceedings in the former cause, and complained of the conveyance obtained by *Bletsoe* from the heirs of the wife, who were but in the nature of trustees, for the benefit of the executor and legatees of the wife.

*First*, it was agreed, that notwithstanding the dismissal of *Bletsoe's* bill, *Sawyer* being now plaintiff by an original bill, the cause was open, and the merits of the case properly before the court, so that the question was, whether upon the deed, the wife dying in the life-time of the husband, had power to appoint or dispose by will or otherwise, this 100*l.*

the cause is open, and the merits of the cause are before the court.

*Secondly*, it was agreed that where the wife has power to dispose in the life-time of the husband, though it be not par-

in the life of her husband, she may dispose of it by a writing in nature of a will, though not so provided.



ticularly provided that she may dispose by will; yet a disposition by a writing in the nature of a will, would be a good disposition or appointment.

SAWYER v.  
BLETSOR.

So that the question was reduced to this, viz. whether as the deed is penned, it was the intention of the parties, that although she died in the life-time of her husband, she might dispose of this 100*l*.

And the court was of opinion that she could not, for that it appears that if the husband survived, the 6*l. per ann.* was to cease; for he was in such case to hold the estate for his life exempt from any charge, and the 100*l.* was to be paid with interest only, from the decease of the husband, and if the husband survives her, he is in law her assignee. And it is observable that care is taken, that she, notwithstanding the coverture, might dispose of the 6*l. per ann.* but no such provision as to the 100*l.* And besides it is reasonable to suppose, that if it had been intended that the 100*l.* should remain a charge upon the estate, although the husband should survive, it would not only have carried interest during the life of the husband, but provision would have been made that the husband in his life-time might have redeemed and freed his estate: but the deed provides only that the heir of the husband might pay the 100*l.* and therefore dismissed the plaintiff's bill. (1)

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(1) Vide ante 1 vol. 244. S. C. *Peacock v. Monk*, 2 Vez. 190.

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[ 331 ]

## TERM. S. MICHAELIS, 1696.

IN CURIA CANCELLARIÆ.

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HIDE *versus* PARRAT.

THE plaintiff *Hide's* father devised the goods in his house at *Hoddesden* in these words, *I give and bequeath unto my wife, all my household goods that are in my dwelling-house at Hod-* goods to his wife for life, and afterwards to his son. This is a good devise over, and the same as if the devise had been only of the use of the goods, to the wife for life.

CASE 316.  
14 Octobris.  
Eq. Ca. Ab.  
361. pl. 10.  
S. C.  
A. devises  
household

Vol. II.

U

HIDE v.  
PAKRAT.

desden in the parish of Much-Amwell, during her natural life : and after her decease I give and bequeath my said household goods unto my son Joseph for ever. The question was, whether the devise over of these personal chattels (as the will was worded) was good or not.

It was insisted by the defendant's counsel, that the devise over was void, and relied on the difference taken in the books, where the thing itself was devised, as in this case the goods were devised, the devise over was void ; but where only the use of them is devised to one for life, it is otherwise ; and for that purpose cited the case 37 H. 6. 30. *Brook's Abridgment*, Tit. *Devise*, *Plowden's Commentaries*, 521. *b. Owen's Reports*, 33. and *Marsh's Reports*, 106. where a prohibition was granted out of the Court of Common Pleas, to the Court of the Marches of *Wales*, for proceeding for the devise over of a personal chattel.

[ 332 ]

For the plaintiff it was answered, that all these authorities cited were built upon the case 37 H. 6. but of latter times it had been otherwise resolved upon great debate, and instanced in the case of Lord *Ferrars*, *Hart* and *Say*, and *Vachell* and *Vachell*, (1) &c. and that in the present case, the same arising upon a will, a construction (as far as the law will admit) is to be made, that the intention of the testator may take place. And therefore if a man possessed of a term for years grants the term to one for life, the remainder over ; the remainder over is void : but in the case of a will, or of an assignment by way of trust, there the remainder over is good.

Where a personal chattel is devised for a limited time, this is to be intended of the use of it, and not of the thing itself.

The *Lord Keeper* held that the devise over was good, for as to the personal chattels, the civil and canon law is to be considered, and there the rule is, where personal chattels are devised for a limited time, it shall be intended the use of them only, and not the devise of the thing itself, and therefore allowed the remainder over to be good. (2)

(1) 1 Ca. in Ch. 129.

(2) Vide 1 P. Wms. p. 1. S. C. and particularly the cases cited at length in the note there. *Clarges v. Duke of Al-*

*bemarle*, ante p. 245. *Gibbs v. Barnardiston*, Pre. Ch. 323. *Gilb. Eq. Rep.* 79. S. P.

DE

## TERM. S. HILLARII, 1696.

IN CURIA CANCELLARIÆ.

LUCIUS HENRY CARY Lord Viscount  
FALKLAND, Son and Heir of EDW. } Plaintiff.  
CARY, an Infant, by his Guardian,

JAMES BERTIE and ELIZABETH his  
Wife, Sir WILLIAM WHITLOCK, } Defendants.  
JOHN GROUT and others,

CASE 317.  
Jan. 25.  
Eq. Ca. Ab.  
110. pl. 10.  
Salk. 231.  
2 Freem. 220.  
3 Ch. Ca. 129.  
S. C.

*JOHN CARY*, of *Stanwell*, Esq. having neither wife nor child, and the defendant *Elizabeth*, now the wife of Mr. *Bertie*, being his niece and heir at law, on *Sept. 10*, 1685, he made his will and thereby devised his manor of *Stanwell*, and divers others manors and lands, being his own real estate (except his manor of *Caldicot*, which he thereby gave to his kinsman *Edward Cary*) to *Grout*, *Hall* and *Whitlock* and their heirs, upon trust, (*inter al'*) to pay what debts and legacies his personal estate should not extend to satisfy, and then in trust for the honourable *Elizabeth Willoughby*, the defendant, his cousin and heir, in case she should within *three* years after his death be married to *Francis Lord Guildford*, for her life; and after her death, in case such marriage was had, to the eldest son of the Lord *Guildford* on her body to be begotten, and to the heirs males of the body of such son; and for default of such issue, to all other the sons of the said *Elizabeth* by the Lord *Guildford* in tail male; and in default of such issue, or in case such marriage should not take effect within the said *three* years, then in trust for *Anthony Lord Falkland* for life, and to his first and other sons in tail male; in default of such issue in trust for *Edward Cary*, the plaintiff's father, for life, within the *three* years, then in trust for the Lord *Falkland* for life, remainder to his first, &c. son in tail male, remainder to his own right heirs. The niece's marriage with the Lord *Guildford* does not take effect, and after the *three* years she marries Mr. *Bertie* with the trustees consent. This is a condition precedent, and equity cannot relieve against the non-performance.

One devises lands to trustees and their heirs, in trust to pay such of his debts and legacies as his personal estate should fall short to pay; then in trust for his niece *Elizabeth* (his heir at law) for her life, in case she within *three* years after his death should be married to the Lord *Guildford*, remainder to her first, &c. son by the Lord *Guildford* in tail male. In default of such issue, or in case the said marriage should not take effect

CARY v. BERTIE, &c.

and to his first and other sons in tail male; and in default of such issue, in trust for the right heirs of the said *John Cary* the testator: and devised to his trustees the leasehold, subject to the same trusts, as are declared concerning the freehold; and devised to them his household goods at *Stanwell*, that the same might go and be for the benefit of such person, who by virtue of his will should be intitled to his house. (1)

Sept. 18, 1685, he made a codicil, only directing some other legacies.

[ 335 ]

The 20th of the same month he makes another codicil, reciting that by his will he had appointed the trust of his real estate, to be for the benefit of the honourable *Elizabeth Willoughby*, in case she should within *three* years after his decease be lawfully married to the Lord *Guildford*: now his will is, that if the said marriage should take effect before years of consent, and if not afterwards, when of a competent age, ratified, the said *Elizabeth Willoughby* should have no benefit of the said trust, other than she should have had if the marriage had been never solemnised; and devises the tuition of his niece to the Lady *Wiseman*, the Lord *Guildford*'s sister, and soon after died.

The marriage between the Lord *Guildford* and *Elizabeth Willoughby* did not take effect within the *three* years, and after they were elapsed, she intermarried with the defendant Mr. *Bertie*, having first by her trustees come to an agreement with *Anthony Lord Falkland*, and *Edward Cary* (the plaintiff's father) that they, on the terms agreed on, should permit her to enjoy the estate; but they being both but tenants for life and since dead, the plaintiff, the son and heir of *Edward Cary*, brought his bill claiming the benefit of the trust, demanding an account of profits, and a conveyance of the legal estate from the trustees.

Mr. *Bertie* and his wife had also brought their bill to the like effect. This cause was heard by the Lord Chancellor *Somers*, assisted with the two Chief Justices, and this day was appointed for the delivery of their opinions.

Lord Chief Justice *Treby*. I take this will to be designed by the testator for a final and fixed settlement of the estate, and although *Elizabeth Willoughby* was his niece and heir at law, yet the Lord *Falkland* was of his name and blood, though not altogether so nearly related to him, as the defendant, his niece and heir at law: and it appears likewise in the case, that

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(1) Vide *Richards & Al. v. Lady Bergavenny*, ante p. 324. *Offley v. Offley*, Pre. Ch. 26.

the testator was related also to the Lord *Guildford* by marriage, CARY v. BERTIE, &c. but not in blood.

*First*, he was of opinion that the defendant *Eliabeth's* [ 336 ] being willing and consenting, or endeavouring to bring about the marriage, would not be of any avail or moment in this case; for that the will was formed not upon the endeavour or agreement of the parties to marry, but upon the event. If a marriage should be had according to the will, then his niece was to have an estate for life, and so to first and other sons of Lord *Guildford* on her body begotten; but was to take nothing by the will, unless the marriage was actually had. And this appears more plainly by the codicil, whereby it is provided, that although a marriage should be so far proceeded in, as to be solemnised between his niece and the Lord *Guildford infra annos nubiles*, yet unless afterwards confirmed, when both of age capable to contract marriage, (for by law until both are of competent age, that is, the man *fourteen*, and the woman *twelve*, either of them are at liberty to go off from such marriage) such marriage was not be reckoned a marriage within the intention of the will, nor would his niece take any estate thereby. (1)

He observed Mr. *Bertie's* Counsel seemed to be a little at a loss, what relief, what conveyance to ask from the trustees, whether a fee, or an estate in tail male to *Elizabeth*, and her first and other sons by Mr. *Bertie*, or whether to content themselves only with an estate for life.

In the determining and judging upon this case he was of opinion,

*First*, That no regard was to be had to the greatness or quality of the persons. The rule the Divine Law-giver laid down was, that there should not be any respect, even to the poor, in judgment, much less to the rich.

*Secondly*, That all the parol proof on both sides is to be rejected, and thrown out of the case, (that is to say) the declarations of the kindness the testator had for his niece the defendant, and that she was his heir, and he would not disinherit her, and the like, &c. And the great uncertainty there is of proof in this case shews how necessary it was to make

[ 337 ]

In case of a devise of lands no regard to be had to parol declaration.

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(1) But where covenant that *A.* being then *infra annos nubiles* shall marry before such a day, and the marriage is had, and after, at the age of consent *A.* disagrees to the marriage yet the marriage is a performance of the covenant, *Fenner's case*, *Owen*, 25. So *Leigh* and *Hanmer's case*, 1 *Leo.* 52. et vide *Co. Litt.* 79, 80. *Grey's case*, *Dy. Rep.* 368. b.

CARY v. BERTIE, &c.

the statute against *frauds and perjuries*. (1) The case therefore must be determined as it stands upon the will, and consequently to enter into an enquiry what regard he had to his niece; how far he considered the Lord *Guildford* either in point of affection, or in gratitude for good offices received, or by reason of affinity by marriage, or the like, is not material, nor necessary to know; and it may be it is not possible now to know what induced him to limit his estate in the manner as by his will is expressed: but he having done it, we must agree with the Lord *Dyer*, that men's deeds and wills, by which they settle their estates, are the laws that private men are allowed to make, and they are not to be altered even by the *King* in his courts of law, or conscience; we must take it as we find it.

And that being so, thus far his intention plainly appears, that his heir should not have his estate, unless she married with the Lord *Guildford*, and likewise that neither the Lord *Guildford*, nor his issue were to have any benefit by it, unless he married his niece. And the condition, which is a condition precedent, not having been performed, the marriage not having taken effect, it is plain that the estate by the letter of the will is gone over to the Lord *Falkland*, and the trust of the estate vested in him.

All that remains is, whether a court of equity can relieve in this case, and in what manner.

[ 338 ]

*First*, The defendant *Elizabeth* cannot have the inheritance for if she had performed the condition in the will, she was to have had but an estate for life, with a remainder to her first and other sons by the Lord *Guildford*; and she must not have a greater and better estate by not performing, than she could have had in case she had performed the condition.

*Secondly*, if she cannot be intitled to the inheritance, yet it hath been insisted on by her Counsel, that she ought to have an estate for her life, and to her first and other sons in tail male by Mr. *Bertie*; for that it was not through her default that the marriage with the Lord *Guildford* was not accomplished, and that she has equitably performed the will, by marrying a person equal in quality and estate to the Lord *Guildford*; and this they call a performance of the condition *cypres*, that she hath gone as far as was in her own power, and cited the case of *Popham* and *Bampfild*, where the court relieved upon an equivalent as a precedent to suit this case.

Vol. I. Case  
73. 159.

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(1) And such evidence would have been rejected even before the Stat. per *Holt*, Ch. Just. post. 339.



But that case is not like this : and they run upon a plain mistake, in saying that they come to be relieved against a forfeiture ; and that the testator by his will principally intended the advancement of his niece ; whereas the will is made in derogation of her right as heir at law. And although the testator might be willing, and it would be agreeable enough to him if such marriage took effect, yet he handles that matter with some indifferency ; for he does neither enjoin his niece to marry the Lord *Guildford*, nor so much as recommends to either party, but leaves them at their liberty. But if the marriage took effect, the estate was to go accordingly ; if not, the estate was to go to those of his name and blood. If they should marry, they were to take the estate ; it is given to them in the conjunctive, to neither of them severally ; there is no latitude left for her to choose another man : it is not a case in compensation ; it is not capable of an equivalent to answer the will of the testator : nor can, as I apprehend, a court of equity relieve, or decree even an estate for life to the defendant, unless they can decree Mr. *Bertie* and the Lord *Guildford* to be the same person.

CARY v. BERTIE, &amp;c.

[ 339 ]

Lord Chief Justice Holt was of the same opinion, that the bill ought to be dismissed ; and first was clear of opinion that all the parol proof, as to what the testator either declared, or intended, was to be disallowed, and the case must stand confined to the will, and is to be considered as it stands upon the will alone, and must have been so even before the making of the statute of *Frauds and Perjuries* ; (1) for by the statute of *Wills*, by which men are enabled to make wills, and devise their lands, it must be a will in writing ; and should parol proof be admitted, it would introduce a mighty uncertainty, and an infinite inconvenience. The last will of a man is looked upon as the last serious act of his life, as to the disposition of his estate, and must be admitted sufficient to repeal all former wills, and much more to control all parol declarations. (2)

It is plainly a condition precedent. In cases of conditions subsequent, that are to defeat an estate, those are not favoured in law ; and if the condition becomes impossible by the act of God, the estate shall not be defeated or forfeited ; and a court of equity may relieve to prevent the divesting of an estate, but cannot relieve to give an estate that never vested. The case of *Fry and Porter*, is much a stronger case, and more proper

Equity cannot relieve against the breach of a condition precedent.

1 Mod. 300.

(1) Vide note to *Towers v. Moor*, 30. and cases cited in not. (2) p. 31. ante p. 98. *Bromley v. Jeffereys*, Pre. Ch. 138.

(2) Vide *Fane v. Fane*, ante 1 vol. post 415. S. C.

CARY v. BERTIE, &c.

[ 340 ]

for relief, the condition there being to be performed by an infant, and an infant too that had no notice of the condition in the will. In the case of the Earl of *Montague* and Earl of *Bath*, (1) there the Duke of *Albemarle* who made the settlement, and had reserved a power to revoke, yet having tied himself to strict terms, as to the manner and circumstances of doing it, although by his last will made in a very solemn and deliberate manner, he sufficiently expressed his intention and resolution to revoke it; yet the court would not relieve in that case; and if the party himself, who was master of the estate, and might have disposed of it as he pleased, is to be tied down to the terms and circumstances he had imposed upon himself: those that claim or derive under him, those to whom he gives an estate upon terms and conditions, must stand much more obliged to the performance of the conditions and circumstances upon which it is given. And if the condition becomes impossible even by the act of God, as in case the Lord *Guildford* had died within the *three* years, or soon after the death of the testator, he was of opinion the estate would never arise; there would be no relief even in that case, much less is there any room for relief in the case in question. (2)

On the will, the testator's intention is plain and express, that his niece should not have the estate, unless the marriage took effect; an actual marriage was plainly by him intended upon the face of the will; and by his further declaration in the codicil put beyond doubt. The prospect that such marriage might take effect, seems to be the only consideration that induced him to give the estate in such a manner as he has done. It appears by the proof in the cause, that he had a real kindness and affection for the Lord *Guildford*; and as he had a kindness and affection for his niece, so it likewise appears he was desirous to preserve the estate in his name and family. And whereas it is objected, that the heir at law is to be favoured, *that* may hold, where the words are ambiguous or doubtful, there shall be no strained construction to work a disinheritance. But where there is no doubt, no ambiguity, the plea of heirship must not control a plain and express will. (3)

In case of doubtful words of a will, an heir is to be favoured, not where the will is plain.

[ 341 ]

And it is very vain, what has been pretended, that he did not intend to disinherit his heir, when the whole frame and intent of the will is to prevent the descent, and that she should not

(1) 2 Freem. Rep. 121.

(2) Quæry as to conditions subsequent. Vide Co. Litt. 206. a. b. *Pop-*

*ham v. Bampffield*, ante 1 vol. p. 83.

(3) Vide *City of London v. Garway*, post 571.

take as heir. And it is likewise as vain to talk of an equivalent; although the lady may be as well preferred, or advanced in marriage to Mr. *Bertie*, that is no equivalent to the testator, who had an affection for the Lord *Guildford*, and was for ought appears an utter stranger to Mr. *Bertie*, and was minded his niece should marry the Lord *Guildford*: it is in truth no more an equivalent, than it may be pretended to be a performance of the condition; and it would be hard to maintain, that where an estate is given upon condition that the niece marries one man, to say that she has performed that condition; not in marrying him, but in marrying another man: and concluded, that if it was a rule in equity, that estates ought to go according to the will of the dead, he must advise the Lord *Chancellor* to dismiss the bill; but if this court can alter wills, it might be proper to relieve the plaintiff in the cross cause.

CARY v. BERTIE, &c.

*Lord Chancellor* concurred in opinion with the two *Chief Justices*, and observed that it was plainly a condition precedent, for that by the will, the *three years'* profits after the decease of the testator, were to be applied to pay the debts, so nothing descended in the mean time, nor vested; and there was no ground to maintain what was offered from the bar, that this should be deemed a condition subsequent, or to divest an estate, and observed there could not be stricter words to make a condition precedent, than what were inserted in the will.

And his intention is manifest that his niece should take nothing as heir, unless there should happen to be a failure of issue male of the *Carys*; but in case his niece married the Lord *Guildford*, then he preferred her, and she was to take before the Lord *Falkland*, and the rest of his name and blood; but if such marriage was not had, then the Lord *Falkland*, and those of his name and blood are preferred to her. If Lord *Guildford* had intermarried with her, and had died without issue male, it is plain that neither her daughters by him, nor any issue male of her's by any after taken husband, could have become intitled to the estate by the devise in the will.

[ 342 ]

As to what has been said of its being an hard limitation, and that being in the case of a trust, there is a great latitude of expounding in a court of equity, to correct the rigour of a devise, (1) limitations of estates, whether it were by way of trust, or by estates executed at the common law, were to be governed by the same rule; and it is much better, that an

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(1) Vide in the case of a charity, *Attorney-General v. Reg. Professors in Cambridge*, ante 1 vol. 55.

CARY v. BERTIE, &c.

estate should be carried from the heir by a hard or imprudent disposition, than that the courts in *Westminster-Hall* should take upon them to vary from the intention of the testator expressed in his will.

King as *Pater patriæ*, has the direction of charities, infants, ideots, lunatics.

Divers privileges of infants.

[ 343 ]  
But infants are bound by conditions.

And as to the plea of infancy, it is true infants are always favoured. In this court there were several things that belonged to the *King as Pater patriæ*, and fell under the care and direction of this court, as charities, infants, ideots, lunatics, &c. afterwards such of them as were of profit and advantage to the King, were removed to the *Court of Wards* by the statute ; but upon the dissolution of that court, came back again to the Chancery, where the interests of infants are so far regarded and taken care of, that no decree shall be made against an infant, without having a day given him to shew cause after he comes of age. An infant may by his *Prochein Ami* call his guardian to an account even during his minority : (1) if a stranger enters and receives the profits of an infant's estate, he shall in the consideration of this court, be looked upon as a trustee for the infant, and the like. But the court never pretended to change the nature of infants' estate, or to make *that* absolute, which was defeasible. Where an estate is given to an infant upon a condition, such act as an infant can perform, must be done by him ; and infancy in such case is no excuse ; and so it was held in that case of *Fry and Porter*, which has been cited. (2)

The case of *Popham and Bampffield*, has no resemblance to this case, for here can be no equivalent ; the nature of this condition is not in point of value, but on a collateral act to be done : and as to the case of the Earl of *Salisbury*, which was cited, there was a performance of the condition in substance, and there was no express devise over of the 10,000*l.* in case the Countess, then Mrs. *Bennet*, did not observe the circumstances prescribed by the will as to her marriage. (3) And so

(1) So he may file a bill for an account against a stranger, *Gundry v. Baynard*, post 479. Et vide *Newburgh v. Bickerstaffe*, ante 1 vol. 295.

(2) This doctrine is more generally laid down by *Coke*, 1 Inst. 240. b. where he says, "regularly no laches shall be accounted to infants for non-entry or claim, to avoid descents, yet laches shall be accounted in them for non-performance of a condition annexed to the state of the land, for the laches of an infant, for not performing of a condition annexed to a state,

"either made to his ancestor or to himself, shall bar him of the right of the land for ever." Et vide *ibid.* 360. *Whittingham's Case*, 8 Rep. 44. *B. Slade v. Tomson*, 3 Bulstr. 59. *Holford v. Platt*, Cro. Jac. 465. And further as to acts by which infant may be bound, vide cases cited in note (2) to *Franklin v. Thornebury*, ante 1 vol. 132.

(3) Ante 223. 2 Vent. 352. S. C. And note, in the report in *Ventris*, the devise over was to the executor, and there said it was not to be considered, being no more than the law implied.

likewise the case of *Ventris* and *Glide* on Sir Nich. Staughton's will. The consent of the aunt was asked, and she did not absolutely refuse, but pretended she was coming to town, and being a suitable match, and all other relations consenting, the consent of the aunt was, what she ought, according to the trust reposed in her, to have given, application being made to her on that behalf: and besides the aunt's consent, there were trustees as to the portions, until the daughters attained *twenty-one*, and the condition of consent was taken to have relation to the term only, to their marrying in their infancy, and there the daughter had attained *twenty-one* before her marriage.

CARY v. BERTIE, &c.

And therefore, upon the whole matter, he was of opinion,

*First*, That Mrs. *Bertie* had no pretence to claim the absolute fee and inheritance of the lands in question: it would be very absurd to say she should profit by disobeying, and that she should take a greater and better estate by not performing, than she could have had by the performance of the condition.

*Secondly*, Nor can her claim of having a like estate, or a conveyance *cy pres*, viz. to her and her issue by *William Bertie*, as it would have been to her and her issue by the Lord *Guildford*, (if the marriage had taken effect) be any way maintained or supported, either by precedent or reason, unless Mr. *Bertie* could really become the Lord *Guildford*.

[ 344 ]

*Thirdly*, As the condition was the performance of a collateral act, and did not lie in compensation, he did not see any thing that could be a just ground for relief in a court of equity, or to give Mrs. *Bertie* even an estate for life, unless the remainder-men (who were to take the estate on non-performance of the condition) had used any indirect practice, or contrivance to prevent the marriage from taking effect. (1)

When the next in remainder by practice or contrivance, prevents the performance of a condition, equity will relieve.

And dismissed the bill of Mr. *Bertie* and his *Lady*, and in the other cause decreed the trustees to execute conveyances, according to the trust, to the Lord *Falkland*, &c.

*Note*; This cause was afterwards, upon an appeal to the *House of Lords* in parliament, ended by compromise. (2)

(1) It seems to be a general principle of law that no one shall take advantage of the non-performance of a condition, who was himself the cause of its not having been performed, Co. Litt. 206. b. And on the subject of conditions generally, vide cases cited in not. (1) *Popham v. Bampfield*, ante 1 vol. 83.

(2) Said 1 Salk. 232. S. C. to have

been reversed. The accounts of the fate of this appeal being contradictory the underwritten is stated from the Journals of the House of Lords, Journal, vol. 16. p. 230, 236, 237, 238, 240. 241. Resolved, that the appellants have relief, and that Mrs. *Bertie* do enjoy the estate for her life, and ordered accordingly, that the trustees Sir Wm. Witlock and J. Grant, and

their heirs, do forthwith convey all the manors, &c. of *John Carey* devised to them, so that they may be assured to *Eliz. Bertie* the appellant for life, remainder to Lord Viscount *Falkland*, and the heirs male of his body; remainder to the right heirs of the said *John Carey* for ever. And that there shall not be any account of the profits

of the premises for the time past, and that Mr. *Carey's* goods shall go according to his will, and that so much of the order of dismissal of appellant's bill, and of the decree on behalf of Lord *Falkland*, as is contrary to this judgment be reversed. Et vide *Colles*, P. C. 10.

CASE 318.

Feb. 1.

Pre. Ch. 81.  
S. C.

Trustees joining with the *Cestui que* trust in tail in a feoffment, will bar an estate tail in a trust.

### BOWATER & Ux' versus ELLY.

[ 345 ]

*ELLY*, the defendant's grandfather, being seised of the lands in question, by his will devised the same to Sir *Simon Archer*, and others and their heirs, in trust for *John Elly* the father for life, remainder to *Elizabeth*, the wife of *John* the father for life, remainder to the heirs of the body of *John* the father, by *Elizabeth* his wife; they had issue *John* a son, and *Mary* a daughter, now the wife of the plaintiff *Bowater*; *John Elly* the father died, *Elizabeth* his wife survived him; *Elizabeth* the mother, and *John* the son, together with Sir *Simon Archer* the surviving trustee, join in a feoffment to the use of *Elizabeth* the mother for life, remainder to *John* her son and his heirs. *John* the son by his will, devises the lands to *John Elly* his kinsman and heir male of the family in fee, subject to the payment of several debts and legacies. The plaintiff's bill was to have the trust and conveyance executed. The question was, whether this feoffment was a bar in equity to the plaintiff's demand, who derived her title under an entail of the trust of the lands in question.

For the defendant it was insisted, that *John Elly* the testator's grandson, being tenant in tail, with the reversion in fee to himself, had it been of a legal estate or use executed at common law, might by fine or common recovery have barred the plaintiff; a feoffment would have made a discontinuance; and this court so far favours the owner of the inheritance, that had a power to dispose, that if tenant in tail make a feoffment, or a deed of vouchers, as is commonly practised in *Wales*, the issue in tail or remainder-man shall not have the assistance of a court of equity, to defeat the conveyance, but must defeat it at law if he can. And so it was adjudged in the case of *Sherrard* and *Stapleton*, where the intail being discontinued by feoffment, the court would not oblige the defendant to discover where the freehold was, to enable the



plaintiff to find out a tenant to the *Præcipe*, against whom he might bring his *Formedon*.

BOWATER v.  
ELLY.

But here the intail is only of a trust, and is not within the Statute *de donis*, and so a fine or recovery not necessary, but is alienable by any other conveyance, made by him who hath an estate of inheritance in the trust. (1)

Ant. Ca. 205.

In this case, if the mother and son had brought a bill against the trustee, the court would have decreed the trustee to convey to them, or to whom they should appoint, and possibly he might have paid costs for refusing to convey, and putting his *Cestui que Trust* to the charge of an unnecessary suit. And in this case, the trustee having done that voluntarily, without a suit, which if he had refused to have done, the court would have compelled him to do, is as strong and as valid when done, without a suit, as if it had been done pursuant to a decree; and no trustee was ever yet blamed for doing that without a suit, which this court would have compelled him to have done; (2) and yet if the plaintiff has any relief in this case, it must be upon a supposed breach of trust in the trustee; for the legal estate is well passed and settled; and if not done in breach of trust, there is no ground for this court to relieve the plaintiff.

[ 346 ]

No trustee  
ever blamed  
for doing that  
without a suit,  
which equity  
would compel  
him to do.

The *Lord Chancellor* held, that the complainants' equitable title under the intail, was well barred by the feoffment, and dismissed the bill. (3)

(1) Vide on this head, *North v. Way*, *Winchelsea v. Norcliffe*, ante 1 vol. p. ante 1 vol. p. 13, and cases cited in not. 434.  
p. 14 there.

(3) Reg. Lib. 1697. A. fol. 531.

(2) *Quære tamen*. Vide *Earl of*

### SMITH *versus* BURROUGHS, LOADER & A<sup>r</sup>.

THE plaintiff being just come of age, and intitled to a real estate of 3000*l.* *per ann.* and upwards, but then in possession of trustees, for the raising of portions for younger children, and wanting 1000*l.* proposed to take it up upon a mortgage of some part of his real estate; but *Loader* the scrivener persuaded him, that it might be better done, and with less trouble, by giving only a recognizance for repayment of it: \* and it likewise appeared by proof in the cause, that the plaintiff Smith all along declared he would have the money of a gentleman, and not of a *mechanic*, as his expression was, because then he might expect gentlemanlike usage; however

CASE 319.  
7 Feb.  
Pre. Ch. 80. 2  
Eq. Ca. Ab.  
478. S. C.  
One just come  
of age, intitled  
to an estate of  
3000*l.* *per ann.*  
being drawn  
into a statute  
for 1000*l.* upon  
which he re-  
ceived only  
300*l.* is re-  
lieved upon  
the circum-  
stances of  
fraud.

[\*347]

SMITH v.  
BURROUGHS.

*Loader* the scrivener concerted the matter between him and the other defendant *Burroughs*, a *Vintner*, that *Burroughs* did not appear as the lender, but pretended to act as on the behalf of a friend and acquaintance of his, a gentleman that lived in the country; *Smith* the plaintiff, together with *Loader* the scrivener (who readily offered to be bound for his customer) both enter into the statute, 300*l.* is paid to *Smith* in Goldsmiths bills, more offered to be paid in *guineas*; but being then of uncertain value, Mr. *Smith* would not take them at the rate they then went, and was by agreement to have come the next day for the residue of the money; but the meeting was put off, and several disappointments happened from time to time: at length the 300*l.* before lent is made up 1000*l.* by paying about 100*l.* in money to *Loader*, and discounting an old debt he owed *Burroughs*; and by a parcel of wines which *Burroughs* put off to *Loader* at the price of 400*l.* though after sold for 150*l.* and according to the proof in the cause were not worth above 200*l.*

The plaintiff's bill being to be relieved, against the fraud, the question was, whether the plaintiff should be bound by the payment made to *Loader* of 400*l.* in wines, and 300*l.* in money and by discount of an old debt, or whether he should only repay the 300*l.* and interest received by himself.

[ 348' ]

It was insisted for the defendant *Burroughs*, that *Loader* was the plaintiff's scrivener and agent in this matter, and trusted by him, and therefore in that respect the plaintiff ought to be bound by what *Loader* did, and pretended he would have paid the whole in *specie*, and provided money for that purpose; but that *Loader* chose to have wines, and offered to discount his own debt; and there was some proof in the cause to that effect. And it was further insisted, that if *Loader* was not to be considered as agent for the plaintiff, and as a person trusted by him; yet in regard *Loader* was as well bound in the statute as the plaintiff, as he was joint cognisor with the plaintiff; a payment made to either of the cognisors of the statute ought, as to the defendant *Burroughs*, to be allowed as a good payment.

But it was answered that *Burroughs* knew the plaintiff *Smith* was the borrower, that he intended to have had it on a mortgage, and of a country gentleman, and that he was a party to the contrivance, in altering the security proposed from a mortgage to a statute.

And if *Loader* had been impowered and intrusted by the plaintiff *Smith*, to receive the money, it was never intended

that his own debt should have been discounted, nor had he any authority to take wines in lieu of money.

SMITH v.  
BURNBOUGHS.

*Per Cur.* Decree that the plaintiff shall be relieved on payment of the 300*l.* and interest, and a perpetual injunction against the statute, as to any further demand thereon against the plaintiff. (1)

(1) Vide *Nott v. Johnson*, ante p. 27, and cases cited in note there.

THOMAS Bar. & Ux' versus KEMEYS Bar. & Ux.'

CASE 320.  
9 Maii.

ON marriage of Sir — Thomas with the Lord Wharton's daughter, there was by the marriage-settlement a term lodged in trustees for the raising of 5000*l.* for daughters on failure of issue male, and a maintenance until the portions were payable, which was to be at *eighteen*, or marriage; and subject to that term, the estate was intailed on the issue male, with a remainder to the right heirs of Sir — Thomas.

Eq. Ca. Ab.  
269. pl. 10.  
2 Freem. 207.  
S. C.  
On marriage  
lands are set-  
tled on A. for  
life, remainder  
to the first, &c.  
son of the  
marriage in  
tail male, re-

mainder to trustees for 500 years, to raise 5000*l.* portions for daughters, payable at *eighteen* or marriage, remainder to A. in fee. After the marriage A. settles other lands, and a term is created for raising the like sum of 5000*l.* for daughters on failure of issue male, payable at *sixteen*, or marriage. A. dies leaving a daughter his heir at law, who attains *eighteen*, and dies unmarried. The trust of the term is not merged in the fee, but the portion shall go to the daughters executors, and is disposeable by her will; but there shall be but one 5000*l.* raised.

After the marriage had, Sir — Thomas made a settlement of other lands, and thereby likewise lodged a term in trustees for raising the like sum of 5000*l.* for daughters on failure of issue male, payable at *sixteen*, or marriage, and a maintenance in the meantime for remainders over, *prout*.

[ 349 ]

There being issue a son and daughter of that marriage, the son died in his minority unmarried, and the estate descended upon his sister and heir, who having attained the age of *nineteen* and upwards, in her last sickness made a will nuncupative, and thereby mentioned to devise all that was in her power to devise to her mother, then the wife of Sir Charles Kemeys, (by whom he had several children) and died. Her mother proved the will in the prerogative court, and the real estate descended to the plaintiff's wife, her heir at law.

The plaintiff's bill was, as being heir at law, to be relieved against a judgment in ejectment, obtained by the trustees on the terms for years lodged in them, for raising portions for daughters as aforesaid.

The question was, what passed to the Lady Kemeys by the will of her daughter, whether both or either of the sums of 5000*l.* charged on the lands in manner aforesaid, as portions

THOMAS v.  
KEMEYS.

for daughters in failure of issue male: and whether in the consideration of a court of equity, the sums intended for the portion of Mrs. *Thomas* were not merged or extinguished, and the trust determined, either by her dying unmarried, before the portion was raised, or by the inheritance of the whole estate descending upon her, as being the heir at law to her brother, father, and grandfather.

[ 350 ]

For the plaintiff it was insisted, that the trust was determined, and the proceedings in the trustees names ought to be stayed by the injunction of this court.

*First*, Because the several sums of 5000*l.* and 5000*l.* were intended as a portion for Mrs. *Thomas*, and she dying in her minority and unmarried, the intention of the trust was answered, and there was no occasion for the raising of a portion; and therefore the proceedings upon the ejectment in the trustees names ought to be stayed by the injunction of this court, and the terms ought to be assigned to the plaintiff the heir at law: And insisted this was the reason of the decree in the case of *Pawlet* and *Pawlet*, where it was held that the daughter dying an infant and unmarried, the portion should not be raised for the benefit of her administrator; but should sink into the inheritance, for the benefit of the heir, although there was no provision or clause in the settlement, that the portion should in such case cease.

Vol. I. Case  
201.

*Secondly*, That the inheritance descending upon her, the whole estate was consolidated, and the term was no longer a trust for the raising of a portion for her, but the whole intire term became a trust for her, and she might have compelled the trustees to have assigned the term to her, or to whom she should appoint; and to make her portion to be a subsisting charge on the estate, is in effect to say she was debtor to herself.

[ 351 ]

*Thirdly*, That where matters come to be controverted, between the heir and administrator, the heir is generally favoured, (1) and ought to be so in this case; the rather because here were no debts to pay, and the nuncupative will was made when she was almost *in extremis*, and doth not contain any particular devise of the portion; but is in general, of all she had power to dispose of, and cited the case of *Narbone* and *Narbone*, where by articles of marriage, 12000*l.*

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(1) So in *Scudamore v. Scudamore*, 483. b. *Edwards v. Countess of War-*  
Pre. Ch. 544. *Hayter v. Rod*, 1 P. *wick*, 2 P. Wms. 175. *Lutkins v.*  
Wms. 363. *Chaplin v. Horner*, *ibid.* *Leigh*, Forr. 54.

THOMAS v.  
KEMEYS.

was to be laid out in land, and settled to the husband for life, remainder, as to part, to the wife for her jointure, remainder to the first and other sons in tail; and in failure of issue male, a term to trustees for raising portions for daughters, remainder to the right heirs of the husband. The husband dying leaving issue only a daughter; on a bill brought to have the money invested in land and settled according to the articles; the court in that case decreed a performance of the articles, but with this, that there should not be any term in trustees for the raising of a portion for the daughter; but that the estate subject to the mother's jointure, should go to the daughter and her heirs; and the reason given by the court was, that it was in vain to direct any such term, since the daughter was the heir at law, unless it were for the benefit of an administrator, to the prejudice of the heir, as that case might happen, which the court thought not reasonable.

*Fourthly*, It was insisted, if the portion provided by the marriage settlement was still a subsisting charge upon the estate; yet there ought to be but one sum of 5000*l.* raised, and the latter provision should be taken to be in lieu and satisfaction of the former, as had been adjudged in the case of *Blois* and *Blois*, (2) *Jesson* and *Jesson*, and in many other like cases. Ant. Ca. 243, 244.

For the defendant it was answered,

*First*, That this case was not within the reason of the judgment given in the case of *Pawlet* and *Pawlet*, for there the portion which was to be out of lands, was made payable at *eighteen* or marriage, and the young lady happened to die unmarried, and before the age of *eighteen*, of which age she wanted a year at her death; but in the principal case, the portion was not only *debitum*, but was also become payable in her life-time, and therefore may be more properly resembled to the case of the Earl of *Rivers* and Earl of *Derby*; Ant. Ca. 67. [ 352 ]

but is in truth a much stronger case, for there being no time appointed for the payment of the daughter's portion; but the term for raising it being to commence upon the decease of her father, whom she survived, there although she died in her infancy and unmarried, it was looked upon as an interest vested, and went to her administrator, and was so decreed in this court, and affirmed upon an appeal to the Lords in *Parliament*; and much more might the portion in this case

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(2) 2. Ch. Rep, 162. 2 Vent. 347.

THOMAS v.  
KEMEVS.

be deemed an interest vested, since it was made payable at a certain time, and she survived the time appointed for payment thereof.

*Secondly*, Although the inheritance descended and vested in her as heir at law, yet there could be no *Merger* of the term, for that was lodged in trustees; and where an infant hath two rights in her, this court which is to take care of infants will always preserve that right, which is most beneficial to the infant; and in this case, it was for the interest and advantage of the infant, that the portion should be looked upon as a continuing and subsisting charge, and not sink into the inheritance; because it might have been a means to have preferred her in marriage during her infancy, and before she was capable of making a settlement of her real estate; and likewise when of the age of *seventeen*, (1) she was capable of disposing by will of her personal estate, either for payment of debts, or in legacies amongst her relations; and in the case of *Narbone* and *Narbone* that was cited, if the infant had desired her portion might have been raised, in order to prefer her in marriage, or the like, no doubt but the court would have decreed it to be raised out of the land. And in case there had been a bill brought as on the behalf of Mrs. *Thomas*, to have the term assigned, so as it might have merged in the inheritance; the court would not have so decreed, because it would have been to the prejudice of the infant; and for that reason in the case of *Audley* and *Audley*, where the committee of a *lunatick* had invested part of the lunatick's personal estate in a purchase of lands, when that matter came to be controverted between the heir at law and the next of kin, the court there decreed that it should still be accounted as personal estate; and the next of kin consenting to accept the lands at the value they were purchased at; the land was decreed to be sold accordingly; or otherwise the committee must have been charged with the money, and have disposed of the land as he could. And so it was likewise adjudged in the case of one *Dennis*, where the guardian of an infant took upon him to invest part of an infant's personal estate in the purchase of lands.

*Thirdly*, It was insisted by the defendant's counsel, that both the 5000*l.* ought to be raised; for that the latter provision is not said to be in lieu or satisfaction of the former, and they are made payable at different times; the 5000*l.* by the

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(1) At *twelve*, *Bishop v. Sharpe*, post 469.



THOMAS v.  
KEMEYS.

marriage-settlement at *eighteen*, or marriage; that of the provision of the father at *sixteen*, or marriage; if the father had married a second wife, and had issue male, yet the 5000*l.* by the marriage-settlement must have been raised; but the latter 5000*l.* was not to arise but in failure of issue male of the body of the father, as well of the first, as of any other after taken wife: and as the daughter by the first wife was to have 5000*l.* although the father should have had one or more sons by a second wife; so in case he should have no son at all, but only daughters by a second wife, or should think fit to give the estate to any collateral heir, it might be reasonable to augment and double the daughter's portion; and that might be a sufficient reason to induce the father to make this further provision for his daughter: and as it is not declared that the latter provision was intended to be in lieu and satisfaction of the former, there was nothing in the deed that led to such construction, nor that necessarily implied any such matter, but rather the contrary; being not only made payable at several times as aforesaid, but also different sums appointed for maintenance, until the portions were payable. And the case of *Duffield* and *Smith* was cited, where the daughters had portions charged upon lands, and their brother afterwards by will gave them his personal estate, and devised the lands to a kinsman of his name; although the personal estate so devised was of better value than their portions; yet upon an *Appeal* to the Lords in *Parliament*, it was adjudged they should have both the one and the other. (1)

[ 354 ]

Ant. Ca. 244.

The *Lord Chancellor* was of opinion, that as the term in law was not merged, so neither was the trust determined or extinguished in equity, but remained still a subsisting charge upon the estate, and ought to be raised and paid to the Lady *Kemeys*, who had administration with the will annexed. Post Ca. 418.

And likewise held, that only one 5000*l.* with the maintenance ought to be raised, and the defendant to take by which of the two settlements she thought most to her advantage; but to discount what profits were received from the death of Mr. *Thomas* the brother: the 5000*l.* to carry interest from the time it was payable. (2)

(1) Contrary to the decree of the Lords Commissioners.

(2) There is an entry of an order 22d *May*, which states that the cause had been heard on the 9th *March*,

9 Wm. 3. Reg. Lib. 1698. B. fol. 458. but the Editor has not been able to find any entry of the decree. So *à fortiori* where fee vested in trustees, *Duke of Chandos v. Talbot*. 2 P. Wms. 601. 4.

THOMAS v.  
KEMEYS.

Note; This decree was afterwards affirmed upon an appeal to the *Lords in Parliament*. (1)

(1) 8th April, 1701.—Journ. Ho. *Forbes v. Moffatt*, 18 Ves. 384. *Price v. Gibson*, 2 Eden 115. *Donisthorpe v. Porter*, ibid. 162. Amb. 600.] *Bodicoate v. Moreton*, 8th March, 1793, at the *Rolls*.  
Rep. 231. 397. [2 Ves. jun. 261.

[ 355 ]

### HEVENINGHAM *versus* HEVENINGHAM.

CASE 321.  
Eq. Ca. Ab.  
117. pl. 5. S. C.  
By a settlement, two estates, one in Norfolk, and the other in Suffolk, are subjected to the raising of a portion of 2000*l.* to a daughter, by a term of 500 years, commencing after the respective decease of two several lives; one life upon the Suffolk estate, and the other upon the Norfolk estate. The life on the Suffolk estate fell, and the daughter bringing her bill for the 2000*l.* *J. S.* to whom that

estate was come, paid the 2000*l.* Afterwards the life on the Norfolk estate fell, and the fee-simple thereof descended to the daughter. *J. S.* that paid the 2000*l.* shall have contribution out of the Norfolk estate, in proportion to its value, only the Suffolk estate shall be valued as an estate in possession, and the Norfolk estate as an estate in reversion.

BY a settlement in 1675, both the estates, (to wit) the *Norfolk* and *Suffolk* estates were made subject and liable for the raising of 2000*l.* for the portion of the defendant *Abigal Heveningham*, by a term for years that was to commence upon the determination of the estates then in being; both the estates respectively being then subject to jointures, and other estates for lives. The *Suffolk* estate by the limitations of the settlement being come to the now plaintiff Mr. *Heveningham*; it so happened that the lives on the *Suffolk* estate happened first to die, and *that* estate falling first into possession, and the term first taking place upon that estate, the now defendant had brought a bill and obtained a decree that the term should be sold for raising of her portion. Mr. *Heveningham* to prevent the sale of the term, paid the 2000*l.* and interest; and now brought his bill to be reimbursed a proportion of the 2000*l.* and interest out of the *Norfolk* estate, which was lately since that decree descended upon the defendant; so that now she, who before was intitled only to a sum of 2000*l.* charged upon both the estates, was intitled to the inheritance of the *Norfolk* estate.

The *Lord Chancellor*, assisted with the *Master of the Rolls*, held, that what was now asked by the plaintiff, was consistent with the former decree, by which the term that covered both the *Norfolk* and *Suffolk* estates was to be sold to raise the portion, and the plaintiff having paid the whole, was intitled to demand contribution from the *Norfolk* estate, the inheritance whereof was now vested in the defendant herself, and decreed each estate to bear its proportion. But with this, the term being to commence and take place as the former estates fell in, and the lives upon the *Suffolk* estate first dying;

[ 356 ]

in the adjusting what proportion each estate was to pay, *that* is to be valued as an estate in possession, and the other as an estate in reversion; and so to value what the term upon each estate respectively was worth to be sold. (1)

HEVENING-  
HAM v. HE-  
VENINGHAM.

(1) There is an entry in this cause 4th *March*, of an order that the cause do stand for judgment on the 8th of the same month, Reg. Lib. 1697. *A.* fol. 751. but no entry of a decree appears. So where freehold subjected to a covenant by settlor, that copyhold lands should be settled to the same uses, *Shouldham v. Shouldham & Al'*, ante p. 321.

### ARTHINGTON *versus* FAWKES & Al'.

CASE 322.  
Eq. Ca. Ab.  
103. pl. 4. S. C.  
Lord incloses  
part of the  
common, in-  
sisting it was  
an improve-  
ment within  
the Statute  
of Merton,  
and that he  
had left suffi-  
cient common

THE lord of a manor having inclosed part of a common, and the tenants by force throwing open the inclosures, brought his bill to quiet him in possession, surmising he had only improved according to the Statute of *Merton*, and had left a sufficiency of common; but that some of the defendants (although they pretended to have a right) were not intitled to inter-common upon the waste in question. for the tenants. The tenants throw open the inclosure by force. Court grant an injunction, and at hearing direct issues, whether the defendant had a right of common; and whether sufficient common left.

Upon the hearing, two issues were directed to be tried at Ant. Ca. 290. law.

*First*, As to some of the defendants, whether they had right of common there.

*Secondly*, Whether there was sufficient common left beyond what was inclosed.

And the injunction was continued in the mean time, although a new inclosure, and made not above *two* years before the bill exhibited. (2)

(2) And a verdict was found for the defendants, Reg. Lib. 1697. *A.* fol. 74. Afterwards 3d *Feb.* 1698, it was ordered that the plaintiff should be at liberty to go to a new trial upon payment of defendant's costs of last trial, Reg. Lib. 1697. *B.* fol. 229. Vide *Fines v. Cobb*, ante 116. *Weeks v. Staker & Al'*, ante 301.

DE

## TERM. S. TRINITATIS, 1698.

IN CURIA CANCELLARIÆ.

Case 323.

STRATTON *versus* GRYMES & AL'.

Devise of a legacy to a daughter; but if she marry without her mother's consent, then 500*l.* of the daughter's legacy to go to the son. The daughter marries without the mother's consent, the son shall have the 500*l.* Ant. Case 284. Post. Case 415.

MR. *Stratton*, a citizen and freeman of *London*, having issue a son and a daughter, devises two thirds of his legatory part to his daughter; but if she married without the consent of her mother, then her brother to have 500*l.* of what he had so devised to his daughter. (1)

the son. The daughter marries without the mother's consent, the son shall have the 500*l.* Ant. Case 284. Post. Case 415.

The daughter marries without the consent of her mother.

[ 358 ] *Per Cur.* This is not to be as a clause *in terrorem* only, but the *five hundred* pounds upon her marrying without the consent of her mother, is well devised over, and an interest vested in her brother, who in this case must be looked upon as a person the testator considered, and had in his thoughts, as to what provision he was to have, and what benefit to take by his will, as well as the daughter; and this is according to the difference taken by the Lord Chief Justice *Hale*, in the case of Sir *Henry Bellasis*, and in the case of *Davis* and *Hatton*. (2)

(1) The proviso was by codicil made nearly three years after the date of the will, and was as follows: "that if his said daughter *Eliza* should marry before her age of 21 years without the consent of his brother and his kinsman, two of his executors; then that 500*l.* should be deducted out of her share of his estate, and should be paid to his son *Nathaniel*." R. L.

(2) The bill was filed by *Nathaniel Stratton* the brother, against *Grymes* and his wife, and prayed that the remainder of the fortune of Mrs. *Grymes* after deducting the said 500*l.* should be settled upon her, and a cross bill by the widow of the testator and *Grymes* and his wife for an account of the personal estate. The cause was heard by the Lord Keeper and the Master of the Rolls, and the decree (8 Nov.) was "That the said 500*l.* with in-

terest for the same from the time of the intermarriage of the defendant *Grymes* and his wife ought to be paid to the plaintiff *Nathaniel* in the first place." The Master was then ordered to go on with the account of the personal estate which had been ordered in a former cause, and it was then ordered, "That after the account taken when it will appear what the defendant *Grymes* wife's share of her said father's estate doth amount unto, the said Master do consider of a reasonable provision to be made her thereout, and to certify the same to the Court." Reg. Lib. 1698. B. fol. 100. The husband was a pawnbroker, and appeared to be of little or no property. Vide on this subject *Jervois v. Duke*, ante 1 vol. p. 20, and cases in note there.

DE  
TERM. S. MICHAELIS, 1698.

IN CURIA CANCELLARIÆ.

HOOLEY *versus* BOOTH & Al'.

CASE 324.  
Nov. 9.  
Eq. Ca. Ab.  
106. pl. 5. S. C.  
One devises  
lands to his  
son by his  
second wife  
in tail male,  
remainder to  
his eldest son  
by his first  
wife; pro-  
vided, that if  
the land  
should come  
to his eldest  
son, that then  
he or his heirs  
should pay

**ANTHONY BOOTH** having issue a son by the first *Venter*, and two sons and six daughters by a *second* wife, settles his estate in question on his eldest son by his second wife in tail male, remainder to his second son by his second wife, and the heirs males of his body; and in default of such issue, to the son by his first wife. Provided if both his sons by the *second* wife died without issue male, so that the estate came to his eldest son, that then his eldest son, or his heirs, should within *four* months after the estate came to him or them, pay 1000*l.* to his daughters; or in default the trustees therein named to enter and raise it. (1)

1000*l.* to the testator's daughters within four months after the estate should come to them, and in default of payment, the trustees to enter and raise the money. The son by the first wife dies, leaving a son. The son by the second wife suffers a recovery of a moiety of the lands, and dies without issue; so that the moiety only of the premises, comes to the son of the ~~son~~ by the first wife. Though no part of the premises ever came to the eldest son; yet the moiety of the lands shall be liable to the payment of the whole 1000*l.* without any apportionment.

*George*, one of the sons by the *second venter*, enters and levies a fine and suffers a common recovery; but his mother being then living, who had a jointure in a moiety of the estate, the recovery as to that moiety was void, there being no surrender made of her estate for life; and she being since dead, and both her sons dying also without issue, one moiety of the estate by virtue of the said settlement, came to the grandson of *Anthony Booth*, being the son of his son by his first wife. (2)

The bill was by the daughters to have the *one thousand* pounds raised.

[ 360 ]

(1) He was to give security to the trustees for 1000*l.* payable in four years after the estate should so come to *Anthony* and his heirs, and for want of such security and payment, that then the trustees should be seized of the estate until the said 1000*l.* above all charges should be paid.

The 1000*l.* was afterwards left to the daughters by old *Anthony Booth*, by will, to be divided amongst them as therein mentioned. R. L.

(2) It came to *William Booth*, the great grandson of old *Anthony Booth* being the grandson of *Anthony* the son by the first wife. R. L.

HOOLEY v.  
BOOTH.

The defendant's counsel made two objections to the plaintiff's demand.

*First*, That the estate never came to *Anthony* the eldest son by the first wife, for he died in the life-time of his brothers of the half blood; but they afterwards dying without issue, one moiety of the estate came to the son of *Anthony*; but not coming to *Anthony* himself, the charge of 1000*l.* according to the words of the proviso did not arise, or attach upon the estate.

But that objection was over-ruled by the court the very proviso being, that if the two sons by the second wife died without issue male, that his eldest son, or his heirs, should within *four* months after the estate came to them, pay, &c.

[ 361 ] *Secondly*, it was objected, that in regard the whole estate did not come to *Anthony* or his heirs, but a moiety only, there did not accrue to the defendant so great a benefit, as was intended him, and in respect whereof he was to pay the 1000*l.* and therefore the charge ought not to arise at all; the moiety that was conveyed away under the common recovery, being better worth than 1000*l.* or if the defendant's moiety ought to be charged with any thing; yet at most it ought to be but with a moiety of the 1000*l.*

But this *Objection* was also over-ruled by the court, for that the 1000*l.* was a legal subsisting charge, and the daughters did not claim under but paramount *George*, who suffered the common recovery, and therefore there was no apportionment, but the daughters were intitled to the whole. (1)

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(1) The decree "declared that the plaintiffs were well intitled to the 1000*l.* with interest from the time limited for payment thereof by the said settlement, and that the moiety of the said *Amy* (the second wife) for her life, was subject and liable to the raising thereof, and doth think fit and so order and decree, that the trustees do enter upon, and hold and enjoy the said estate limited to the said *Amy* for life, the said plaintiff's demands as to those lands not being barred by the common recovery, and do receive the rents and profits thereof, and apply the same in and towards the raising and paying the said sum of 1000*l.* together with interest at the rate of 5*l.* per cent. *per ann.*

"from the end of four years after the death of the said *Amy*, when the said estate came to the defendant *Wm. Booth*, the heir of *Anthony* the eldest son of *Anthony Booth* the elder, according to the said deed of trust and will of the said *Anthony* the elder," but reserved the consideration whether the money was to be raised by mortgage or sale, on the Master's report of the value of the estate, &c. Reg. Lib. 1698. A. fol. 61. entered *Hooley v. Parker*. Afterwards, 24th Feb. 1699, the cause came on upon the Master's report, when it appearing that the estate in question was worth 60*l.* *per ann.* only; the Court ordered the said moiety to be sold, Reg. Lib. ub. sup. fol. 214.



BAYLEY *versus* POWELL.

**ELIZABETH BURGESS** by will gave several legacies therein specified, to all her next of kin by name; and likewise gave particular legacies to *Mead* and *Powell* two dissenting ministers, and made them her executors; but did not make any express disposition of the surplus of her personal estate.

CASE 325.  
Decembris 6.  
Eq. Ca. Ab.  
244. pl. 2. Pre.  
Ch. 92. S. C.  
Devise of ex-  
press legacies  
to the execu-  
tors, and also  
to the next of

kin; and no disposition of the surplus. How the surplus shall go.

The question was, whether the executors must retain it to their own use, or should be obliged to distribute it to the next of kin.

The case of Sir *William Basset* (1) cited as a much stronger case, where he had devised his lands to his executors, to be sold for payment of debts; and further wills, that if there should be any surplus after his debts were paid, it should be deemed part of his personal estate, and go to his executors; yet even in this case they were decreed to account and pay over the surplus to the next of kin. (2)

(1) *Lord Bristol v. Hungerford*, Pre. Ch. 81. S. C.

(2) The surplus was decreed to be equally divided between the plaintiffs the brothers and sisters of the testatrix, Reg. Lib. 1698. A. fol. 87. Note, it is stated in the answers of both the defendants that the plaintiffs on payment of their legacies gave general releases to the defendants, that *Mead* assigned without any valuable consideration his moiety of the surplus to the plaintiffs; and that the testatrix often declared in her life-time that she would not leave her brother and sisters more than 100*l.* which was the amount of their respective legacies. The defendant *Powell* filed a cross bill against the plaintiffs and the defendant *Mead*, to have the benefit of the leases and to be indemnified as to the legacies, and for an account of the estate of the testatrix come to the hands of *Mead* and the other defendants to the cross bill, and that he might retain his moiety of the surplus, which was dismissed with costs; and the plaintiffs in the original bill, and also the defendant *Mead* were to have their costs to be paid by *Powell*. As to the circumstance of the executor *Powell* being made to pay the costs, the facts in addition to the foregoing, are shortly and so far as is material,

correctly stated from the Register's book by *Loughborough*, then one of the *Lords Commissioners of the Great Seal*, in delivering the judgment of the Court in *Bowker v. Hunter*, 1 Br. Ch. Rep. 333. as follows, "There were legacies  
" to most of the next of kin, and to  
" their children. *Mead's* children had  
" legacies, the executors also had lega-  
" cies, though unequal, one 50*l.* the  
" other 20*l.* The executors had repre-  
" sented to the next of kin that there  
" would be no residue, *Powell* had ar-  
" rested *Bayley*, one of the next of kin,  
" for a debt due to the testatrix, and  
" had, upon remitting the debt, and  
" upon a promise of 30*l.* (of which he  
" paid him only 10*l.*) obtained from  
" him a release; by some means *Bay-*  
" *ley* got the release again, and de-  
" stroyed it; by other representations  
" *Powell* obtained releases from the  
" other next of kin. After this *Bayley*  
" attacks the executors, *Mead* assigned  
" a moiety (the whole being 700*l.*) to  
" the next of kin, *Powell* was indebted  
" to the testatrix 350*l.* The prayer of  
" the bill was to set aside the releases.  
" *Powell* insisted, in his answer, upon  
" parol evidence, and undertook to  
" prove the testatrix's intent that the  
" surplus should go to the executors,  
" he also insisted that the debt was dis-

DE

## TERM S. MICHAELIS, 1699.

IN CURIA CANCELLARIÆ.

LAWRENCE *versus* LAWRENCE, Widow.

CASE 327.  
 Novemb. 21.  
 Eq. Ca. Ab.  
 218. pl. 2.  
 2 Eq. Ca. Ab.  
 386. pl. 5. 388.  
 pl. 14. 2  
 Freem. 234.  
 S. C.  
 One by will,  
 gives a legacy  
 to his wife,  
 and devises to  
 her part of his  
 real estate,  
 during her widowhood, and devises the residue of his whole estate to J. S. for life, remainder to his first son, &c. Whether, if the wife accepts of this devise, it does not bar her of her dower.

MR. *Lawrence* by his will, devised some legacies out of his personal estate to his wife, and devised to her part of his real estate during her widowhood, and devised the residue of his estate to trustees for *twenty-one* years, for payment of debts and legacies; the remainder of the whole estate he devised to the plaintiff, (who was his godson, and of his name, but a remote relation) for life, and to his first and other sons in tail, &c.

[ 366 ]

In this case the Lord Chancellor *Somers* was of opinion, that although what was given to the wife, was not declared to be in lieu and satisfaction of dower, and although no estate for life was devised to her, but only during widowhood; yet that in equity it ought to be taken, that what was so devised was intended to be in lieu and satisfaction of dower, and that it might be plainly collected and intended from the will, that it was so intended, because he has thereby devised all other his real estate to other uses; and a collateral satisfaction may be a good bar to dower in equity, though not pleadable at law, and decreed that she must either take her dower, and wave the devise, or accept the devise, and wave her dower. This decree was afterwards reversed by *Lord Keeper Wright*. (1)

(1) 18th Nov. 1702, Lord Keeper *Wright* conceived there was nothing in the testator's will that shewed an intention to bar defendant of her dower, and in case any such thing did appear by the will, it would only be a bar at law where the matter had been already determined. His lordship therefore re-

versed so much of *Lord Somers's* decree, as awarded an injunction against defendant's proceeding at law, and ordered that so much of the bill as sought relief touching the dower, should stand dismissed. Afterwards in Hill. Term. 1712, the next remainderman brought his bill to be relieved

at defendant's judgment in dower, or an account, which cause came before Cowper, Lord Chancellor, December, 1715, who declared that Keeper Wright's determination ever since remained unquestioned, should not vary it, but nevertheless decreed an account. Afterwards, May, 1717, the widow appealed

Lords from the decree of Lord Er, so far as it concerned the point over, and there appearing to their tips no direction in decree that so of the bill as related to the question of dower should be dismissed, lordships ordered the bill to stand as to that point, 1 Bro. P. C. 597. Journ. Ho. Lords, 20 vol. with 30*l.* costs. Eq. Ca. Ab. 218.

[And see *Inclendon v. Northcote*, 436, 7.] As to the claim of it appears that at the common jointure upon a woman even of age, would not bar her dower benefit. 27 Hen. 8. Cap. 10. Co. Litt. et vide note 224, where the principal case mentioned; but by that jointure will bar, *Harvey v. Ash-*

Atk. 612. *Earl of Bucks. v.* 5 Bro. P. C. 570. [2 Eden, 39.]

must amongst other requisites effectual bar, be expressed or said to be in satisfaction of dower. *itt. ub. sup.* But a man may by facts at law bar a wife of dower, which the intent is inferred, as there is a fine by way of render, *Master of the Rolls, Baden v. of Pembroke*, ante p. 58. So

the husband only a trustee, contrary to *Nash v. Preston*, bar. 190.\* and such said to be the present practice of the court, *Noel v.*

Mich. 1678. 2 Freem. 43. So

where husband *cestui que* trust or intitled only to the equity of redemption of mortgage in fee. Vide cases cited in not. (2) *Banks v. Sutton*, 2 P. Wms. 719. But this court requires that the intention to bar shall be plain, *Lemon v. Lemon*, 8 Vin. Ab. 366. pl. 45. *Charles v. Andrews*, 9 Mod. 151. *Hitchin v. Hitchin*, Pre. Ch. 133. post 403. S. C. *Brown v. Parry*, 2 Dick. 685., the report of which is very short, but it seems by that case, as though the opinion of the court was, that in a devise or bequest to the wife, in order to be a bar, it must be expressed; it appears however, as a general principle, that the intention will do, *Walker v. Walker*, 1 Vez. 54. which was the case of a covenant before marriage, to settle part of a real estate, in bar of dower, out of all lands of freehold and inheritance of the husband's, of which he was then, or should ever thereafter be seised, and which was held to bar the widow from claiming freebench in copyhold lands after purchased. And it is clear, dower may be barred by provision for the wife, though not expressed to be by way of jointure, *ibid.* And *Eldon*, Lord Chancellor, seemed to be of opinion, that a covenant by the husband in marriage settlement, that widow should within six months after his death, have a conveyance, payment and assignment of one full and clear moiety of all such real and personal estate as the husband should be seised and possessed of, or intitled to at his decease, would be implied to be a provision in bar of dower, *Garthshore v. Charlie*, 10 Ves. 20. but not decided on that point. [See *Coates v. Needham*, ante 66. and note.]

appears from a M.S. note, that the above case of *Nash v. Preston*, was cited in Chancery 17th July, 1688, before *Jeffries*, Lord Chancellor, in a case between the creditors of *Earl of Pembroke* and his heir, and by his lordship and the judges assisting, namely, *Luttrell* and *Powell*, and by the bar unanimously declared to be against equity, and the concurrence of Chancery. Vide Bacon's Tracts, 37.

CASE 328.  
Eq. Ca. Ab.  
109. pl. 8. S.C.  
One devises  
his land to  
J. S. paying  
1000*l.* to his  
daughter.  
J. S. makes  
default in pay-  
ment. The  
daughter re-  
covers in eject-  
ment. The  
heir of J. S.  
brings a bill,  
and is relieved  
on payment of  
favour of a voluntary devisee.

BARNARDISTON *versus* FANE & Al'.

**EDWARD ROTHWELL**, having two daughters and heirs, devised his real estate to his kinsman Sir *Richard Rothwell*, paying 1000*l.* apiece to his two daughters, within six months after the decease of his wife. The money not being paid, the daughters who were the heirs at law brought an ejectment, and recovered; the plaintiffs claiming under Sir *Richard Rothwell* the devisee, brought their bill to be relieved, and obtained a decree for that purpose, paying what remained unpaid of the 2000*l.* with interest and costs.

principal, interest, and costs; though to the disinherison of an heir, and in

Although it was objected that Sir *Richard Rothwell* claiming only as a voluntary devisee, ought not to be relieved in equity against the breach of the condition, whereby to establish a disinherison against the defendants; but that he ought at his peril to have taken care to have performed the same; and that there being neither purchaser nor creditor in the case, equity ought not to assist a devisee against the heir, but the law ought to take place; *sed non allocatur.* (1)

(1) Five hundred pounds had been paid to, or to the use of each of the daughters of the testator, and accepted by or for them, on account of the said respective sums of 1000*l.* and 1000*l.* and the decree was, "that there having been 500*l.* paid to the defendant *Fane*, and 500*l.* to Mrs. *Ward*, the said two daughters of the testator, according to the appointment of the will of the said *Edward Rothwell*, that the plaintiffs ought to be relieved against the forfeiture of the said es-

tate, for non-payment of the remaining 1000*l.* according to the time limited in the said will," Reg. Lib. 1699. A. fol. 118. And it should seem as a general doctrine, that the court will relieve, though against the heir, and in favour of a voluntary devisee, where compensation can be made for breach of condition, *Grimstone v. Lord Bruce*, post 595. 1 Salk. 156. S. C. Et vide *Popham v. Bampffield*, ante 1 vol. p. 83.

[ 367 ]

TABOR *versus* GROVER.

CASE 329.  
Nov. 13.  
Eq. Ca. Ab.  
273. pl. 1. 328.  
(H.) pl. 5. 2  
Freem. 227.  
S. C.  
A mortgage in  
fee, though  
two descents  
cast, and  
though more  
due upon it than the  
value, and though the mortgagor by answer says he will not redeem; yet it shall go to the executor, and not to the heir, the equity of redemption not being foreclosed, or released.

UPON an appeal from the *Rolls*, the case was, that a mortgage was made of a copyhold estate by a surrender thereof to one *Mabel Porter*, who was admitted tenant, and died in 1690, *Thomas Porter* her son and heir, and executor entered, and was also admitted. And by his will, but without any surrender to the use of his will, devised to the plaintiff, who was also administrator *de bonis non* to *Mabel Porter*.

the value, and though the mortgagor by answer says he will not redeem; yet it shall go to the executor, and not to the heir, the equity of redemption not being fore-

The defendant was heir at law both to *Mabel* and *Thomas Porter*, and would have this to be taken as a real estate, being so long since forfeited, and two descents cast, and more due than the value of the estate, and the mortgagors by answer refusing to redeem, and submitting to be foreclosed; and the devise of *Thomas Porter* to the plaintiff void at law, for want of a surrender to the use of the will.

TABOR v.  
GROVER.

But decreed at the *Rolls* to the plaintiff, as *administrator de bonis non* to *Mabel Porter*; and the decree was affirmed upon the appeal, there being no foreclosure, nor release of the equity of redemption. (1)

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(1) Reg. Lib. 1699. B. fol. 37. As *Winn v. Littleton*, ante 1 vol. p. 4. and to the doctrine on this subject, vide cases cited in not. there.

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### TREDWAY *versus* FOTHERLEY.

THE plaintiff was a copyhold tenant of inheritance, in the manor of *Rickmondsworth* in *Hertfordshire*, of which the defendant was lord, and to secure 700*l.* \*borrowed of *Grove*, surrendered to him his copyhold, to be void if repaid in six months. At the end of the six months the mortgagee being willing to continue his money on that security, desired the old surrender might be taken up, and a new one made for six months longer, but the lord refused to accept the new surrender; but insisted the time for payment upon the first surrender being elapsed, *Grove* the mortgagee ought to come in and be admitted, and take up the estate, and pay an arbitrary fine of two years' value, and for that purpose called courts, and caused proclamations to be made, &c. but before the third court the bill was exhibited, complaining of this as an unjust proceeding in the lord, to gain to himself an arbitrary fine, and to oppress his tenant, and to enforce *Grove* to take the advantage of the forfeiture of the mortgage, though he did not desire it; but was willing to accept of a new conditional surrender.

CASE 330.  
Novemb. 27.  
Eq. Ca. Ab.  
120. pl. 16.  
S. C. Skin.  
142. S. P.  
Copyholder in fee makes a conditional surrender for securing a sum of money at the end of six months. Money not being paid, and mortgagee willing to continue his money, they desire the lord that the old surrender might be taken up, and a new one made for six months longer. But the lord insisted the mortgagee should come

in and be admitted, and pay a fine of two years' value. Equity will not relieve against the lord.

[ \*368 ]

The court refused to make any decree in favour of the plaintiff, save only to try it at law, (if he thought fit,) whether the lord was by the custom of the manor bound to renew the surrender, or to accept the second surrender; if not, although a hard case, yet was not to be relieved in equity. This being the opinion of the court, the matter was afterwards

TREDWAY v.  
FOTHERLEY.

ended by compromise, and a fine of 40*l.* paid to the lord, the estate being 100*l.* *per ann.* (1)

(1) Yet if copyholder should sue by petition in the lord's court, upon which the lord should give judgment, though no appeal or writ of error would lie of such judgment, the Court of Chancery would correct the proceedings, in case any thing were done therein against conscience, per *Parker*, Ch. Just. *Christian v. Corren*,

1 P. Wms. 330. Et vide *Cowper v. Clerk*, 3 P. Wms. 155. that there are cases in which equity will relieve against forfeiture of copyhold. Vide *Sir Harry Peachy v. Duke of Somerset*, Pre. Ch. 568. But it will not where the forfeiture is found so at law, unless where compensation can be made, *ibid.*

CASE 331.  
Eodem die.  
Eq. Ca. Ab.  
258. E. pl. 2.  
281. pl. 6.  
S. C.

A. devises  
lands to  
trustees until  
debts paid,  
and then to  
an infant and  
his heirs.

Defendant

enters and levies a fine, and five years pass. Infant when of age brought an ejectment, but was barred because the trustees should have entered. Equity will relieve, and not suffer an infant to be barred by laches of the trustees; nor to be barred of a trust estate during his infancy. The infant in this case shall recover the mean profits.

[ \*369 ]

### ALLEN *versus* SAYER & Al'.

J. S. seised of the lands in question, devised them to trustees until debts paid, then to the plaintiff *Allen* and his heirs; *Allen* being then an infant, the defendant (1) \*entered on the estate, and levied a fine in 1678, and *non-claim* passed; the plaintiff when of age, brought an ejectment, and was nonsuit by the fine and *non-claim*, and now brought his bill to be relieved for possession, and an account of profits.

And although the fine and *non-claim* was a good bar at law, the legal estate being in the trustees, who were of full age, and ought to have entered; yet the plaintiff ought not to suffer for their *laches*, being an infant; and as soon as of age made his entry, and brought his ejectment, and likewise his bill in this court, before *five* years incurred after he attained his age. And the court decreed the possession, and an account of profits, (2) declaring the fine and *non-claim* should not run upon the trust in the infant's minority, nor he suffer for the *laches* of his trustees. (3)

*Note*; It did not appear whether the debts were all paid, nor whether the plaintiff became intitled to the possession. (4)

(1) *Peter Sayer*, the father of some of the defendants, entered and conveyed to some other of the defendants in trust, and then died, and the defendant's trustees took out letters of administration of his effects, R. L.

(2) So far as the defendants had assets of *Peter Sayer*, but no further, R. L.

(3) Vide *Wyck v. East India Company*, 3 P. Wms. 309. and particularly

note (G) there. [Mitford, Pleading, 205. (3d Edit.) *Hovenden v. Annesley*, 2 Sch. & L. 629. *Pentland v. Stokes*, 2 Ba. & Be. 74.] So time in redemption of mortgage may run upon an infant, *St. John v. Turner*, post 419.

(4) Nor does it appear from the Register's Book, further than by statement in the bill, Reg. Lib. 1699. A. fol. 502.



PARKER *versus* BLACKBOURNE.

ONE of the defendants, a necessary party, having been a lodger in *London*, and not now to be found; the plaintiff obtained an order that service of process to appear and answer at his last place of abode, should be deemed good service, and left the same at the house where he so lodged, and carried on the process to a *sequestration*, and then brought on the cause against the other defendant *Blackbourne*, who insisted that if the plaintiff ought to be relieved against him, he ought to have a decree over against the other defendant; and therefore he was concerned to see the proceeding was regular, and insisted, that it being above *twelve* months since the other defendant\* had left that lodging, the service was not good; and the court was of that opinion. (1)

lodgings above a year before the subpoena served.

CASE 332.  
Eq. Ca. Ab.  
73. pl. 17.  
351. pl. 5.  
Pre. Ch. 99.  
S. C.

Leaving a subpoena to appear and answer at the lodgings of a defendant, who was not to be found, not good service, though an order was obtained for that purpose, it appearing afterwards the defendant had left his

[ \*370 ]

(1) Persons not entering appearance within the usual time after subpoena, and justly suspected to abscond to avoid process, court to fix a day for their appearance, to be inserted in the

Gazette, and published in the parish church of the defendant, and posted in some public place, Stat. 25. Geo. 2d Cap. 25. Sect. 1.

DRAPER & Al' *versus* BORLACE, IVE & Al'.

DRAPER, Naylor and Hill, having lent *Borlace* 8000*l.* Naylor 3000*l.* Draper 3000*l.* and Hill 2000*l.* on a mortgage in fee of his manor of *Treludro*, and on a statute of 16,000*l.* penalty, as a farther security; the said *Hill* being a counsellor of *Lincoln's-Inn*, was afterwards advised with by Mr. *Ive*, in lending of 2000*l.* to *Borlace* on a mortgage of the manor of *Gargoll*, being a lease for *three* lives held of the Bishop of *Exeter*; Mr. *Hill* encouraged *Ive's* lending of the money, drew the mortgage, and therein was a covenant that the estate was free from incumbrances, making no mention of the statute. *Treludro* being supposed to be deficient, the question was, whether *Hill* should be admitted to take advantage of the statute, to lessen *Ive's* security upon *Gargoll*.

*Per Cur.* If he who only conceals his incumbrance shall be postponed, much more ought Mr. *Hill*, who was intrusted as counsel by the mortgagee, and encouraged the lending of the money, and drew the deed with covenant that the estate

CASE 333.  
A counsel having a statute from *A.* advises *B.* to lend *A.* 1000*l.* on a mortgage, and draws the mortgage with a covenant against all incumbrances, and conceals his own statute. The statute shall be postponed to the mortgage.

**DRAPER v. BORLACE, &c.** was free from incumbrances, (1) and decreed that *Ive* should be satisfied his 2000*l.* out of *Gargoll* before *Hill* should charge the same with his statute. (2)

- (1) That he who conceals his incumbrance, shall be postponed, vide the case of *Charles Clare v. Earl of Bedford*, cited in *Hunsden v. Cheyney*, ante p. 151. *Ibbotson v. Rhodes*, post 555.
- (2) *Draper, Naylor*, and the representative of *Hill* were the plaintiffs, and the lands in the bishop's lease *Treludro* and *Gargoll*, being liable to the plaintiff's demand, were ordered to be sold, and out of the money arising from the sale, *Draper* and *Naylor* were first to be paid, then *Ive*, and lastly *Hill*, and if any surplus arose out of the sale of *Treludro*, after payment of *Draper* and *Naylor*, the same to be paid to *Ive*, towards discharge of his debts, Reg. Lib. 1699. A. fol. 158. Note, *Hill* had obtained from *Ive* a covenant, that *Hill's* debt should have preference of *Ive's*.

### PENHAY versus HURRELL.

**CASE 334.**  
Decemb. 8.  
2 Freem. 258. **ROGER HURRELL** seised in fee, had issue *Sampson Hurrell* his eldest son, and by deed and fine conveys to trustees for *seventy* years, if *Roger Hurrell* should so long \*live, remainder to trustees for 3000 years, and from and after the death of *Roger* the father, to *Sampson* the son for life, and to his first and other sons in tail male, remainder to *Henry* second son of *Roger* for life, and to his *first* and other sons in tail male, with other remainders over. *Roger* the father, and *Sampson* his son, by deed and fine, convey to the plaintiff.

**A.** seised in fee by deed and fine conveys the lands to the use of trustees for *seventy* years, if *A.* so long live, remainder to trustees for three thousand years, and after the death of *A.* then to his son *B.* Whether the remainder to *B.* is good.

[ \*371 ]

Question whether the remainder to *Sampson* for life, and to his *first* and other sons in tail male, remainder to *Henry* for life, and his *first* and other sons in tail, were good or void remainders. If void, plaintiff well intitled as a purchaser: the objection was, that an estate of freehold was to commence *in futuro*, for the *first* freehold estate is limited to *Sampson*, which is not to arise until the expiration of the terms, and after the death of *Roger*; and no estate for life limited to *Roger*, unless an estate for life shall be supposed to result back to *Roger*.

For the plaintiff it was insisted, that the conveyance here working by way of transmutation of possession, no estate for life can result, nor arise by implication of law; as there may in a covenant to stand seised, or in a will; but where a conveyance works by transmutation of possession, no estate results, or arises but by express limitation.

For the defendant it was insisted, that every man is supposed to be seised of the estate and of the use, and where he conveys by deed and fine, or feoffment, if no use is declared, the whole results back; and uses at law are the same as trusts now; and in the case of *Webb* and *Cranmer* resolved upon an appeal to the *House of Lords*, that no trust being declared during the life of the Duke of *Southampton* (but only from and after the decease of him and his wife without issue, and she being dead without issue, and the *Duke* yet living) that during his life the trust resulted, and descended to the heirs at law of Sir *Henry Wood*.

PENHAY v.  
HURRELL.

[ 372 ]

Whereunto it was replied by the plaintiff's counsel, that if what the defendant's counsel contend for should be admitted; viz. that whatever use is not declared or disposed of, either remains in the party, or results back; that would put an end to all questions on contingent remainders; and all vacancies in settlements, shall be supplied by that notion of a resulting use; and even in the case of a will, where there is an express estate limited to the party; as in this case a term for *seventy* years to the trustees, if *Roger* so long lives, he cannot have any other or greater estate by implication.

The cases of *Fenwick* and *Mitford*, and *Pibus* and *Mitford*, before Chief Justice *Hale*, *Lane* and *Pannell*, *Roll's first* Rep. and the case of *Speed* and *Davis* cited.

Moor 284.  
3 Cr. 321.  
Raym. 228.  
1 Rol. 238,  
317, 438.

The court took time to consider of it. (1)

(1) 15th *March*, 1696-7. *Roger Hurrell*, senr. had issue by his first wife, *Sampson*, by his second *Thomas*, by his third *Roger* and *Charles*, and three daughters. 1659, *June* 1, by deed, *Roger*, senr. and *Sampson* covenanted with eight trustees to levy a fine (*int. al.*) of the manor of *Woodley*. The uses as to the manor, were declared, first, to confirm certain leases which had been granted; secondly, to five of the trustees for 70 years if *Roger*, senr. should so long live, in trust for him, with power for the trustees with him and *Sampson* to raise monies by leasing, &c. 300*l.* for *Sampson*, the rest between them; and after the death of *Roger* senr. to five of the trustees for *three thousand* years for raising portions for his younger children; and after the death of *Roger*, senr. and the determination of the term of 3000 years, the eight

trustees to stand seised of one moiety, to the use of *Sampson* in tail male, with power to grant leases; remainder to *Thomas* in tail male; remainder to *Roger* the son, in tail male; remainder to the heirs male of the body of *Roger* senr.; remainder to the heirs male of the body of *Roger* the grandfather; remainder to the right heirs of *Roger* senr.: and of the other moiety, to the use of *Sampson* for life; remainder to his first and other sons in tail male; remainder to five trustees and their heirs in trust to raise portions for *Sampson's* daughters: and after the death of *Sampson*, without issue male, and the raising the daughters' portions; then the five trustees and their heirs, to stand seised to the use of *Thomas* for life; remainder to his sons successively in tail male; remainder to *Roger*, his son, for life; remainder to his sons in tail male;

remainder to the heirs male of the body of *Roger* senr.; remainder to the heirs male of *Roger* the grandfather: a fine was levied accordingly. 1663, Dec. 17, by deed, *Roger*, senr. in consideration of 280*l.* assigned his interest in the term of 70 years to *Sampson*, and the trustees, who were parties (but not assignors,) covenanted to join with *Sampson* in leases. By deed indented and enrolled (acknowledged only by *Sampson*) *Roger*, senr. *Sampson*, *Thomas*, and *Roger*, junr. sold the manor to *Richard Halfe*, to make him tenant to the præcipe, for suffering a recovery. A recovery was suffered, in which *Halfe* was tenant, and *Roger*, senr. and *Sampson*, *Thomas*, and *Roger*, junr. were jointly vouched; neither of the sons had then any issue, but the trustees to support the contingencies were not parties to the deed or recovery. 1669, July 1, by deed, *Roger*, senr. *Thomas*, and *Roger*, junr. declared the use of the recovery to *Sampson* his heirs and assigns: the portions of the younger children of *Roger*, senr. were afterwards paid by *Sampson*. The plaintiffs in the cause claimed the whole manor under *Sampson*, and also claimed a recompense for losses, supposed to have been sustained by him in respect of leases that might have been granted in the life time of *Roger*, but from which he was prevented by the trustees not joining. The cause having been heard before, came on, the 8th of March, on the case stated by the two counsel, which is stated in the decree instead of the pleadings, and then stood over for consideration: on the 15th the decree was pronounced: As to the claim of loss under the 70 years term, the bill was dismissed. As to the term of 3000 years, an account was directed of what *Sampson* had paid and received during the 70 years term, in the life time of *Roger*, senr.; and when all was paid the representative

of the surviving trustee of the term was to assign his interest in one moiety to *Roger*, the grandson and his heirs, to attend his moiety.—And as to the recovery suffered by *Roger* the father, and his sons *Sampson*, *Thomas* and *Roger*; his Lordship declared the same was well suffered as to that moiety whereof *Sampson* was seised in tail, and therefore ordered the plaintiffs to hold and enjoy accordingly; but as to the other moiety whereof *Sampson* was only tenant for life, his Lordship declared that the defendant *Roger* was intitled thereto, and ought to hold and enjoy the same after the death of the defendant *Thomas*, according to the limitations of the deed of the 1st June, 1659. The moieties to stand equally charged with the portions, Reg. Lib. 1696. B. fol. 363. A petition of rehearing was afterwards in *Michaelmas* Term, 1698, presented by the plaintiffs to Lord *Somers*, (then Lord Chancellor) and the cause appears to have been re-heard in *Michaelmas* Term, 1699: but before judgment was given, his Lordship was removed. Another petition therefore to rehear the cause was presented to Lord Keeper *Wright*, and the cause was ordered to be heard *ab origine*: having afterwards abated and been revived, it came on to be heard 8th June, 1702, and on the 15th June judgment was given affirming the decree, and the deposit of 5*l.* ordered to the defendants. Reg. Lib. 1701. B. fol. 351. The Editor has been induced to state this case the more particularly, because both in the above report of it, and in that in *Freem.* it is inaccurately stated, and because Mr. *Fearne*, in his *Essay on Contingent Remainders*, page 27 et seq. 4th edition, (*quod* vide on the doctrine of the principal case) has a good deal considered it, but not with any further reference than to the printed Reports.

DE  
TERM. S. HILLARII, 1699.

IN CURIA CANCELLARIÆ.

HALFPENNY *versus* BALLETT.

CASE 335.  
Feb. 9.

ON marriage treated to be had between the plaintiff and the defendant's daughter, an agreement was reduced into writing and signed by the plaintiff, and delivered to *Ballet* to be signed by him, but he by answer denied he ever signed it, but tore it being dissatisfied with it, in some particulars; but his objections not being to any material parts of the agreement, and he having permitted the plaintiff to court his daughter, and the marriage being afterwards had, and he not declaring his dislike until asked for payment of the portion, and permitting the young couple to live with him; the *Master of the Rolls* decreed the agreement and payment of the portion. (1)

A marriage treated betwixt plaintiff and defendant's daughter, and the articles signed by the plaintiff, but not by the defendant; but the defendant permitting the plaintiff to court his daughter; and not declaring his dislike to the marriage, and permitting the young couple to live with him.—Court decreed the defendant to pay the portion according to the articles.

(1) With interest from the time of the marriage, Reg. Lib. 1699. A. fol. 210. vide Eq. Ca. Ab. 20. pl. 6. where the report seems to be taken from a statement of the case in *Bawdes v. Amhurst*, Pre. Ch. 402. quod vide and also observations on the doctrine of that case by *Hardwicke*, Lord Chancellor, in *Welford v. Beazeley*, 3 Atk. 503.

DE

[ 374 ]

TERM. S. TRINITATIS, 1700.

IN CURIA CANCELLARIÆ.

PILKINGTON *versus* SHALLER and JEFFERIES & Al'.

CASE 336.  
June 3.

THE plaintiff lent to one *Richardson* 100*l.* by way of mortgage on an assignment of a building lease; and although she rent, is assigned over by way of mortgage to *J. S.* for 100*l.* The mortgagee never entered, and lost the 100*l.* mortgage-money, and is sued by the lessor for the ground-rent. No relief, it being his own fault, to take the mortgage by way of assignment, and not by way of under-lease.

Eq. Ca. Ab. 47. pl. 6. S. P. Lease for years subject to a ground-rent.

PILKINGTON  
v. SHALLER  
& JEFFERIES.

never entered nor took possession, and lost the 100*l.* lent; yet the defendant had recovered against her, as assignee, the rent reserved on the lease.

The plaintiff's bill was to be relieved against the recovery at law, and although a hard case, could not be relieved; but the bill was dismissed, she being ill advised to take an assignment of the whole term; whereas if she had taken only a derivative lease, she could not have been liable to the rent reserved on the *first* lease. (1)

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(1) Vide *Sparkes v. Smith*, ante p. 275; and for observation on that and the principal case, *Powell*, Law. Mort. 233, et seq.

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[ 375 ]

CONSTABLE *versus* CONSTABLE & Al'.

CASE 337.  
Eq. Ca. Ab.  
161. pl. 6. S. C.  
By a marriage  
settlement *A.*  
is tenant for  
life, remainder  
as to part to  
his wife, for  
life, remainder  
as to the whole  
to the first  
son, &c. in  
tail. By cus-  
tom of York  
the eldest son  
by means of  
this settle-  
ment is ex-  
cluded from  
a share of his father's personal estate.

UPON the hearing of this cause on *June* 25, 1695, a question arising upon the custom of the *Province* of *York*, touching the distribution of the personal estate of the father; an issue was directed to be tried at law, whether the father having by settlement on his marriage settled his real estate to himself for life, part to his wife for her jointure, the remainder of the whole to his *first*, and other sons in tail, remainder to his own right heirs, the eldest son was thereby excluded by the custom of the *Province* of *York*, from having any share of his father's personal estate; and it being found that he was thereby debarred and excluded, and the cause coming now to be heard on the equity reserved, it was decreed accordingly. (2)

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(2) 8*th June*, the bill by the eldest son, touching the question of the issue dismissed with costs at law, but not in this court, Reg. Lib. 1699. *A.* fol. 478. As to this subject, vide *Benson v. Bellasis*, ante 1 vol. 15. *Ramsden v. Gudgeon*, *ibid.* and ante 274. S. C.

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CASE 338.  
June 8.  
Eq. Ca. Ab.  
223. pl. 1.  
S. C.  
*A.* and *B.*  
claiming each  
of them a rent  
charge out of  
land, by the  
same deed, *B.*  
can be no wit-  
ness for *A.*'s  
title to his  
rent-charge,  
being a party  
interested,  
until he has released his own rent-charge.

Lord CULPEPPER *versus* FAIRFAX & Ux' & Al'.

THE plaintiff's bill being to be relieved touching an annuity charged on the estate of the defendant's wife, Mr. *Cheney Culpepper*, the plaintiff's brother, was examined as a witness for the plaintiff. It was objected against his evidence, that he was concerned in interest, having the like annuity by the same deed charged upon the estate, which was in fact true; but the late Lord *Culpepper* had made him another satisfaction in lieu of it, and he released his annuity; but *that* not appearing by any proof in the cause, the court put off the



hearing, and gave the plaintiff liberty to examine witnesses to prove that *Cheney Culpepper* had released his annuity, before he was examined as a witness in the cause. (1)

CULPEPPER  
v. FAIRFAX.

(1) Reg. Lib. 1699. A. fol. 387.

SPEARING & Ux' *versus* LYNN.

[ 376 ]

CASE 339.

June 12.

Eq. Ca. Ab.

30. pl. 6. 344.

pl. 7. Pre. Ch.

115. S. C.

A mistake in the title of an order amended, though to charge a surety that gave a recognizance to abide the order of hearing.

A RECOGNIZANCE to abide such order as should be made upon the hearing of the cause, being put in suit against *Field* of *Hatton Garden* vintner, who was one of the securities. It fell out, that in the title of the order for confirming of the report, the words & ux' were omitted, the defendant at law took advantage thereof, and pleaded there was no such order made in the cause; the plaintiff perceiving the mistake, obtained an order from the *Master of the Rolls* to amend the title of the order, by adding the words & ux', and the same was afterward confirmed by the *Lord Keeper*. (2)

(2) Vide *White v. Taylor*, post. 453. Vide *Northcote v. Northcote*, Colles P. C. 287. *Earl v. Earl*, Tr. 1700. And the court gave leave to amend the deposition of a witness, (the application

being founded on affidavit) by striking out the word *November*, and inserting instead thereof the word *October*. *Rowley v. Ridley*, Dick. 677.

BISHOP of OXON *versus* LEIGHTON & Al'.

CASE 340.

June 17.

THOMAS POWELL on the marriage of his wife, by lease and release conveyed to *Holland* and his heirs, to the use of himself for life, to his wife for her jointure, remainder to the heirs of *Powell* on the body of his wife to be begotten, remainder to the right heirs of *Thomas Powell*.—*Proviso*, that in default of issue of their bodies, *Holland* should convey to such uses as the survivor should appoint.—*Thomas Powell* devised to the defendant *Leighton* and his heirs. (3) The wife survived, and appointed *Holland* to convey to Sir *Francis Warrington* and his heirs, to the use of herself and her heirs, issue of the marriage, the trustee shall convey to such uses as the survivor should appoint. Although the husband devises the land and dies first without issue, yet the wife has a good power of disposing of the estate by her appointment.

A. on his marriage, conveys his land to a trustee to the use of himself for life, remainder to his wife for life, remainder to the heirs of their two bodies, remainder to A. in fee.

*Proviso*, that in default of issue of the marriage, the trustee shall convey to such uses as the survivor should appoint.

(3) The answers stated the estate in question to be a term for *one thousand* years, and not a fee, and the bequest or devise was to the wife for life, and

then to the defendant *Leighton* for the remainder of the term for *one thousand* years, R. L.

BISHOP OF  
OXON v.  
LEIGHTON.

and she by will devised to the plaintiff and his heirs. The plaintiff could not recover at law, by reason that *Holland* had not made such conveyance as Mrs. *Powell* directed.

[ 377 ]

*Lord Keeper*: The Lord *Dyer's scintilla juris* remains in *Holland*, and although the proviso be unskilfully penned, it amounts unto a power of revoking, and limiting new uses; and decreed the defendant to admit that *Holland* had conveyed according to the wife's appointment, prior to the will of the wife, by which she devised to the plaintiff. (1)

One devises if his son die before 21, or without issue, that the land shall go to J. S. The son dies before 21, but leaves issue, J. S. shall have the land. Post. Ca. 356.

The case of *Jenning* and *Hellier* cited, where the devise was, if the son die before *twenty-one*, or without issue, I give and devise the premises to J. S. Adjudged on a special verdict, that if the son die before *twenty-one*, although he leave issue, the issue shall not take, but the remainder-man; (2) and the case of *Saul* and *Gerrard* in *Cro.* (3) and *Price* and *Hunt* in the Exchequer, (4) and *French's* case in *Dyer*, insisted upon by Justice *Powel*.

(1) The parties were sent to law, and the defendant to admit as above, and the plaintiff to produce all deeds, &c. on oath. Reg. Lib. 1699. A. fol. 426.

(2) 12 Mod. 276. But the decision

there was, that the will was void, as to the devise, the devisee being one of the witnesses.

(3) Cro. Eliz. 525. Moor, 422. S. C.

(4) Pollex. 645.

#### CASE 341.

June 22, 1700.

Eq. Ca. Ab.

314. pl. 3. Pre.

Ch. 116. S. C.

Mortgagor

admitted to

redeem a

mortgage

made in 1642,

after three de-

scents on the

defendant's

part, and four

of the plain-

tiff's part. Length of time answered by infancy and coverture, and an account made up by the mortgagee in 1686.

#### PROCTER & AL' versus COWPER.

THE bill was to redeem a mortgage made in 1642, the mortgagee entered in 1650, *three* descents on the defendant's part, and *four* on the part of the plaintiff; yet the length of time being answered for the greatest part by infancy or coverture: (5) and forasmuch as in 1686, a bill was brought by the mortgagee to foreclose, and an account then made up by the mortgagee, the court decreed a redemption, and an account from the foot of the account in 1686. (6)

Length of time answered by infancy and coverture, and an account made up by the mortgagee in 1686.

(5) 2 Vent. 340. S. P. But if the time begins upon the ancestor, it shall run on against the infant, as in the case of a fine at common law, *St. John v. Turner*, post 419.

(6) And the Master in taking the account, was to allow interest at the rate of 8*l.* per cent. per ann. that being

the rate of interest at the time of the mortgage, till the ordinance of parliament, and then interest at the rate of 6*l.* per cent. per ann. from that time,\* Reg. Lib. 1699. B. fol. 450. Vide *Cook v. Arnham*, 3 P. Wms. 287. Note (B.) *Orde v. Heming*, ante 1 vol, 418. *Frazer & Al' v. Moor*, Bunb. Rep. 54.

\* On this head, vide *Walker v. Penry*, ante p. 42. 144. S. C.

## WRAY, Bart. &amp; Al' versus Lady WILLIAMS.

CASE 342.  
June 26, 1700.  
Eq. Ca. Ab.  
219. pl. 4. Pre.  
Ch. 151. S. C.

SIR *Griffith Williams* grants a term for *ninety-nine* years to Mr. *Bulkeley*, as a collateral security for other lands he had sold him. Sir *William Williams* the son of Sir *Griffith* entered, and dying, the defendant his widow recovered a *third* of those lands for her dower. The bill was to be relieved against that recovery in dower. (1)

(1) The case as stated on the pleadings is extremely long, and depended on the circumstances: but as to the question in the printed report, is in substance as follows: Sir *Griffith Williams* being seised in fee of certain manors and lands in the counties of *Caernarvon* and *Anglesey*, of the value of 2500*l. per ann.* intermarried with *Penelope* the sister of Lord *Bulkeley*, and after the marriage, made a voluntary settlement of all his real estate, both in possession and reversion, whereby he conveyed to the defendant *Bulkeley*, all his lands in *Lleithwedd* for the term of his life, and for *seven* years after, and by the same conveyance reserved to himself a power to demise all his lands in *Llanberris*, and four other parishes therein mentioned, of the yearly value of 500*l.* for a term not exceeding *ninety-nine* years, at such rents as he should think fit; afterwards Sir *Griffith Williams* by indenture, 29th Nov. 17 Car. 2d. demised the lands in the said five parishes to the said defendant *Bulkeley*, his executors, &c. for *ninety-nine* years, for such purposes and with such powers as therein mentioned, and *int. al'* that all the said premises in the said five parishes were to remain in the said defendant *Bulkeley*, his executors, &c. as a security for the benefit of the said defendant *Bulkeley*, to the intent that he and his assigns should quietly enjoy the aforesaid lands in *Lleithwedd* during his life, and *seven* years after free from incumbrances, and from and after his decease, and the expiration of the said *seven* years in trust for Sir *Griffith Williams*, who died, and at his death, left Sir *Wm. Williams* his only son and heir at law, an infant, who soon after he had attained his age of *fourteen* years, married a niece of the

defendant *Bulkeley*s, of the age of *thirteen* years, and afterwards contracted debts, and having attained *twenty-one*, mortgaged his estates, and then made his will, 25th June, 1696, and thereby devised all his manors and lands in the said counties of *Caernarvon* and *Anglesey*, to Sir *Boucher Wray*, the father of the plaintiff Sir *Boucher Wray* for life, remainder to the plaintiff for life, remainder over, and the bill was by Sir *Boucher Wray* the son, and others claiming under the said will of Sir *Wm. Williams*, against the widow of Sir *William Williams*, claiming dower in the lands in the said five parishes, mortgagees and others claiming adversely, and the decree relating to the above question is, "that  
" the defendant the Lady *Williams* was  
" not intitled to dower, or thirds out of  
" any of the lands lying in the said five  
" parishes, the same being within the  
" said Mr. *Bulkeley*'s collateral security  
" made precedent to her said marriage  
" with Sir *Wm. Williams*, and where-  
" out the said Mr. *Bulkeley* ought to  
" he reimbursed so much as had been  
" recovered and received by the Lady  
" *Williams* for her dower, or thirds  
" out of the lands in *Lleithwedd*,  
" and that the Master do set out and  
" appoint so much of the annual rents  
" of the lands in the said five parishes,  
" whereof the said defendant *Bulkeley*  
" is now in possession, as the annual  
" rent of those lands amount unto,  
" which are already received by the  
" said Lady *Williams*, out of the said  
" lands in *Lleithwedd*, which are to  
" be enjoyed for the time to come  
" by the said defendant *Bulkeley*, in  
" lieu thereof, during the life of the said  
" defendant Lady *Williams*," Reg. Lib.  
1699. B. fol. 580. This decree was afterwards 21 March, 1701, affirmed

by *Wright*, Lord Keeper, on a rehearing, Reg. Lib. 1700. B. fol. 640. But afterwards Hill. Term 1710, on a bill of review, it was reversed on solemn argument before *Harcourt*, Lord Keeper,

1 P. Wms. 137. post 680. Et vide *Lady Bodmin v. Vandebendy*, ante 1 vol. 356. Pre. Ch. 65. *Palmes v. Danby*, Pre. Ch. 137.

## CASE 343.

June 29.

Eq. Ca. Ab.

297. pl. 6.

S. C. 231. pl.

3. on another point.

Divers legacies given by a will, and the will is, that if any legatee

died before his legacy was

payable, it should go to his brothers and sisters; a legatee died in the testator's life-time; no lapsed legacy, but shall go to his sister.

DARREL *versus* MOLESWORTH.

A LEGACY of 50*l.* is given to *Darrel Trelawny* at *twenty-one*, or marriage, 50*l.* to *Elizabeth Trelawny* at *twenty-one* or marriage; and in the close of his will, the testator adds, if any legatee died before his legacy was payable, the same should go to the brothers and sisters of such legatee; *Darrel Trelawny* died in the life-time of the testator; adjudged it was no lapsed legacy, but should go to his sister. (1)

(1) This was not the question: by the statement in the Register's Book, it appears that *Thomas Darrel* by his will (*int. al.*) gave a legacy of 200*l.* a-piece, and 40*s.* a-piece for mourning, to his grandchildren the plaintiffs, *Henry Darrel Carew*, *Francis Carew*, *Thomas Carew*, and *Charles Carew*, and the like legacy to the plaintiffs *Ann*, *Giles*, *Grace* and *Mary Risdon*, to be paid to them or so many of them as should be living *two years after his death*. After the testator's death, and within the two years, two of his grandchildren had each one child born, and the question was, whether such two great-grandchildren of the testator were intitled to the said legacy of 200*l.* and 40*s.* respectively, and the court declared they were not, Reg. Lib. 1699. A. fol. 564. As to the question in the printed report, vide *Miller v. Warren*, ante p. 207. *Ledsome v. Hickman*, post 611. *Bretton v. Lethulier*, post 653. *Bird v. Lockey*, post 744. *Elliot v. Davenport*, 1 P. Wms. 83. and particularly note (2) p. 86. *Perkins v. Micklethwaite*, 1 P. Wms. 274. *Willing v. Baine*, 3 P. Wms. 113. where held in the like case, that though the legacy lapsed as to legatee dying, yet it was well given over. So where a legacy is given in consideration of paying an annuity, and the legatee dies in the testator's life-time, the annuity shall be a charge on the residuum,

though the legacy was lapsed, *Oke v. Heath*, 1 Vez. 141. So where devise to trustees for a charity, the trustees die in testator's life-time, this subsists in equity, though lapsed at law, *Attorney-General v. Hickman*, W. Keb. 4. Et vide *Sibley v. Cook*, 3 Atk. 572. *Sibthorp v. Moxom*, ibid. 580. *Brown v. Clarke*, 3 Ves. 166. And in *Bridges & Al' v. Wood & Al'*, at the Rolls, Feb. 3, 1791, not reported, testatrix gave 1000*l.* each to several persons named in her will, and directed that if any of them should die in her life-time, it should go to his and their legal representative, one of the legatees died in the life-time of the testatrix, having first made his will, and appointed two persons his executors, and gave the residue of his effects to several other persons, they and the executors claimed the 1000*l.* against the next of kin of the legatee, it was held not to be a subject that could pass by the will of the legatee, but that his next of kin took it as persons designed by the will of the testatrix in the place of the legatee. And to prevent the lapse of a legacy, the will ought to be specially penned, or the intention perfectly clear, *Sibthorpe v. Moxom*, 3 Atk. 582. *Corbyn v. French*, 4 Ves. 485. From these cases it is presumed, it may be gathered as a general principle; that where the object of the testator's bounty having a vested interest in the subject dies in

the life-time of the testator, or not having a vested interest dies before the time marked out for the possession; the legacy becomes lapsed, but that where there is an object of bounty ulterior the person to whom the legacy is immedi-

ately given, and who is interested therein, and who survives the testator, there the death of the immediate legatee in the life-time of the testator, will not intercept his intended bounty to such ulterior object.

TILLY MIL' *versus* WHARTON & è contra.

**WHARTON** on a plea of *non est factum*, had obtained a verdict on a bond of 3000*l.* penalty for payment of 1500*l.* and there not being sufficient personal assets, *Wharton* brought a bill to have a trust of lands executed in aid of the personal estate. The defendant insisted the bond was forged, and had made a strong proof of it; but *that* being the point tried at law, the court would not enter into the proof thereof, or permit the depositions to be read: but admitted if the witnesses had been convicted of perjury, or the party of forgery, that might have been a just ground for relief in equity, especially since the prosecuting of attaints was become in a manner impracticable; (1) but upon an appeal to the *House of Peers*, a new trial was directed, and the bond found to be forged.

CASE 344.  
June 28.  
Eq. Ca. Ab.  
378. pl. 4. S.C  
New trial  
granted by the  
House of  
Lords.  
Post. Ca. 382.

[ 379 ]

If a witness be  
convicted of  
perjury, or the  
party of for-  
gery, good  
cause for a  
new trial.

(1) It appears there had been a trial Trin. Term 1693, in the *Exchequer*, on the bond above mentioned, in which the plaintiff *Wharton* was nonsuited, then an action was brought in the *King's Bench*, and a verdict obtained by *Wharton*, but he neglecting to enter up judgment thereon afterwards, Trin. Term 1694, a new trial was had, and a verdict obtained by *Wharton* thereon. *Sir John Roberts*, Bart. deceased, had in his life-time by deed, charged his real estate with payment of his debts, and particular legacies to be given by his will, he afterwards made his will, and thereby confirmed the said deed, &c. No executor was named in the will, and administration with the will annexed was granted to *Deborah*, who afterwards married the defendant *Jos. Tilly*; the plaintiff *Wharton* who had married the obligee named in the bond in question, and his wife brought their bill against *Tilly* and his wife as above stated. As to the proof of the forgery it appears from the account of *Tilly* and his wife, that since the last mentioned trial in Trin. Term 1694, they had discovered several new matters and evidence not insisted on at any of

the former trials, which would manifestly make it appear that the said bond was not executed by the said *Sir John Roberts*, the Register's Book then states "that the defendants' counsel" further insisting that they had examined witnesses in the cause pursuant "to two several orders of the 11th" "March, 1698, and the 4th July, 1699," and that by such examinations which "were all or most of them matters discovered since the last trial, the defendants have fully proved the forging the said bond, and that the plaintiffs have joined in such examinations, and made an exhibit of the said bond, and therefore prayed the said examinations might be read, but the plaintiff's counsel alleging that the defendant's examinations did tend only to impeach and invalidate the verdict, which was solemnly obtained at the *King's Bench* bar, upon a *non est factum* pleaded, and therefore the said examinations ought not to be read. His lordship thereupon declared that he would not hinder the said defendants from reading their proofs in the cause, but he would not regard any of the said proofs that did



“ tend to impeach the said verdict, unless the defendants could produce or make out against the plaintiffs a conviction of perjury or forgery, or confession of the parties which the said defendants’ counsel could not make out.” The decree then ordered an account of the personal estate of the testator, and that the principal and interest due on the bond should be paid thereout, and that what the personal estate should fall short to pay, should be made good by the produce to arise by sale of so much of the real estate

as should be necessary, in which all proper parties were to join, Reg. Lib. 1699. B. fol. 490. entered *Wharton v. Tilly*, and confirmed on a rehearing, and ordered that the defendants should give the plaintiffs a release of errors on their said judgment at law, Reg. Lib. 1700. B. fol. 191. entered also *Wharton v. Tilly*, vide post 419. S. C. As to this court granting new trial, vide *Barbone v. Brent*, ante 1 vol. 176. and cases cited in not. there. *Blynman v. Brown*, ante 232.

CASE 345.  
Eodem die.  
Eq. Ca. Ab.  
345. pl. 17.  
S. C.

ARETHUSA Lady Dowager CLIFFORD *versus* Earl of BURLINGTON, Lord CLIFFORD & Al’.

Tenant for life, with power to make a jointure of 1000*l.* per ann. upon marriage, covenants to make a jointure on his wife of 1000*l.* per ann. Afterwards gives a particular of lands mentioned to be 1000*l.* per ann. which are settled for the jointure, but prove to be but 600*l.* per ann. Decreed the jointure to be made up 1000*l.* per ann. by the issue in tail.

THE Lord *Clifford* by marriage-settlement, was made tenant for life, of several manors and lands in *Ireland*, with power to make a jointure not exceeding 1000*l.* per ann. Upon his marriage with the Lord *Berkeley’s* daughter, he covenanted to settle a jointure on her of 1000*l.* per ann. and pursuant thereunto, a settlement was made, and a particular of lands mentioned, and set out for the jointure, and which in the particular given him, were computed at 1000*l.* per ann. but in truth fell short, and were not above 600*l.* per ann. the bill was to have the jointure made up 1000*l.* per ann.

Tenant in tail covenants to settle a jointure and dies, issue in tail not bound by the covenant.

It was insisted for the defendant, that he claimed under the marriage-settlement as a purchaser, and the late Lord *Clifford* had only a power to have charged the estate with 1000*l.* per ann. if he had not done it at all, and had died without executing of his power, a court of equity could not have done it for him, and have raised a jointure of 1000*l.* per ann. upon the estate, though it had been reasonable and just for him to have done it in his life-time. So if he had executed his power but in part, that cannot be extended or carried further in equity. (1) If tenant in tail covenants to make a jointure, although he might have done it by a fine or *common recovery*, a court of equity cannot relieve, or decree a jointure.

[ 380 ]

But the court in this case decreed the jointure to be made up 1000*l.* per ann. against the issue in tail, who was not privy to the marriage-treaty, nor guilty of any fraud. (2)

(1) It is a clear doctrine that this court cannot supply the non-execution of a power, although it will aid a defective execution, *Arundell v. Phillpot*,

ante p. 69. Et vide on this subject *Powell on Powers*, 156. et seq.

(2) Vide *Wharton v. Wharton*, ante p. 3, *Fox v. Crane*, ante p. 306.



EYTON *versus* EYTON.

CASE 346.

July 6.

THE defendant having suppressed a marriage-settlement by which a remainder in tail male was limited to the plaintiff's father, and all the prior estates spent: upon proof made that the settlement came to the defendant's hand, and that he had confessed it in an answer to a former bill, though he now denied it; the Master of the *Rolls* decreed the plaintiff should hold and enjoy the estate; and this decree was confirmed upon an appeal to the *Lord Keeper*. (1)

Eq. Ca. Ab.  
169. pl. 1. Pre.  
Ch. 116. S. C.

Defendant suppresses a marriage-settlement, whereby a remainder in tail is limited to plaintiff's father, all prior estates

being spent. Decreed plaintiff to hold and enjoy the estate.

(1) By the decree the defendant was also to account for and pay to the plaintiff the rents and profits received by him during his possession, together with costs, Reg. Lib. 1699. A. fol. 412. So decree made upon a deed suppressed. The *King & Lord Hunsdon v. Arundel*, cited in *Dalston v. Coatsworth*, 1 P. Wms. 732. *Sanson v. Rumsey*, post 561. there also cited. Note, the principal case is differently reported in Pre. Ch. 116. by the statement there it appears there was a counterpart of the settlement, and that admitted as

evidence, and this decree on appeal was affirmed in Dom. Proc. 1 Bro. P. C. 151. Journ. Ho. Lords, 18 vol. p. 237. As to the evidence required in cases where instruments have been lost, suppressed or destroyed, vide *Dalston v. Coatsworth*, 1 P. Wms. 730. *Cowper v. Earl Cowper*, 2 P. Wms. 748. *Cookes v. Hellier*, 1 Vez. 234. *Whitfield v. Fausset*, ibid. 389. *Cole v. Gibson*, ibid. 505. *Clavering v. Clavering*, 2 Vez. 232. [*Bates v. Heard*, 1 Dick. 4. *Bowles v. Stewart*, 1 Sch. & Lef. 209.]

Dr. STEWARD *versus* EAST-INDIA COMPANY.

CASE 347.

July 10.

BILL to be relieved against an award made by some of the members of the *Company*, touching the *quantum* of freight due to the plaintiff, from the *Company*. The arbitrators and some of the particular members being made defendants, they demurred to the whole bill, because the plaintiff could have no decree against them, (2) and their answers would be no evidence against the *Company*, and the plaintiff might examine them as witnesses. Demurrer allowed, without putting them to answer as to matters of fraud and contrivance. (3)

Eq. Ca. Ab.  
40. pl. 8. 73.  
pl. 14.  
Bill to be relieved against an award made by some of the members of the East India Company; and those members, and the arbitrators are made

defendants. They may demur to the whole bill, without answering to the fraud; for the plaintiff can have no decree against them, nor can their answer be read against the *Company*; but they ought to be examined as witnesses.

(2) [*Whitworth v. Davis*, 1 V. & B. 545. *Griffin v. Archer*, 2 Anst. 478. S. C. stated 2 Ves. J. 613. *Lloyd v. Lander*, 5 Mad. 282. *Smith v. Snow*, 3 Mad. 10.]

(3) Vide *Wyck v. Meal*, 3 P. Wms.

310. and it is a principle that a mere witness shall not be made a party to the bill. sic dict. per *Master of the Rolls*, *Neuman v. Godfrey*, 2 Br. Ch. Rep. 332.

CASE 348.

Octob. 20.

One devises 15*l.* apiece to each of his relations of his father and mother's side, and gave the surplus of his personal estate to *A.* and makes *B.* executor. *B.* the executor, paid 15*l.* to the testator's cousin

JONES *versus* BEALE & A<sup>r</sup>.

*WILLIAM WILLIAMS* in 1681, devises 15*l.* apiece to each of his relations of his father's and mother's side; and devises the surplus of his estate, after debts and legacies paid, to the plaintiff, and made the defendants executors; he left several cousin Germans on the father's and mother's side, who were his nearest relations. The defendants the executors paid fifteen pounds to one *Dorothy Smith*, who was one of the testator's cousin Germans, and likewise fifteen pounds apiece to four of her children. German, and 15*l.* apiece to her four children. The court allowed the payment to the children, and would not restrain the devise to the relations within the Statute of Distributions.

The plaintiff insisted this was a *male* administration, as to what was paid to the children; for that in cases of such general and uncertain devises, the court had always restrained it to such kindred, as would be intitled by the statute for settling intestate's estates; so that the payment ought to have been only to the next of kindred, which were the cousin Germans, and not to their children.

The *Lord Keeper* being attended with precedents, allowed the 15*l.* apiece to the four children of *Dorothy Smith* to be well paid, as against the plaintiff the residuary legatee; and took notice of the case of *Arnold* and *Bedford*, (1) where although it is mentioned in the order that the devise to the kindred should be governed by the statute for distribution of intestates' estates; yet there the children of brothers and sisters were let in to receive a share in the life-time of their parents, (2) which is not allowable on a distribution under the statute. (3)

(1) *Carr v. Bedford*, 2 Rep. in Ch. 77. S. C.

(2) [In that case the executors had a discretion under the will.]

(3) But the Statute of Distributions is now and long has been considered as the rule in such cases, *Roach v. Hammond*, Pre. Ch. 401. *Anon.* 1. P. Wms. 327. *Harding v. Glyn*, 1 Atk. 469. and cases cited in not. there respectively. [*Garrick v. Camden*, 14 Ves. 372. *Smith v. Campbell*, 19 Ves. 400. *Coop.* 275. In *Doe v. Over* real estate devised to relations was held a devise to those who would have taken personal estate under the statute.] De-

*visme v. Mellish*, 5 Ves. 529. where bequest to each of testator's relations by blood or marriage, and held that relations under Stat. of Distributions, and those married to them intitled, otherwise it should seem that bequest to relations does not include those by marriage, *Maitland v. Adair*, 3 Ves. 231. *Cruwys v. Colman*, 9 Ves. 323. but where legacy given to be paid to testator's relations at the discretion of *A.* there *A.* is not bound by the Stat. *Bennett v. Honywood*, Amb. 708. *Supple v. Lowson*, *ibid.* 729. *Cruwys v. Colman*, *ub. sup*

DE  
TERM. S. MICHAELIS, 1700.

IN CURIA CANCELLARIÆ.

CHAMPERNOON *versus* GUBBS & A<sup>t</sup>.

CASE 349.

Octob. 24.

Pre. Ch. 126.

S. C.

Plaintiff had  
120*l.* per ann.  
rent-charge  
settled for her  
jointure; and  
there being a  
great arrear,  
and not suffi-  
cient distress  
on the land;  
plaintiff

THE plaintiff on her marriage had a rent-charge of *one hundred and twenty pounds per ann.* settled on her in lieu of a jointure, with power of distress; and there being no less than *five hundred pounds* arrear, and no sufficient distress to be found on the land; the bill was against the devisee of the inheritance, that a sufficient distress might be set out, or that the plaintiff might hold and enjoy the land until satisfied the arrears, and the growing payments.

brought her bill that the defendant, the devisee of the inheritance, might set out sufficient distress; or that the plaintiff might hold and enjoy till paid the arrears. *Cur.* when the party has provided one remedy, *viz.* by distress, we will not give her another, unless some fraud be proved in letting the land lie fresh, or depasturing the land in the night-time only. Post. Case 354.

The *Lord Keeper* thought not fit to relieve the plaintiff, declaring the law never gives any other remedy, than what the party has provided for himself, and the remedy here being only by distress, and not to enter upon and hold the lands, declared he could not relieve the plaintiff, unless some particular fraud had been proved; as letting the land lie fresh, or depasturing it in the night time, on purpose to prevent a distress; and if that were the case, such fraud by tenant for life ought to turn to the prejudice of the remainder-man, to charge the land with arrears, which incurred in the time of the tenant for life, and declared he must dismiss the bill.

[ 383 ]

The defendant proposing that if the plaintiff would quit the arrears, he would pay all the growing annuity, and be decreed to pay it; her counsel took time to return an answer to the proposition. (1)

(1) The annuity was in consideration of 2000*l.* portion with the plaintiff, and paid on her marriage with *John Gubbs* deceased, and settled in trust for her for *ninety-nine* years after the death of *Gubbs*, if she survived him

and should live so long. *John Gubbs* by his will, devised the premises charged with the said annuity, and subject thereto, to *Robert Gubbs*, who entered and paid the annuity, and then died and left the defendant *Mary Gubbs*

his widow, and the defendant *John* an infant, his heir at law, having first made his will, and devised all his real estate to *Northmore, Kingston, Oliver* and *Symonds*, and their heirs, in trust by profits or sale to pay his debts, and then in trust for the defendant *John* the infant; it then appears that the trustees entered, but that *Mary Gubbs* the widow, by their permission, received the profits of the said premises, and then that one *Sir Thos. Mallett* and his son were seised in fee, (how they became so does not appear) and had granted a lease thereof to one *Michael Mallett* for *ninety-nine* years, determinable on *three* lives. Divers proceedings are then stated by the bill to have been had both at law and in equity, with respect to the said premises and annuity, and then the bill stated that during such proceedings no part of the said annuity had been paid, and that no distress was to be had, there being no clause of entry in the said grant of the said annuity, and and the prayer of the bill was for an account of the profits of the said estate since the death of the said *Robert Gubbs*, and that the same might be applied towards satisfying the arrears of the said annuity with damages, and that the premises might be charged with the arrears and the growing payments, and the plaintiff have a decree to hold till the same should be satisfied. By the answers of *Northmore* and the other trustees, it appears that the devise by *Robert Gubbs* (the devisee of *John*) was to *Kingston, &c.* and *Mary Gubbs* upon trust, to pay debts, &c. and that *Mary Gubbs* received the profits, and the decree was, "whereupon, &c. this court doth order that the plaintiff's bill be dismissed out of this court, as against the said defendants *Northmore, Kingston, Oliver* and *Symonds*, with 40s. costs to each, and as to the defendant *Mary Gubbs*, it is ordered to be referred to take an account of the arrears of the said annuity, after payment of taxes, and payments to the plaintiff, and that

"the said defendant *Mary Gubbs* do come to an account before the said Master for the rents and profits of the said estate, charged with the said annuity since the death of the said *Robert*, raised or received by the said *Mary*, or any for her, and that what shall appear due to the said plaintiff for the arrears of her said annuity, the said *Mary Gubbs* is hereby ordered and decreed to pay unto the said plaintiff out of the rents and profits of the said estate, which upon such account shall appear to have been received by the said *Mary Gubbs*, together with the costs of this suit, but as to the said defendant *John Gubbs*, (the son of *Robert*) this court declared that they saw no reason to charge him or the said estate with the arrears of the said annuity." As to the proposal of the defendant respecting the growing annuity mentioned in the printed report, the proposal was on the part of *John Gubbs* the infant, who is stated in the Register's Book to have been in court, and consented thereto, and is to the effect above stated, except as to his submitting to be decreed to pay the same, on which point the cause stood over until the 6th *December* following, when the plaintiff by her counsel refused the same, and desired to be at liberty to proceed at law for the arrears, if she could not be relieved for the same in this court, (vide the decree as above) and as to that the decree was, "this court doth order that the said plaintiff's bill as against the said *John Gubbs* do stand dismissed out of this court as to all matters therein mentioned, save as to the lease made by *Sir Thos. Mallett* and his son, with costs to be taxed," but the defendant *John Gubbs* and his said trustees were thereby restrained from setting up the said lease to bar the plaintiff from recovering her said annuity, or the arrears thereof at law, Reg. Lib. 1700. A. fol. 115. entered *Champernoon v. Northmore*. Vide *Cocks v. Foley*, ante 1 vol. 359. and cases cited in not. there.

COLCHESTER *versus* ARNOTT.

CASE 350.

Octob. 30.

Pre. Ch. 124.  
S. C.

**BILL** by the landlord to compel the defendant his tenant at a rack-rent to surrender his lease, whereby to enable the plaintiff to renew with the church, the plaintiff offering by his bill, (as he had before done) as soon as the grand lease was renewed, to make a new lease to the defendant for the term then to come, and under the same rent, &c.

Lessee of a church-lease, makes an under-lease, and would have the under-lessee to surrender, in the tenant's

in order to enable him to renew with the church. There being no covenant in the tenant's lease to surrender, the court cannot compel him to do it.

*Per Cur.* There being no covenant in the under-lease to compel the tenant to surrender to enable the plaintiff to renew, court cannot compel him thereunto, and dismissed the bill. (1)

(1) With costs to be taxed, Reg. 11th *February* then next, Reg. Lib. 1700. A. fol. 5. no case stated. ub. sup. fol. 74. but no further entry Afterwards 28th *Nov.* there is an entry of an order for rehearing on the appears.

FERRARS *versus* CHERRY & Al'.

CASE 351.

Octob. 26.

Eq. Ca. Ab.  
3. pl. 11. 331.

pl. 5. S. C.

**THE** defendant purchased from the plaintiff's father and mother, the lands in question by deed and fine, whereby \*they conveyed to him and his heirs; whereas pursuant to an agreement made on their marriage, the estate was settled to the plaintiff's father for life, part to the mother for her jointure, remainder of the whole to the first and other sons in tail-male, &c. (2) and it appeared by the proofs in the cause, that the defendant *Cherry* had notice of the settlement, and that the same amongst the other writings was delivered to him. Upon his purchase, the defendant took in a mortgage-term, which was prior to the settlement, and enters, and afterwards sold the estate, part to *Howland*, and other part to *Harwood*, who were made defendants to the bill, and pleaded they were purchasers without notice; and the plaintiff not being able first shall account for the purchase-money which he received, with interest from the death of the tenant for life.

One purchases having notice of a settlement, whereby the vendor was but tenant for life, remainder to his first, &c. son in tail, and afterwards sells to one who had no notice. Tenant for life dies leaving a son. Decreed the last purchaser shall hold the land; but the

[\*384]

(2) The premises were, by indenture, made and executed before the marriage, agreed to be settled as to so much thereof as did not exceed 40*l.* *per ann.* to the use and behoof of such person or persons, as the plaintiff's father should appoint; to the intent that the same might be sold to the best advantage: and as to all the residue

of the said premises, as in the printed report, save that the whole of such residue was to the wife for her jointure. A settlement was executed according to the aforesaid agreement *after* the marriage. The part of the premises which the plaintiff's father was by the said agreement at liberty to sell, was sold to one *Gosnold* for 275*l.* R. L.

FERRARS v.  
CHERRY.

to prove any notice upon them, the bill as against them was dismissed; (1) but as against the defendant *Cherry*, the court decreed him to account for the consideration-money for which he sold the estate, with interest, from the decease of the plaintiff's father and mother, (2) thereout discounting what was due on the mortgage, made prior to the settlement. (3)

The settle-  
ment was  
made after  
marriage, but  
in pursuance  
of articles  
before the  
marriage; but  
the articles  
are not taken  
notice of in  
the settlement.  
him to inquire  
marriage.

It was objected, that although it now appears by the proof, that the settlement which was made after marriage, was made pursuant to articles made before the marriage; yet it was not so recited in the settlement, nor any notice taken therein of the agreement or articles before marriage; and for aught appeared to the defendant *Cherry*, the deed was fraudulent, as against a purchaser.

However the purchaser having notice of the settlement it was incumbent on him to inquire whether it was voluntary, or made in pursuance of an agreement before marriage.

[ 385 ]

*Per Cur.* He ought to have inquired of the wife's relations, who were parties to the deed, whether it was voluntary, or made pursuant to an agreement before marriage, and having notice of the deed, must at his peril purchase, and be bound by the effect and consequence of the deed. (4)

(1) With costs, R. L.

(2) "Mother only," R. L.

(3) "And to pay the plaintiff his costs, and also what costs the plaintiff shall pay to the other defendants *Howland* and *Harwood*." Reg. Lib. 1699. A. fol. 553.

(4) The words of the decree as to the notice are, "that the said defendant *Cherry* is to be presumed to have had notice of the said settlement, he having had the same in his hands before the time of his pretended purchase, and did thereby know that the plaintiff's late father, had but an estate for life," Reg. Lib. ub. sup. cited in *Strange*, 243. In *Senhouse v. Earle*, Nov. 1755. Amb. 289. *Hardwicke*, Lord Chancellor, is reported to say of the principal case, "As to the case of *Ferrars v. Cherry*, the reporter has mistaken the state of the case. I am inclined to think it was left uncertain on the face of the settlement, whether it was made before marriage or not, I deny the authority of that case." As to which,

vide note (2) in the preceding page. Notwithstanding this, it was again cited in a case of *Mertins v. Jolliffe*, July, 1756. Amb. 311. when his Lordship said, "*Ferrars v. Cherry*, went a great way, that was, implied notice." And by a M.S. note, it appears to have been cited in *Fox v. Macreth*, June, 1786, at the Rolls. Vide *Biscoe v. Earl of Banbury*, 1 Ch. Ca. 187. *Moor v. Bennett*, 2 Ch. Ca. 246, which according to the report, was a case where *A.* makes a conveyance to *B.* with power of revocation by will, and limits other uses, if *A.* dispose to a purchaser by the will, another purchaser subsequent, (i. e. under the deed) is intended to have notice of the will, as well as of the power to revoke, and this is in law a notice on the principle that where a purchaser cannot make out a title but by a deed, which leads him to another fact, he shall be presumed conusant thereof, for it is *crassa negligentia* that he sought not after it. [And see *Hiern v. Mill*, 13 Ves. 114.]



MOYSE *versus* GYLES.

THE plaintiff's late husband and his ancestors had, together with the defendant and his ancestors, long enjoyed a church-lease in moieties, and had several times renewed it under an agreement, that no advantage should be taken of survivorship; but on the last renewal of the lease by the plaintiff's testator and the defendant, there was no express agreement made to bar survivorship. The plaintiff's late husband falling ill of the small pox, sent for a schoolmaster, and intending to sever the joint-tenancy, made a grant or an assignment of his interest to his wife the plaintiff, and likewise by will devised it to her. (1)

CASE 352.  
Octob. 30.  
Eq. Ca. Ab.  
293. pl. 2. Pre.  
Ch. 124. S. C.  
The plaintiff's husband and defendant had enjoyed a church-lease in moieties, under an agreement that there should be no benefit of survivorship. Upon the last renewal, the lease was

taken in both their names, and no express agreement against survivorship. The plaintiff's husband being sick, by deed assigned his moiety of the lease to his wife; and by his will devised it to her. The grant to the wife is void, and the devise will not sever the joint-tenancy.

The plaintiff's bill was to be relieved against survivorship, and it was insisted by the plaintiff's counsel, that the new lease should be presumed to be taken under the same agreement as the former leases were, viz. that no advantage should be taken of survivorship, or that the court upon the circumstances of the case, should supply the defective grant or assignment to the wife.

*Per Cur.* The grant to the wife is absolutely void in law, and the will cannot take effect to prevent survivorship, and no agreement appearing to exclude it, the court dismissed the bill. (2)

[ 386 ]

(1) It was not devised by the will, R. L.

B. fol. 92, where the case is stated, and afterwards came on as above, Reg.

(2) The cause came on the 11th Nov. 1699, and stood over till this day, for the production, Reg. Lib. 1699.

Lib. 1700. B. fol. 33. which contains merely the order for dismissal.

SEELING & ELIZABETH CRAWLEY *versus* CRAWLEY.

THE defendant having married the plaintiff's daughter, on a quarrel between him and his wife, they agreed to part, and the defendant gave a note to the plaintiff to pay him 160*l.* (being the portion the plaintiff had given with his daughter) on demand, the plaintiff saving him harmless from any debts his wife may contract, and against all demands for her maintenance, &c. The wife with her child went thereupon and to her father, and for the father's indemnifying the husband from the maintenance and debts of his wife, established by a decree, though the husband offered to receive and maintain his wife.

CASE 353.  
Nov. 12  
MASTER of the  
ROLLS.  
Eq. Ca. Ab.  
67. pl. 5. S. C.  
An agreement for the husband and wife's parting, and for the husband's returning his wife's portion

SEELING v.  
CRAWLEY.

lived with the plaintiff her father, and were maintained by him; the bill was to compel payment of the 160*l.* the plaintiff offering to perform the agreement on his part. And although the husband now offered to take his wife home and maintain her and her child, and allow the plaintiff for the time past; yet the court decreed the defendant to pay the 160*l.* to the plaintiff, upon his giving security to indemnify the defendant against the debts and maintenance of the wife and child. (1)

(1) The bill was by the father and daughter, and it appears that the husband on the marriage, had given a bond to the plaintiff *Seeling*, the wife's father, in the penalty of 320*l.* for the payment of an annuity of 16*l.* to the wife for her life, in case she survived him, in consideration of the above portion of 160*l.* and of some goods which he also received with her, but to what amount does not appear, which bond was delivered up to the defendant on his giving the above note, and returning some of the goods, and the bill was in the alternative, either that the defendant should perform his agreement and pay the note, and return the remainder of the goods, or else that he should settle the 16*l.* *per ann.* on the wife, and secure the goods to her in case she should survive him, and make a present competent allowance for her and her child, and pay the plaintiff the father for their maintenance since they had come to him, and the decree ordered "that the said defendant do pay the 160*l.* to the said plaintiff *Seeling* (the father) with interest from the filing of the bill, and upon payment of the same the plaintiff the father is at his charge to give security to be approved by the Master to keep the plaintiff *Elizabeth* and her child, and to indemnify the defendant the husband against any charge that may happen to him by his wife and child." And as to the matter of maintenance, the bill was dismissed, but the defendant was ordered to pay the costs of the suit, and he was at liberty to take his child from the plaintiffs when he should think fit to demand him, and then to maintain him at his own expence, Reg. Lib.

1700. B. fol. 71. It seems perfectly clear as a general doctrine, that in cases similar to the principal case, equity will decree, or carry into effect an agreement for a separate maintenance for the wife, *Sanky v. Golding*, Carey, 124. *Farmer v. Compton*, 1 Ch. Rep. 1. *Ashton v. Ashton*, 1 Ch. Ca. 164. *Oxenden v. Oxenden*, post 493. Pre. Ch. 239. S. C. *Williams v. Callow*, post 752. *Angier v. Angier*, Pre. Ch. 496. *Dutton v. Dutton*, 4 Vin. Ab. 178. pl. 18. *Guth v. Guth*, 3 Bro. Ch. Rep. 614. where the cases are stated and considered, but the principal case very incorrectly, *Bullock v. Menzies*, 4 Ves. 798. and the principle seems to be recognized in *Legard v. Johnson*, 3 Ves. 352. and by *Eldon*, Lord Ch. in *De Manneville v. De Manneville*, 10 Ves. 56. [*Fletcher v. Fletcher*, 2 Cox. 99. *St. John v. St. John*, 11 Ves. 526. *Worrall v. Jacob*, 3 Mer. 256. *Durant v. Titley*, 7 Price, 577. *Jee v. Thurlow*, 2 B. and C. 547. *Westmeath v. Westmeath*, Jacob. 130. *Elworthy v. Bird*, 2 S. and S. 372. and in note to *Westmeath v. Westmeath*, Jacob. 143.] and the court will secure the principal for the children, of property come to the wife after the marriage, *Nicholls v. Danvers*, post. 671. But such jurisdiction is not original, but incidental, per *Loughborough*, Lord Ch. *Ball v. Montgomery*. 2 Ves. jun. 195. in which the doctrine of agreement for separate maintenance is discussed. And the court will act upon the separate maintenance as circumstances may require, *Whorewood v. Whorewood*, 1 Ch. Ca. 250. and that even after a decree, *Head v. Head*, 3 Atk. 295. Et vide observation on that case, arg. *Ball v. Montgomery*, ub. sup. But the court will not entertain

a bill to discover acts of hard usage, between a man and his wife to live  
*Hincks v. Nelthorpe*, ante 1 vol. 204. separate, *Wilkes v. Wilkes*, 2 Dick.  
 Nor will it establish an agreement be- 791. [See *Elworthy v. Bird*, up. sup.]

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FOSTER *versus* FOSTER.

CASE 354.

Nov. 11.

Eq. Ca. Ab.  
 365. pl. 7. Pre.  
 Ch. 122. S. C.

**FOSTER** the son, seised of an estate at *Bromley* in *Kent*, devised the same to the defendant, and devised thereout 100*l. per ann.* to his father, payable half yearly, and in default of payment to enter and distrain, and the distress to detain until the arrears paid; the plaintiff the widow and executrix of the father, brought her bill for satisfaction of the arrears, and the *Master of the Rolls* decreed the arrears with costs and charges, and she to enter and enjoy until satisfied; though the *Lord Keeper* this term dismissed the bill in the like case between *Champernoon* and *Gubbs*.

Devisee of a rent-charge out of lands with power of distress dies. His executrix brings a bill for the arrears. Decreed that she may enter and hold and enjoy till paid the arrears

and costs. Ant. Ca. 349.

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ATTORNEY-GENERAL, at the relation of the Inhabitants  
 of Clapham, *versus* HEWER & A<sup>r</sup>.

[ 387 ]

CASE 355.

Nov. 13.

Eq. Ca. Ab.  
 94. pl. 1. S. C.

A SCHOOL-HOUSE being erected on the waste, by the voluntary contribution of the inhabitants, Mr. *Atkins* the *Lord* of the *Manor* enfeoffs about *eighteen* of the principal inhabitants and their heirs, in trust, and to the intent that the inhabitants of *Clapham* may for ever have a school, &c. as of the gift of *Richard Atkins*. Upon a dispute between the inhabitants and the surviving trustees, the question was, whether the trustees or the inhabitants should nominate the schoolmaster; and for the plaintiff the case of *Hinley Chapel* in the parish of *Wigan* in *Lancashire* was cited, where ground was granted to trustees, whereon to erect a chapel for the celebration of divine service, for the use of the inhabitants: decreed in the *Dutchy*, that the nomination of the minister was in the inhabitants. (1)

A school-house being erected by voluntary contributions of the inhabitants of A. on the waste, the lord of the manor enfeoffs trustees in trust that the inhabitants of A. may for ever have a school, &c. as of the gift of the lord.

Whether the trustees or the inhabitants

are to nominate the schoolmaster.

*Lord Keeper*: This not being a free-school, is not a charity within the provision of the statute of Queen *Elizabeth*, and consequently the inhabitants have not a right to sue in the name of Mr. *Attorney General*. If the lord of a manor should erect a mill, and convey it to trustees, to the intent the inhabitants might have the convenience of grinding there; the inhabitants should not be admitted to sue here in Mr. *Attorney*

If not a free-school, the inhabitants have no right to sue in the *Attorney General's* name.

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(1) Vide *Herbert v. Dean and Chapter of Westminster*, 1 P. Wms. 773.

ATTORNEY-  
GENERAL v.  
HEWER.

*General's* name, (1) and declared unless the plaintiff could produce precedents where the court had relieved in like cases, he would dismiss the bill. (2)

(1) Vide Stat. 43. Eliz. Cap. 4. *Lord Keeper* recommended it to the Duke Ch. uses, 108. parties to submit the matter to Mr.

(2) Nov. 15. the cause is mentioned *Attorney General*, Reg. Lib. 1700. A. fol. 38, no further entry appears. to have come on as above, but no entry appears; and on this day, the

[ 388 ]

### WOODWARD *versus* GLASBROOK.

CASE 356.

Nov. 18.

One devises several parcels of land to his several children in tail, and if any of them die before 21, or unmarried, such child's

part to go to the surviving children. If any of the children die unmarried, though above the age of 21, his share shall go to the surviving child; but such survivor shall have such share for life only.

THE testator *Edward Glasbrook*, by his will (*inter alia*) devised a house in *Lime-street*, to his sons *James* and *Thomas*, and the heirs of their bodies in equal moieties, and devised other houses to his other children in like manner, and then adds, *but my will and mind is, that if any of my said children shall die before 21, or unmarried, the part or share of him or her so dying, shall go over to the survivors.* (3)

In ejectment before the *Lord Chief Justice Holt*, he was of opinion, that *Thomas* dying unmarried, though he attained his age of *twenty-one*, his moiety went over to the survivors; and that *John*, another son, likewise dying unmarried, though after *twenty-one*, that his half went over to the survivors.

What goes over on one child's death shall not go over again a second time.

*Secondly*, That what went over to *John* on the death of his brother *Thomas*, would not go over again a second time. (4)

*Thirdly*, That by the devise over, only an estate passed to the survivors for their lives; and the court decreed an account to be taken, and a partition to be made accordingly. (5)

(3) *Part and share alike*, his son *Robert* only excepted for reasons therein mentioned, R. L.

(4) And *Lord Kenyon* in *West v. Oliphant*, at the *Rolls*, 21st June, 1785, considered this the settled doctrine, vide cases cited and stated by Mr. Cox in note (1) to *Perkins v. Micklethwaite*, 1 P. Wms. 275. but a contrary decision took place in *Worlidge v. Churchill*, 3 Bro. Ch. Rep. 465. by *Buller*, Just. Et vide the case of *Ferguson v. Dunbar*, cited in note

there, p. 469. *Nicholls v. Skinner*, Pre. Ch. 528. [*Vandergucht v. Blake*, 9 Ves. J. 534.]

(5) No opinion or decree of this date appears, the court ordered a case upon the will to be stated, in case the parties or their counsel could not agree the same. Reg. Lib. 1700. B. fol. 90. no further entry appears. In *Moore v. Godfrey*, post. 620, a condition annexed to the whole was decreed in the like case to be annexed to what accrued by survivorship.

NICHOLS *versus* TOLLEY & Al'.CASE 357.  
Nov. 20.

Devise.

[ 389 ]

**JOHN GILES**, having his own life in a copyhold held of the Bishop of *Worcester*, procured a copy in reversion to be granted to *Grace* his wife, *Pritchett*, and *Andrews*, for their lives *successivè*; but this was in trust for *John Giles* and his heirs; *John Giles*, by his will, devises the copyhold after the decease of him and his wife, to the heirs of his body on his wife *Grace* to be begotten, if such issue shall be living at the decease of him, his wife or survivor, remainder over to the plaintiff; he left issue living at the time of his decease, but such issue died in the life-time of his wife.

*Per Lord Keeper*, The word (*survivor*) must not be rejected, and the word (*or*) must be expounded, (*and living at the decease of the survivor*) so that he held the remainder over good; (1) and if that point had been otherwise, yet the plaintiff had been well intitled as heir at law to the testator *John Giles*, and decreed it accordingly.

(1) For the cases wherein the words "and" and "or" have been taken for each other, vide *Richardson v. Spraag*, 1 P. Wms. 434. and cases cited in note there, and in addition 1 Co. Litt. 99. b. *Soule v. Gerrard*, Cro. Eliz. 525. *Price v. Hunt*, Pollex. 645. *Brownsword v. Edwards*, 2 Vez. 249. *Furnival v. Crew*, 3 Atk. 86. *Walsh v. Peter-*

*son*, *ibid.* 193. *Dobbins v. Bowman*, 408. *Mabberley v. Strobe*, 3 Ves. 450. *Weddell v. Mundy*, 6 Ves. 341. *Turner v. Moor*, *ibid.* 557. *Bell v. Phyn*, 7 Ves. 459. [*Fairfield v. Morgan*, 2 N. R. 38. *Denn v. Kemys*, 9 East. 366. *Doe v. Jessep*, 12 East. 288. *Prebble v. Boghurst*, 1 Swan. 330.]

NICHOLLS *versus* HOW and PORTER & Al', & é contra.CASE 358.  
Nov. 24.Pre. Ch. 125.  
S. C.

From what time the lands of a receiver of the crown are bound by the statute of 13 El. Ca. 4.

**BEVIS LOYD** having first purchased a long term for years in the *Lamb-Inn*, and of other houses in *St. Clement's* parish, and afterwards purchased the inheritance, he afterwards became receiver of *North Wales*, and having occasion for 500*l.*, assigned over the term by way of mortgage to *J. S.* Afterwards on the marriage of *Evan Loyd* his son, he settled the houses in *St. Clements* (*inter alia*) on himself for life, remainder to *Evan Loyd* and the heirs of his body. There was issue of the marriage a daughter, now the wife of *Porter*. After this, *Bevis Loyd* mortgages these houses to *Mr. John Nicholls*, for 1800*l.* The *King* extends these houses for the debt of *Bevis Loyd*; and *Nicholls* gets an assignment of the extent, and a *Privy Seal* for the debt.

*First*, Resolved that by the statute of Queen *Elizabeth*, the land and real estate of *Bevis Loyd* was bound and stood liable

[ 390 ]

NICHOLLS v.  
How, &c. &c.

to answer the *King's* debt, although he was not actually a debtor to the *King*, nor any extent against him in several years after.

When the  
King's re-  
ceiver is seis-  
ed of the in-  
heritance, and  
there is a term  
for years at-  
tending the

inheritance, the term is bound as well as the inheritance. But if the King's receiver is possessed of a term in gross, and it is assigned before an actual extent, the assignment is good against the crown.

*Secondly*, That where a term is attendant on the inheritance, if the *King* extends the inheritance, he shall have a right to the term; (1) but if it be a term in gross, and assigned before any actual extent, the assignment will stand good, and the term not liable to the King's debt. (2)

(1) So where escheat of the inheritance, *Thruxton v. Attorney-General*, ante 1 vol. 340.

(2) There is in the Register's Book, 23d Nov. a long entry of pleadings in a cause relating to the *Lamb Inn*, but

no points of the nature of those stated in the printed report occur, Reg. Lib. 1700. B. fol. 73. entered *Nicol v. Bel- lers*, vide Sir Gerard Fleetwood's case, 8 Rep. 171. *Attorney-General v. Als- ton*, 2 Mod. 247.

CASE 359.  
Nov. 24.

### FINCH *versus* RESBRIDGER.

After a long  
enjoyment of  
a water-  
course run-  
ning to a  
house and  
garden,  
through the  
ground of ano-  
ther, it shall  
be presumed  
the owner of  
the house has

a right to the water-course; unless the other party can shew a special license, or an agree- ment to restrain it in point of time.

THE bill was to quiet the plaintiff in the enjoyment of a water- course to his house and garden, through the ground of the de- fendant. It appeared upon the proof, that there had been a long enjoyment of this water-course, particularly by the Earl of *Arundel*, and after him by the Duke of *Norfolk*, and that the plaintiff had scoured and repaired it, when there was occa- sion, and that the *Duke* was in the quiet enjoyment of it, when he sold it to the plaintiff.

[ 391 ]

For the defendant it was insisted, that the Earl of *Arundel* in 1662, took a long lease of the lands, now the defendant's, and that whilst he held those lands as lessee, he made the water-course in question; and that after the expiration of the lease, he was many times denied liberty to scour or amend the water-course, and several witnesses deposed to that effect; and the defendant insisted it was only upon sufferance, and not founded upon any agreement or consideration.

This cause being first heard before the *Lord Chancellor Somers*, he directed an issue to be tried at law, whether there was any agreement made between any of the owners of the plaintiff's and defendant's estates respectively, for the making or continuing of the water-course in question.

A long quiet  
enjoyment is  
the best evi-  
dence of a right.

Upon a rehearing before the *Lord Keeper Wright*, he de- creed for the plaintiffs, declaring a quiet enjoyment was the



best evidence of right, and would presume an agreement, and the proof ought to come on the other side to shew the special license, or that it was to be restrained or limited in point of time. (1)

FINCH v.  
RESBRIDGER.

(1) The decree was so, but no reason stated, Reg. Lib. 1700. A. fol. 67. and affirmed by *Lord Keeper* on another rehearing, 7th *July* following, Reg. Lib. 1700. A. fol. 390. So possession for *sixty* years of a water-course will sustain a bill against a mortgagee, who foreclosed the equity of redemption to be quieted in possession, although right not established at law, *Bush v. Western*, Pre. Ch. 530. So bill for specific performance of covenant for liberty for plaintiff to dig in a pit dismissed, defendant having been in possession *sixty* years, *Scholefield v. Whitehead*, ante 127. So after *fifty* years quiet possession proved by affidavits, equity will not interpose in a questioned right of common, until after one or more verdicts at law. *Anon.* Gilb. Eq. Rep. 183. So where defendant pleaded *forty* years possession, without account or admission of any debt to a bill setting up an old mortgage, and stating an account

settled, and that owing to infancy, coverture, and other disabilities, plaintiffs could not proceed, the plea was allowed, *Blewitt v. Thomas*, 2 Ves. jun. 669. [*Cook v. Arnham*, 3 P. Wms. 287. and cases in note (w).] Query however, if the bill had set forth who were the infants, and at what time the disabilities took place. So the court will presume livery, and decree surrender and release from long possession, *Lyford v. Coward*, ante 1 vol. 196. and cases cited there. So after *twenty* years possession, purchaser shall not be put to prove payment of his bond for the purchase money, *Anon.* Mose. 37. and as a general principle, courts both of law and equity will strongly presume in favour of length of possession, the principal case ub. sup. *Cooke v. Cooke*, 2 Atk. 67. But in the case of long possession by *cestui que trust*, under a term to raise a sum of money, the court would not presume any other title, *Acherley v. Roe*, 5 Ves. 565.

### MITCHELL versus EDES.

THE plaintiff being an assignee of the wages due to a seaman, the defendant was his administrator, and insisted the agreement was but in the nature of a letter of attorney, and consequently revoked by the death of the intestate; and there being bond-debts the intestate's estate ought to be applied in a course of administration; and that the debt owing to the plaintiff, for securing or satisfaction whereof the assignment was made, was only a simple contract debt.

this was only an agreement in nature of a letter of attorney, and determined by the seaman's death, and that there were bond-debts. Decreed J.S. shall be paid in course of administration.

CASE 360.  
MASTER of the  
ROLLS.  
Eq. Ca. Ab.  
45. pl. 6. Pre.  
Ch. 125. S.C.  
A seaman assigns his wages to J. S. as a security for a debt he owed to J. S. and died intestate. It was insisted that

The court decreed an account of assets, and the plaintiff to be paid in a course of administration. (2)

(2) See vide *Crouch v. Martin*, post 595. where adjudged that the assignment of seaman's wages, "specifically bound the wages." Note, in the report of the principal case in Pre. Ch. ub. sup. it is stated to be not an assign-

ment but a letter of attorney; the decree the same as above. As to the method to be observed in making and attesting such letters of attorney. Vide Stat. 31 Geo. 2d. Cap. 10. Sect. 21, 22.

## CASE 361.

HANSON *versus* DERBY.

On a bill to redeem an account decreed, and 240*l.* reported due, and exceptions to the report. Pending which the defendant the mortgagee commits waste. Court orders the mortgagee to deliver up the possession on the plaintiff giving security to abide the event of the account.

THE bill being to redeem a mortgage, on the hearing an account was decreed, and 240*l.* reported due; to which report, the plaintiff had taken exceptions. The cause thus standing in court, the *Lord Keeper* on a motion and reading affidavits, that the defendant had burnt some of the wainscot, and committed waste, ordered the defendant to deliver up possession to the plaintiff, who was a *pauper*, giving security to abide the event of the account. (1)

(1) Nov. 28th. Reg. Lib. 1700. A. fol. 46.

CASE 362.  
Nov. 30.BENNET *versus* EDWARDS and SELBY & A<sup>r</sup>.

Bill to foreclose an infant. By decree it is sent to a Master to see what due. Master reports what is due for principal, interest and costs.

Whether upon a subsequent order to carry on interest, the former interest during the infancy shall carry interest.

A BILL brought that an infant might redeem a mortgage, or be foreclosed, upon the hearing it was decreed to an account, and the infant to pay what should be reported due, unless cause within six months after he became of age. A report made and confirmed of 2600*l.* due, and a subsequent order being made to compute interest from the report the *Lord Keeper* doubted whether interest ought to be allowed for the interest. (2)

(2) As to the general doctrine of interest carrying interest in case of mortgage, vide *Howard v. Harris*, ante 1 vol. 190, and cases cited in not. p. 194. there; *Procter v. Cooper*, Pre. Ch. 116. As to the particular question in the principal case, it is clearly the practice that interest is calculated on a sum composed of principal and interest certified to be due by the Master's report confirmed; and the principle seems to be, that a report is as a judgment, and appoints a day for the payment carrying on interest to that day, *Butler v. Duncomb*, 1 P. Wms. 453, *Brown v. Barkham*, 1 P. Wms. 652, *Harris v. Harris*, 3 Atk. 722. *Creuze v. Hunter*, 2 Ves. jun. 159. [*Turner v. Turner*, 1

J. & W. 47.] But this rule is subject to restrictions, for interest is computed by the Master's report upon such debts only as carry interest according to the rate they carry, and upon further directions subsequent interest is directed on those debts only upon which the report has already computed interest, and no interest is computed on simple contract debts by the report or by order afterwards, *ibid.* p. 165. and where interest arises it is to be computed only from the confirmation of the report. *Creuze and Hunter*, *ub. sup.* 159. *Bedford v. Coke*, before Lord Hardwicke, and cited *ibid.* p. 166. 167. [*Litton v. Litton*, 1 P. Wms. 541. 6th edit. and cases cited in note (z).]

SMITH *versus* BRUNING.

THE court not only decreed a marriage *Brocage* bond to be delivered up, but a gratuity of *fifty* guineas actually paid to be refunded. (1)

delivered up, and a gratuity of fifty guineas actually paid to be refunded.

CASE 363.  
MASTER of the  
ROLLS.  
Dec. 2.

A marriage  
brocage bond  
decreed to be

(1) Vide on this head *Drury v. Hooke*, ante 1 vol. 412.

SHEFFIELD *versus* Lord CASTLETON & Ux'.

[ 393 ]

CASE 364.  
Dec. 4.

THE Lord *Fanshaw* the father, together with his son, on the marriage of his daughter to Sir *Thomas Chappel*, become bound in a recognisance of the 5th of *May*, 1660, for payment of 1500*l.* to Sir *Thomas Chappel*, as his daughter's marriage-portion. It so fell out, that this recognisance was not confirmed by the act of the *convention* for confirmation of judicial proceedings, that act having relation to the *first* day of the *Sessions*, which was in *April* 25, 1660, and confirmed only recognisances then taken.

*A.* is bound as a surety in a recognisance dated May 5, 1660, for payment of money, which happened not to be made good by the convention act, for confirming judi-

cial proceedings, the act not extending to that day, *A.* being a surety only, and having no consideration for entering into this recognisance, the court would not make it good, nor allow it to be so much as a debt.

The question now was, whether this should in a court of equity be looked upon as a debt which the Lord *Fanshaw* the son, (whose widow and executrix the Lord *Castleton* had married) was in conscience obliged to pay, and should be decreed to be satisfied out of his assets.

For the defendant it was insisted, that *Thomas Lord Fanshaw* the son, did not concern himself in the treaty of marriage, made no promise to pay, nor had any allowance or consideration from his father. All that appears is, that he intended and submitted to be bound as surety for his father; but it falls out he is not effectually bound: now where a man intended to become bound as a surety, and had promised and declared he would so do, and died before he did it; or if he afterwards thought better of it, and altered his mind, no bill would lie in equity to enforce him to become bound, or to compel his executors to pay the debt.

The *Lord Keeper* dismissed the bill. (2)

(2) By the decree it seems as though the bill sought to subject some particular sum of 4000*l.* to the discharge of the recognizances, it being, "that the court saw no cause to relieve the plaintiff or to subject any part of the 4000*l.* to his demand, doth therefore order that the said plaintiff's bill do stand dismissed." Reg. Lib. 1700. *B.* fol. 77. but no case is stated. The

principle seems to be that wherever the state of the demand is materially altered as against principal debtor, as by giving time to the principal, varying security, &c. there no demand remains against the surety, *Rees v. Berrington*,

2 Ves. jun. 540. *Wright v. Simpson*, 6 Ves. 734. *Ex parte Gifford*, 6 Ves. 805. but in such cases it should seem the contract may be so framed as to hold both principal and surety still liable, *Ex parte Gifford*, *ibid.* 808.

[ 394 ]

GARDENER *versus* PULLEN and PHILLIPS.

CASE 365.

Decemb. 6.  
Eq. Ca. Ab.  
26. pl. 4. 92.  
pl. 4. S. C.  
One is bound  
by bond to  
transfer 300l.  
East India  
Stock before  
Sept. 30, then  
next. Though  
the Stock was  
much risen,  
defendant de-  
creed to

THE plaintiff became bound to the defendant in a bond of 500l. penalty, that he or one *Phillips* would on or before Sept. 30, 1698, transfer 300l. stock in the *old East India Company*, and stock being now much risen, the question was, on what terms the plaintiff should be relieved against the penalty of the bond, whether to answer the value of the 300l. stock, according to what it was worth on the day on which he ought to have transferred it with interest from that time, or whether he should be obliged to transfer 300l. stock in *specie*.

transfer the 300l. Stock in *specie*, and to account for all dividends from the time that it ought to have been transferred.

*Per Cur.* Decree the plaintiff to transfer 300l. stock in a fortnight, and account for all *dividends* since he ought to have transferred, and costs at law and here, or dismiss the bill with costs. (1)

(1) It appears, that on 22d *March*, 1696, the defendant *Pullen* lent the defendant *Phillips* three shares of the stock on a memorandum in writing from him to assign such shares on demand; *Phillips* neglecting so to do, the plaintiff and he, 15th *March*, 1697, executed a deed poll to *Pullen*, whereby they became bound in a penalty of 500l. that *Phillips* should assign the said three shares on or before a day therein mentioned, together with a sum of 7l. 2s. 6d. since added by the company on a dividend; and upon the execution of the deed poll, the memorandum in writing was delivered up to *Phillips*. The shares were not transferred, and *Pullen* then brought his action against *Gardner* alone, (*Phillips* having become bankrupt) and in Trin. Term 1699, obtained judgment for the 500l. and 53l. costs; *Gardner* then brought a writ of error, and that being nearly spent, filed the present bill, offering to pay the defendant *Pullen* 145l. which he alledged was the value of the then shares at

the time of executing the deed poll, and paid 200l. into court; the decree was as above, adding the 7l. 2s. 6d. and excepting the alternative of dismissing the bill with costs, with this further, "That as to what the Master should find and certify to be due for the said *dividends and costs* as aforesaid, the same is to be paid unto and taken by the defendant *Pullen*, out of the said 200l. brought into court by the said plaintiff, and the residue of the said 200l. is to be paid out to the said plaintiff in case he shall make such transfer by the time aforesaid, but in default thereof, then the injunction granted in this cause is to stand dissolved, and the 200l. in court is to be paid to the said defendant *Pullen*." Reg. Lib. 1700. A. fol. 51. As to a court of equity executing contracts of this nature, it was formerly considered as doubtful, or at least to depend upon particular circumstances, *Cud v. Rutter*, 1 P. Wms. 570. and cases referred to in note (2)

there. But in *Nutbrown v. Thornton*, 10 Ves. 161. *Eldon*, Lord Chancellor, is reported to say, "It is now perfectly settled that this court will not enforce the specific performance of an agreement for a transfer of stock;" his Lordship however proceeds, "but in a book I have of Mr. Brown's, I see Lord Hardwicke did that." Et vide *Forrest v. Elwes*, 4 Ves. 492. [*Doloret v. Rothschild*, 1 S. & S. 590. *Ad-derley v. Dixon*, *ibid.* 607.]

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SPRIGG *versus* SPRIGG.

**SPRIGG** devised his lands in *Brigstock*, after the decease of his wife, to his executors to be sold, and thereout to retain their costs and charges, and to pay 500*l.* to his nephew *Thomas Sprigg*, if he came from beyond the sea, and gave a release, and discharge for it. (1) The rest and residue of the money to be raised by sale, he devised to *seven* persons therein named, being nephews and nieces. *Thomas Sprigg* never returned, and is supposed to be dead at the time of the will.

CASE 366.  
Eodem die.  
Devise of  
lands to his  
executors to  
be sold, and  
thereout to  
pay 500*l.* to *A.*  
if he return  
from beyond  
sea, and the  
residue to *B.*  
*A.* died before  
testator. This  
500*l.* legacy  
being given on

a contingency that never happened, is as no legacy, and falls into the devise of the residuum; otherwise if it had been an absolute legacy of 500*l.*

The plaintiff as heir to the testator, brought his bill against the executors and residuary legatees, demanding to have either the 500*l.* or to that value of the land, as undisposed of, and resulting to him as heir at law.

[ 395 ]

It was admitted, that in the devise of the residue of a personal estate, if a legatee was dead at the time of making the will, the residuary legatees shall not have the benefit of that legacy, and that it shall not fall into the residue; nothing being intended to pass by that devise, but the residue after that and other legacies paid.

But in this case the *Lord Keeper* was of opinion that the devise of 500*l.* to *Thomas Sprigg* if living and shall return from beyond sea, is a contingent devise, and on a condition precedent, which not happening, is as if never given. But if it had been an absolute devise, it would not have passed to the residuary legatee by the devise of the rest and residue, and dismissed the bill. (2)

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(1) The words are, "In case he the said *Thomas Sprigg*, should ever return to England and should come and demand and give a release and dis-

charge for the same." R. L.

(2) Reg. Lib. 1700. *B.* fol. 100. vide *Davers v. Dewes*, 3 P. Wms. 40. 43.

CASE 367.

Dec. 11.

Eq. Ca. Ab.

289. pl. 2. Pre.

Ch. 108. S. C.

Bond execut-

ed in *England*for a debt in *Ireland*, shall carry but 6l. per cent. interest.Lord RANELAUGH *versus* Sir JOHN CHAMPANTE.

THE court upon the account allowed the defendant but 6l. per cent. per ann. for a debt contracted in *Ireland*, because the bond for securing of it was executed here in *England*. (1)

(1) Sed vide the report of this case in Eq. Ca. Ab. and Pre. Ch. ub. sup. where said that *Irish* interest was allowed, and it seems formerly to have been clear that interest must be paid according to the law of the country where the debt was contracted, and not according to that where it is sued for, *Lord Dungannon v. Hackett*, Tr. 1702. *Lane v. Nicholls*, 1 Eq. Ca. Ab. 289. pl. 1. *Ekins v. E. I. Company*, 1 P. Wms. 395. 2 Bro. P. C. 72. S. C. *Stapleton v. Conway*, 1 Vez. 428. but then the securities must be executed in such country, for where a will made in *England* devised a rent charge out of an estate in *Ireland*, it was held, it (i. e. interest) should be according to the *English* value, the will being made here. Case on the *Earl of Donegall's* will, Eq. Ca. Ab. ub. sup. So in case of settlement and will, *Phipps v. Earl of Anglesea*, 1 P. Wms. 696. *Wallis v. Brightwell*, 2 P. Wms. 88. but in *Stapleton v. Conway*, ub. sup. *Hardwicke, Lord Chancellor*, seems to imply a distinction between contracts and voluntary dispositions, where nothing is said about interest; for there, on a charge by voluntary settlement upon an estate in the Island of *Nevis*, he considered the court as having a discretion to fix the rate of interest, and fixed it at 5 per cent. Note, it is not stated in that report whether the settlement was executed in *England*; and the contract is considered as made where the security (being it should seem a specialty) is executed, *Connor v. Earl of Bellamont*, 2 Atk. 381. sed vide *Saunders v. Drake*, 2 Atk. 465. where said per *Lord Chancellor*, if note given at *Jamaica*, it must be paid in current money; but as to certain securities executed in *Great Britain* on property in *Ireland* or the Colonies,

and which, under the aforesaid cases would bear *English* interest only, it is by Stat. 14 Geo. 3d. cap. 79. enacted, "that all mortgages and securities executed in *Great Britain* upon property in *Ireland* or the Colonies, bearing an interest not exceeding 6l. per cent. shall be valid, unless the money lent shall be known at the time to exceed the value of the property pledged." The rule however stills holds where the interest is above 6l. per cent. And it seems the act protects such bonds only as are entered into as collateral securities for money lent on mortgages, but not those on mere personal contracts, vide *Driver v. Span*, 3 T. Rep. 425. And further as to the operation of the act on the then previous and future loans, *Scott v. Nesbit*, 2 Bro. Ch. Rep. 644, 647. arg. As to the cases of legacies where will made in *Ireland*, the *West Indies*, &c. the rule is, that the residence of the person devising must decide it, *Saunders v. Drake*, 2 Atk. 466. *Pierson v. Garnet*, 2 Bro. Ch. Rep. 38, 47. determined on the authority of *Saunders v. Drake*, and the other cases. *Raymond v. Brodbelt*, 5 Ves. 199. which was the case of a legacy of *Jamaica* currency, decreed to be paid with *Jamaica* interest; sed vide *Bourke v. Ricketts*, 10 Ves. 330, before *Grant*, Master of the Rolls, which was also a case of bequest of a legacy *Jamaica* currency; where this point of the subject and the cases are stated, and a good deal considered, and the doctrine seems to be placed by his *Honor* rather upon particular circumstances, (e. g. of directions to remit, country where legatees may sue, funds being here, and in the country where testator resided, &c.) than upon any determinate general principle.



HARVEY *versus* EAST-INDIA COMPANY.

THE plaintiff having a decree against the *East India Company* for 3700*l.* a *distringas* issued against them \* and they came in, and entered their appearance with the *register*, and prayed they might be examined, and all proceedings on the *distringas* might be in the mean time stayed. (1) And it was insisted by the *Attorney-General*, that the *distringas* was to compel the defendants to appear to answer, which is to answer upon *interrogatories*, and that there is the same reason that a corporation should be admitted to shew matters in avoidance to save their goods, as there is for a common person to save his liberty, and to prevent a commitment.

But the *Lord Keeper* was of opinion that there being a decree against the corporation for 3700*l.* execution was to go without their being farther heard, as in the case of a judgment at law; but where a decree *agit in personam*, there the defendant shall be admitted in favour of liberty to shew cause why he should not be committed. The *distringas* in process against a corporation is to answer as well the contempt as the bill or complaint; but when upon a decree, it is *ad comparendum et solvendum*. And in the case of *Dr. Hussey* against the *Grocers Company*, 24 *Car.* 2. a sequestration issued on the return of the first *distringas*; (2) and so in *Cholmley* and the *Grocers Company*; and the court refused in this case to grant any stay of process, or for the defendants to be examined. (3)

CASE 368.  
Pre. Ch. 129.  
S. C.  
After a decree against a corporation for a sum of money, and a *distringas* issued out against them, court refused to give them any time, or to let them be examined on interrogatories: otherwise if it was a *distringas* on mesne process.

[\*396]

(1) But by the report of this case in Pre. Ch. it appears that after the *distringas*, a sequestration issued, and then the defendants prayed to enter their appearance, but it was too late.

(2) Vide *Curson v. African Company*, ante 1 vol. 121.

(3) The decree was for the sum of 37,917*l.* 9*s.* and had been signed and inrolled, and the process regular, and the order was for a sequestration of all the estates real and personal of the defendants the *East India Company*, but it being urged that a bill of review was prepared on the part of the said defendants and they praying time to file the same, and that the performance of the decree might be dispensed with till the cause should be again heard

thereon; the order was, "That the said defendants do pay to the said plaintiff 4000*l.* on Wednesday next; and do within a week next give recognisance, to be allowed by the Master, to pay unto the said plaintiff the sum of 37,917*l.* 9*s.* deducting the 4000*l.* together with interest for the same, after the rate of 6*l.* per cent. per ann. from a time therein mentioned, until the same shall be paid and thereupon all proceedings upon the said order for sequestration are hereby stayed until further order, and the defendants are to have time till the day after *twelfth* day to file their bill of review." 14th Dec. Reg. Lib. 1700. A. fol. 50.

HARVEY v.  
EAST-INDIA  
COMPANY.

Private mem-  
bers of a com-  
pany made liable to the company's debts, where the company had no goods.

*Note*; In the case between Dr. Salmon and the *Hamborough Company*, the members in their private persons were made liable, the *Company* having no goods.

liable, the *Company* having no goods.

[ 397 ]

CASE 369.

Lord Keeper  
WRIGHT,  
Lord Chief  
Justice Holt,  
Justice  
POWELL,  
Justice  
BLENCOE.

The reversion  
in fee of divers  
lands let on  
leases, on  
which in all  
70*l.* per ann.  
was reserved  
was granted  
by K. Hen. 8.  
to the Corpor-  
ation of  
Coventry.  
400*l.* of the  
purchase-  
money was  
paid by the  
Corporation,  
and 1000*l.* by  
Sir Thomas  
White; but  
in the grant  
the Corpora-  
tion was said  
to be the pur-  
chasers, and  
it was by the  
deed declared  
that the whole  
70*l.* per ann.  
should be ap-  
plied to sever-  
al charities  
therein men-  
tioned. The  
leases expir-  
ing, the value

of the lands was greatly increased. But the surplus had been all along received by the Corporation of Coventry. The lands themselves not being given to the charities, but particular rents out of the lands, decreed the Corporation should have the surplus of the profits. But this decree reversed by the House of Lords.

## ATTORNEY GENERAL *versus* MAYOR, &c. de COVENTRY.

IN the 34th year of *Hen. 8*, upon the dissolution of monas-  
teries, the lands in question, then under several leases for  
lives at a rent of *seventy pounds per ann.* but of much greater  
value when the lands should come in possession, (now about  
*three hundred pounds per ann.*) were purchased from the  
crown, at the price of *one thousand four hundred pounds*.  
The *Corporation of Coventry* was then very low and poor, and  
by their common box-money, sale of their goods, and of a  
gold ring, &c. raised about *four hundred pounds*; the residue  
of the purchase-money was paid by Sir *Thomas White*, and  
in articles between the Town and Sir *Thomas White*, in  
which notice is taken of the low and decayed condition of the  
Corporation, it was agreed that *seventy pounds per ann.*  
should be applied to several charities therein mentioned, *viz.*  
about *forty-five pounds per ann.* to place out apprentices, and  
to be lent to decayed tradesmen, *five pounds per ann.* to the  
*Mayor and Aldermen of Coventry*, and *twenty pounds per ann.*  
to *Merchant-Taylors Company*, and after the expiration of  
*thirty years*, the charity of *forty-five pounds* was to circulate,  
and be applied one year for the benefit of the Town of *Lei-*  
*cester*, the second for the Town of *Northampton*, the third  
for *Warwick*, and the fourth for *Coventry*, and so for ever by  
such rotation. In the articles the Town of *Coventry* are  
mentioned to be the purchasers, though a *thousand pounds* of  
the money was paid by Sir *Thomas White*. (1)

(1) The above statement as to the purchase, is not correct; by the bill and answer it appears that, the purchase from the Crown was for 1378*l.* 10*s.* to the Corporation of *Coventry*, and their successors for ever, under a reserved rent of 7*l.* 13*s.* 2*d.* The decree was as in the printed report, and was declared to be entirely founded

on certain articles of agreement of the 6th July, 5 *Edw. 6*, and which are thus stated in the answer, "The  
"defendants do also set forth the  
"articles dated 6th July, 5 *Edw. 6th*,  
"made many years after the purchase,  
"between their predecessors and the  
"Merchant-Taylors (of which Com-  
"pany Sir *Thomas White* was a mem-

The Town of *Coventry* had always the possession, and Sir *Thomas White* becoming poor, he wrote to the \*Corporation, in regard many of the leases were fallen into possession, and the revenue greatly increased, that they would settle 40*l.* per ann. on his wife for life, which they refused to comply with; but had all along paid the charities, and disposed of the surplus as they thought fit.

ATTORNEY  
GENERAL v.  
MAYOR, &c.  
DE COVENTRY.  
[ \*398 ]

The information was brought by the *Attorney General*, on behalf of the towns of *Leicester*, *Northampton* and *Warwick*, to compel the Corporation to account for the improved value of the lands, and to have the same applied to the charities mentioned in the articles.

For the plaintiffs it was insisted, that *seventy pounds per ann.* was the whole rent reserved on the leases at the time of the articles, and the *seventy pounds per ann.* being appointed to charities, the whole was appointed to charities, and as the value of lands increased, so ought the charities to be increased in proportion, according to the resolution in the case of *Thetford School*, and that the length of time was no bar; that there was no statute of limitations against God and Religion; what was once given to charity ought to be so applied, and what had been embezzled ought to be restored.

8 Co. 130.

“ber) reciting the purchase; and that  
“it was so made, and had by the only  
“procurement, aid, and help of Sir  
“*Thomas White*, minding thereby to  
“relieve and prefer the common weal  
“of the City of *Coventry*, being then  
“in great ruin and decay: and reciting  
“further, that the said Sir *Thomas*  
“*White* of his goodness had given and  
“paid to the Mayor and his brethren  
“the Aldermen, for the said purchase  
“to be obtained, the sum of 1400*l.*  
“and in consideration thereof, it is  
“therein mentioned that, the said  
“Corporation at the mediation of cer-  
“tain friends of the said Sir *Thomas*  
“*White* did thereby covenant, that  
“after the death of Sir *Thomas White*,  
“they should yearly give of the issues  
“and revenues 70*l.* in such manner  
“as in the bill is set forth, and as in  
“the said articles appears: and for  
“performance thereof, the defendants’  
“predecessors did enter into a penal  
“bond of 4000*l.*” By their answer,  
the defendants further said, “they did  
“not know with whose money the

“purchase was made, or to what in-  
“tent bought; that the consideration-  
“money by the receipt, appeared to  
“be received from and paid by the  
“Corporation, and no notice therein,  
“or in the purchase deed took of Sir  
“*Thomas White*; but do believe he  
“might be privy thereto: and being  
“minded to give 70*l.* per ann. in  
“charity might make application to  
“the Corporation to secure the pay-  
“ment of the same in part by the  
“purchased lands, and on the media-  
“tion of the friends of Sir *Thomas*  
“*White*, and for the consideration of  
“1400*l.* (i. e. the Corporation,) en-  
“tered into the said articles, to pay  
“the same out of the premises, being  
“but of the value aforesaid, which  
“was not sufficient to answer the 70*l.*  
“per ann. and the rents reserved to  
“the Crown besides losses and charges  
“incident to estates.” Reg. Lib. 1700.  
A. fol. 71. [See a copy of the original  
deed referred to in note (a) to *Attorney*  
*General v. Mayor of Bristol*, 2 J. and  
W. 305. confirming the above extract.]

ATTORNEY  
GENERAL V.  
MAYOR, &c.  
DE COVENTRY.

[ 399 ]

But for the defendants it was insisted, and the *Lord Keeper* and the *three Judges* were all of that opinion, that this case was not within the reason of the case of *Thetford School*, but a plain and substantial difference appears, for in that case the lands were given to the charity; and although in directing the application of it a sum certain is given to maintain a schoolmaster, and sums uncertain to other charities, amounting to what was the then value of the estate, as the estate increased, it was reasonable the charity should increase, for no one else was to take any benefit thereof. But in the present case, not the lands themselves, but *seventy pounds per ann.* issuing out of the lands is allotted to charities, and the town of *Coventry* is expressly mentioned to be the purchasers; and it appears that they raised *four hundred* pounds, part of the consideration-money, and that with some difficulty, by sale of their goods, their gold ring, box-money, &c. and when they were in that low and decayed condition, as is mentioned in the articles, the plaintiffs would have it presumed they were such good christians as to sell all they had to give it to the poor.

A charity is  
not barred by  
length of time  
or the statute  
of limitations.

And although a charity is not barred by length of time, or any statute of *limitations*; yet it is an evidence that the surplus belonged to *Coventry*, because they have enjoyed it ever since the purchase: and in the lifetime of Sir *Thomas White*, he in his letters takes notice they enjoyed it, and that leases were fallen in, and the surplus considerable; yet claims not that surplus, or that it ought to go to charities; but in a precarious manner desires them to make a provision for his wife for life.

[ 400 ]

It was strongly insisted by the Lord Chief Justice *Holt*, that the articles mentioning the corporation to be the purchasers, there could be no averment received to the contrary. This purchase was after the statute of 7 H. 8. by which all uses were destroyed, and no such thing as a trust then thought of; nor could a corporation *aggregate* be seised to an use, it being held no *subpœna* lay against them; and the recital that Sir *Thomas White* advanced the money doth not imply that he was to be the purchaser, but the contrary is expressed in the articles, that the corporation were the purchasers. The deed ought to be expounded by itself, and by what appears in it, there being no reference in the deed to any thing foreign to it, and it would be a matter of most dangerous consequence to construe deeds by foreign matters or conjectures; it would put all things into confusion, and render all things uncertain. It is the peculiar advantage of

ATTORNEY  
GENERAL v.  
MAYOR, &c.  
DE COVENTRY.

mankind from all the rest of the creation, that they can commit things to writing, and transmit them to posterity; and cited *Bedell's* case, 7 Co. 39. b. where a particular consideration being mentioned in the deed, the court would not allow the averment of any other consideration, as for natural love, affection, &c.

And concluded that the surplus was always intended for the corporation, the lease itself not being given to the charity, but only *seventy* pounds *per ann.* out of the lands. In the case of *Adams* and *Lambert*, (1) where lands were *twenty* pounds *per ann.* and but *ten* pounds *per ann.* appointed to the Priest, there the whole adjudged to the Queen, because the lands were given, and not a rent out of them; and in the case of *Cherry* and *Dethick*, (2) there the devise of a rent was adjudged a devise of the land itself; but in this case but *seventy* pounds *per ann.* allotted to the charities is a good performance of the articles, and I am of opinion, if I have lands of *forty* pounds *per ann.* and grant out of those lands *forty* pounds *per ann.* to a charity; that if the lands increase to *one hundred* pounds *per ann.* the charity shall have only *forty* pounds *per ann.*

The information was unanimously dismissed. (3) Upon an appeal to the *House of Lords*, the dismissal was reversed, and the defendants ordered to account for the improved value of the land, and the charities to be augmented in proportion. (4)

(1) 4 Rep. 104, 5.

(2) Moor, 640. *Dericke v. Kerry*, sed vide the case.

(3) [See report of Lord *Holt's* judgment in this case, 3 Mad. 353. and see also *Attorney General v. Mayor of Bristol*, 2 J. and W. 294.]

(4) 19 Feb. 1702. Show. P. C. 22. 2. Bro. P. C. 236. Colles, 280. Journ. Ho. Lords, 17. vol. p. 298. Note, by the statement in Bro. P. C. it appears the Corporation of *Coventry* were removed from the trust, the Corporation having during the subsequent proceedings in Chancery come to an underhand agreement with the other Corporations, against which there was a

decree by *Harcourt*, Lord Keeper, 27th Feb. 1710. and the Corporation ordered to pay in before the Master a large sum of money; from this second decree the Corporation appealed to Dom. Proc. where the decree was affirmed 11 March 1720, vide Bro. P. C. ub. sup. Journ. House of Lords 21st vol. p. 468. But equity will not interfere with the Governors of a charity established by charter, unless they have also the management of the revenues and abuse their trust, *Attorney General v. Foundling Hospital*, 2 Ves. junr. 42, 50. nor will abuse of the trust be presumed, but it must evidently appear, *ibid.* 50.



## CASE 370.

LORD

KEEPER.

Decemb. 14.

Eq. Ca. Ab.

329. pl. 8. S. C.

A manor with  
an advowson  
appendant,  
being mort-

gaged, the Church becomes void. The mortgagor shall present, unless foreclosed; and if pending a suit by the mortgagee to foreclose, the Church becomes vacant, though the defendant has no bill, the court will grant an injunction to stay proceedings in a *Quare impedit* brought by the plaintiff. Post Case 500.

AMHURST *versus* DAWLING.

THE defendant having mortgaged the manor of *Thundersley*, to which an advowson was appendant, to the plaintiff, who brought the bill to foreclose, the church became void; the defendant moved the court for an injunction to stay the proceedings in a *quare impedit* brought by the plaintiff.

Mortgagee  
till a foreclo-  
sure, is but  
in nature of  
a trustee for  
the mortgagor.

*Per Cur.* Although the defendant *Dawling* hath no bill, yet being ready and offering to pay the principal, interest and costs, if the plaintiff will not accept his money, interest shall cease, (1) and an injunction to stay proceedings in the *quare impedit*; for the mortgagee can make no profit by presenting to the church, nor can account for any value in respect thereof, to sink or lessen his debt, and the mortgagee therefore in that case, until a foreclosure, is but in the nature of a trustee for the mortgagor.

And the like order was made between *Jory* and *Cox*, where the defendant had an injunction against the plaintiff to stay his presenting to a church, that became vacant pending the suit. (2)

(1) This was a part of the prayer of the defendant's motion: but the order was, "His lordship doth *not* think fit to make any order for payment of the said money to the plaintiff, but doth order that a *supersedeas* do issue to the said writ of *ne admittas*, (which had been sued out by the plaintiff) and that an injunction be awarded for stay of the plaintiff's proceedings at law on the *quare impedit*, till the further order of this court." Reg. Lib. 1700. A. fol. 54. no further proceedings appear.

(2) The following is the entry in the Register's Book, as stated by Mr. *Finch* in his note to the report of *Jory v. Cox*, Pre. Ch. 71. *Cox* preferred his petition, stating that he being seised and owner of the manor and estate of *Normanton* in *Nottinghamshire*, and patron of the parsonage and rectory of *Normanton*, mortgaged the same to the plaintiff for 6000*l.* and the whole mortgage vested in the plaintiff, and there being considerable arrears due, he brought his

ejectment and obtained possession, and then brought his bill to foreclose, and thereupon the defendant *Cox* filed his cross-bill for an account and redemption, stating that upon the 10th of *March*, articles had been entered into for the purchase of the said estate, whereby the purchasers had agreed to pay 10,500*l.* for the same. Before the causes were heard, the incumbent of *Normanton* died, after which on the 16th *February*, 1696, the causes were heard and account decreed, and the plaintiff on payment of interest, &c. to reconvey to the defendant. That the defendant to the first bill, *Cox*, on the death of the incumbent (as patron of the advowson) presented, but the plaintiff *Jory* opposed the same under pretence he had a right to present as being mortgagee in possession; whereas being a mortgagee, he ought to present such person as the defendant nominated, but refused, by means whereof the right was like to lapse, and it was prayed that the plaintiff might present



such person as the defendant should nominate; whereupon his lordship did order that the plaintiff do forthwith at the defendant's charge, revoke and countermand the presentation by him made to the said living, and that the said plaintiff do at the like charge present such person as the defendant shall nominate and appoint to be parson of the said parish of *Normanton*, Reg. Lib. 1697. A. fol. 901. *Attorney General v. Scarisbrick*, post 549. Pre. Ch. 214. *Galby v. Serjeant Selby*, Strange, 403. Comyns, 343. [2 Freem.

273.] S. C. So where mortgagor and mortgagee of a naked advowson, *Mackensie v. Robinson*, 3 Atk. 559. [*Thexton v. Betts*, 2 Freem. 87. *Gardiner v. Griffith*, 2 P. Wms. 404. and see *Mutter v. Chauvel*, 1 Mer. 493.] But the right of the mortgagor is merely in equity, at law it is in the mortgagee as having the legal estate, and he accordingly presents, but he is in equity compelled to present the nominee of the mortgagor, *Croft v. Powell*, Com. Rep. 609. arg.

### BURNETT Arm' versus KINNASTON.

THE plaintiff's testator having married the sister of the defendant *Kinnaston*, her portion was \* secured to her by a mortgage in fee of part of the defendant's estate. The plaintiff's testator after marriage, made an assignment of his interest in the mortgage, and by articles between him and several trustees therein named, the money was to be called in, and invested in land to be settled to the use of the husband and wife, and their issue, remainder to the right heirs of the husband.

call in the money, and lay it out in land to be settled upon the husband and wife, and their issue, remainder to the heirs of the husband. Husband dies without issue, and after the wife dies. This mortgage is a chose in action, and the wife surviving, it shall go to her executor, and not to the executor of the husband. (1)

CASE 371.  
LORD  
KEEPER.  
Decemb. 16.  
Eq. Ca. Ab.  
69. pl. 5. Pre.  
Ch. 118. S.C.  
A man marries  
a woman in-  
titled to a  
mortgage in  
fee, and after  
marriage  
assigns his  
interest in the  
mortgage to  
trustees, to

[ \*402 ]

The husband and wife being both dead without issue, the plaintiff claimed the benefit of the mortgage by virtue of the articles, as claiming under the husband.

But the court dismissed the bill, because the husband had not an absolute power over the mortgage; but being in the nature of a *chose in action*, he had only a right to reduce it into possession, and not having so done in his life time, his assignee stood but in the place of the husband, and could have no greater right or power than the husband himself had, which was only to reduce it into possession in his lifetime, and not having so done, it survived to the wife, notwithstanding the articles, and must go to her administrator. (2)

(1) [In *Purdew v. Jackson*, 1 Russell 1. the doctrine and cases on this point are fully discussed.]

(2) There is merely an entry of dismissal, Reg. Lib. 1700. A. fol. 110. contra in such case where equivalent

settlement by husband on the wife, *Blois v. Lady Hereford*, post 501. *Meredith v. Wynn*, Pre. Ch. 314. Et vide note (D) *Lord Carteret v. Paschal*, 3 P. Wms. 199. And note, had the mortgage in the principal case

been a mortgage for years, which the husband alone could have disposed of, such assignment, it should seem, had been good, *Sir Edward Turner's Case*, ante 1 vol. p. 7. and cases cited in not. there. And note also, by the report of the principal case in Pre. Ch. 119.

it appears that the husband survived the wife, and took administration to her, and, having devised this interest, died, and the contest was between the devisee of the husband and the administrator *de bonis non* of the wife.

CASE 372.  
MASTER of the  
ROLLS.  
Eodem die.  
*A.* borrows  
200*l.* of *B.* and  
gives *B.* a  
mortgage de-  
feasanced to  
be void on *B.*'s  
paying *A.* 40*l.*  
per ann. for  
8 years by  
quarterly pay-  
ments. Court  
relieved on  
payment of  
the 200*l.* and simple interest.

### JAMES *versus* OADES.

THE plaintiff being possessed of a reversionary term for *thirty-six* years, to commence with the year 1700, of the value of about *two hundred* pounds *per ann.* when the estate should fall into possession; in the year 1683, applied to the defendant *Oades*, a scrivener, to lend him the sum of *two hundred* pounds; they came to an agreement for that purpose, viz. that the plaintiff should assign his term to the defendant, defeasanced to be void on the payment of *forty* pounds *per ann.* for *eight* years, by quarterly payments.

[ 403 ] Plaintiff's bill was to relieve, paying principal, interest, and costs; the defendant insisted to have the benefit of his bargain, and interest from the time of each quarterly payment, and the rather, because he lent his money in 1683, on such a remote reversion.

*Per Cur.* What is usually called a *Bristol bargain* is *twenty* pounds *per ann.* for *seven* years for *one hundred* pounds; but this goes beyond it, and is extended to *eight* years, viz. *one hundred and sixty* pounds for every *hundred*, by *twenty* pounds *per ann.* and should it be allowed of, it may be carried to *nine* years, and so on without any stint or bounds; and declared it to be an agreement against conscience, and decreed a redemption on payment of the *two hundred* pounds with simple interest at *six* pounds *per cent.* (1)

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(1) Vide *Berny v. Pitt*, ante p. 14. and cases cited in not. p. 15.

CASE 373.  
LORD  
KEEPER.  
Decemb. 17.  
Pre. Ch. 133.  
S. C.

### HITCHENS Wid' *versus* HITCHENS.

*SAMUEL HITCHENS*, in 1679, deviseth, that if his stock and credits abroad should not be sufficient for payment of his debts and legacies, that his executors should pay the same out of the rents and profits of his real estate; and when debts and legacies were paid, devised his real estate to his son *Giles Hitchens* in tail, with remainder over, and shortly after-

wards died; the executors enter on the real estate. *Giles Hitchens* the son, married the plaintiff *Silvestra*, and died in 1681, before the debts were paid, and before he had any possession. In 1694, the plaintiff *Silvestra* recovered her dower in the *Mayor's Court*, and two hundred and twenty-seven pounds for damages, and had her dower set out by metes and bounds by the sheriff, but had not recovered the actual possession, an old satisfied mortgage to Sir *John Tippetts* standing in her way; (1) and therefore she brought her bill against the executors, alledging the debts and legacies were long since paid, and against the remainder-man, and also against the defendant *Sarah Hitchens* the testator's widow, to set aside her pretence of dower, alledging the testator had made some other provision for her, which was intended in lieu and recompence of dower, though not so expressed in the will, yet was implied, because he had devised all the rest of his estate, to other purposes, and as to that matter it was insisted by the plaintiff's counsel that in the case of *Lawrence and Lawrence*, it was decreed by the late Lord Chancellor *Somers*, that where the testator had devised part of his real estate to his widow for life, and other part to her during her widowhood; and devised the rest of his estate to other purposes, that what was so devised to his widow, should be deemed and taken to be in lieu and satisfaction of dower; and set aside her recovery in dower. And a cross-bill was brought by the devisee of the lands and executors, to set aside *Silvestra's* recovery of two hundred and twenty-seven pounds for damages, for detaining her dower, and upon the first hearing it being referred to a *Master* to take an account of the personal estate, and rents and profits of the real estate received by the executors, and how much the debts and legacies amounted to; the *Master* had made his report therein, and thereby certified that sufficient was raised for payment of all the debts and legacies in the year 1693, and that the recovery in dower was not until 1694. (2)

HITCHENS  
WID. v.  
HITCHENS.

[ 404 ]

Ant. Ca. 327.

*Per Cur.* It must be admitted that the estate in the executors was but a chattel interest, (3) and as such could not remainder to his son in tail. The son marries and dies before the debts paid. The estate of the executors is only a chattel interest, and will not hinder the son's wife of dower. But the wife's dower cannot commence in possession, nor damages be recovered for detaining it, but from the time of the debts being paid.

Devise of lands  
to executors  
till debts paid,

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(1) 100*l.* on the mortgage to Sir *J. Tippetts* then remained due. R. L. 1698. A. fol. 461.  
(2) 17th June, 1699, and the *Master* was ordered to state a case as to *Sarah Hitchens'* title to *Dower*, Reg. Lib. (3) So is *Cordal's* case, Cro. Eliz. 135. *Matthew Manning's* case, 8 Rep. 96. (a) et vide *Bates v. Bates*, 1 Lord Raym. 326.

HITCHENS  
WID' v.  
HITCHENS.

[ 405 ] hinder dower; they were only to receive the rents and profits until debts and legacies paid, and *that* interest determines at law, when the trust is satisfied, and therefore her recovery in dower was just; but as to the damages that is carried too far back, she having recovered the value from the death of her husband; whereas she ought to have had damages but from the time of debts paid, and trusts performed. (1) As for the testator's widow she not having recovered her dower, *that* is to be laid out of the case, and the plaintiff's dower is not therefore to be looked upon as *dos de dote*, and decree the mortgage made to Sir *John Tippetts* for *one thousand* years, and since assigned to the defendant, to be set aside, and the plaintiff to be let into her dower; but set aside the verdict as to the *two hundred and twenty-seven* pounds damages, and she to have only an account of the *third* of the profits from the time the debts were paid, and trusts performed. (2)

(1) Like the *cesset executio* during a term on a judgment in dower at law. *Hamilton v. Mohun*, 1 P. Wms. 121.

(2) The case stated as to *Sarah Hitchens's* title to dower, appears to be, "That the said *Samuel Hitchens* " was seised in fee of the premises " in question, and also of other houses " in Robinhood Court, Aldermay, " London; and was possessed of other " houses for terms for years, and did " devise the same to *Sarah Hitchens* " in these words, *viz.*: I give and be- " queath to my said wife *Sarah* " *Hitchens*, all those my freehold " messuages, with the appurtenances, " situated in Robinhood Court, in " Aldermay, London; and the rents, " issues, and profits thereof, from and " after my decease, for and during the " term of her natural life, without im- " peachment of waste: also I give to " my said wife, my two houses in Old " Jewry, London, which I hold by " lease from the Company of Cloth- " workers, for and during the rest and " residue of the term of years I have " in the said lease, which at the time " of my decease shall be to come, if " she shall so long live." But the Master did not find that any deed or conveyance was made by the said *Samuel Hitchens* in lieu or bar of her dower; but it appears, that on the 28th Jan. 1694, the defendant *Sarah*

*Hitchens* had brought her writ of dower; but had not since further proceeded therein; the decree is as follows; " This court doth order and " decree, that the said plaintiff *Sil-* " *vestra Hitchens*, be forthwith let " into possession of the houses set out " by the Sheriff of London for her " dower, exonerated from the said Sir " *John Tippetts's* mortgage; and that " the said defendants the trustees, do " out of the monies in their hands, pay " off and discharge the said mortgage, " and a perpetual injunction is hereby " awarded to stay any action at law " that may be brought against the " said plaintiff *Silvestra Hitchens*, on " account of the said mortgage, and " the said defendants the trustees, are " to come to an account before the " said Master for the rents and profits " of the houses, so set out for dower " which have been received by them " or any other person for their use, " from the time the same was so set " out, and as to the 227*l.* recovered " for the arrears of the said *Silvestra's* " dower at the time of the assignment, " it is further ordered that the said " Master do examine and certify what " incurred due for the arrears of the " dower of the said plaintiff *Silvestra*, " after the debts of the said *Samuel* " *Hitchens* were paid, and what the " said Master shall find and certify to

“ be due for the said arrears, and also  
 “ what shall appear to be in the de-  
 “ fendants the trustees hands, for the  
 “ rents and profits of the said premises  
 “ on the account before directed, the  
 “ said trustees are hereby ordered and  
 “ decreed to pay the same to the said  
 “ plaintiff *Silvestra Hitchens*, out of

“ the said testator *Samuel Hitchens's*  
 “ estate in their hands, together with  
 “ the said *Silvestra Hitchens's* costs  
 “ in these suits in this court to be  
 “ taxed, but no costs at law.” Reg.  
 Lib. 1700. A. fol. 109. vide *Lawrence*  
*v. Lawrence*, ante p. 365.

## ANONYMOUS.

CASE 374.

LORD  
KEEPER.

THE testator seised of a reversion in fee expectant on the determination of an estate for life, devised the same to *A.* and *B.* to be sold for the payment of his debts and legacies, and made the said *A.* and *B.* his executors.

A reversion in  
 fee expectant  
 on an estate  
 for life, is de-

vised to *A.* and *B.* for payment of debts and legacies, and *A.* and *B.* are made executors. The devisees being executors, the money raised by sale is legal assets, and the debts must be first paid; otherwise if the trustees had not been made executors.

The question was, whether the money raised by the sale should be deemed legal assets, and consequently the debts to be thereout paid in the first place, or only as equitable assets, and consequently the debts and legacies to be paid in proportion & *pari passu*.

Decreed that the debts should be first paid. The devise being to the same persons as are named executors, the money becomes legal assets: but if to trustees not made executors, it had been otherwise; and cited the case of *Hiron* and *Witham* in *Chancery Reports*, and *Roll's Abr. Tit. Executor*. Land devised to be sold by executors for payment of debts, the money raised by sale is legal assets, and the case of *Edwards* and *Graves* in *Hobart*. (1)

[ 406 ]

1 Chan. Ca.  
 248. 1 Rol.  
 Abr. 920. G. 6.  
 Hob. 265.

(1) No decision on that point in *ibid.* 482. *Anon.* ante 133. *Bickham Edwards v. Graves*, vide *Girling v. v. Freeman*, *Prc. Ch.* 136. *Lee*, ante 1 vol. 63. *Gosling v. Dorney*,

DE  
TERM. S. HILLARII, 1700.

IN CURIA CANCELLARIÆ.

JOHNSON Mil' & Ux'.

Plaintiffs.

Sir EDWARD NORTHEY & Al'.

Defendants.

Case 375.  
LORD  
KEEPER.  
Jan. 29, 29.  
Pre. Ch. 134.  
S. C.

THE Earl of *Cleveland* having in 1638, settled the manor of *Toddington*, and several lands in *Bedfordshire*, to the use of himself for life, remainder to the Lord *Wentworth* for life, and to his first and other sons in tail; in default of such issue to the heirs female of the *Earl*, with a power to revoke by deed or will.

The Earl of *Cleveland* and Lord *Wentworth* his son, make a letter of attorney to *Thomas Byers* to sell the premises to pay debts, and to pay the surplus as they should appoint.

And an act of parliament was also made empowering trustees to sell to pay debts, and the surplus to the Earl of *Cleveland*.

[ 408 ]

The Lord *Wentworth* died without issue male, leaving issue a daughter, the Lady *Philadelphia Wentworth*, who in 1684, by deed conveyed to her mother the Lady *Philadelphia* and her heirs, but kept the deed in her own custody, and afterwards by will devised the lands to her mother for life, and then to be sold to pay debts, and died without issue.

Bill brought by the old Lady *Lovelace*, as only daughter and heir female of the Earl of *Cleveland*, and heir at law to the Lady *Philadelphia Wentworth*, to have the deeds and writings, and to set aside the deed of 1684, as gained by fraud, or as a trust for the daughter.

And a bill was brought by the Lady *Philadelphia Wentworth* to have up the settlement of 1638, as being revoked, and to have all other deeds and writings which concerned the premises, setting out her title by the conveyance from her daughter by the deed in 1684. To which bill the Lady *Lovelace* answered to the effect of her bill, and the cause proceeded, and divers witnesses examined, and a decree was made against the old Lady *Lovelace ex parte*.

The Lady *Lovelace* died, pending the suit, and John Lord



*Lovelace* her son, being also dead, and the old Lady *Wentworth* being also dead, and having devised the lands to Sir *Edward Northey & ul'*, to be sold for the payment of debts. JOHNSON MIL' v. SIR EDWARD NORTHY.

Sir *Henry Johnson* and the Lady *Wentworth*, Baroness of *Nettlestead*, his wife, being the only surviving child of the Lord *Lovelace*, brought their bill against the trustees and executors of the Lady *Philadelphia Wentworth*, to set aside the deed of 1684.

And a bill was brought by the creditors to have the benefit of the former decree made *ex parte*, and to have the lands sold for payment of debts. [ 409 ]

*Per Cur.* First, the limitation to the heirs female of the Earl of *Cleveland* was determined, and the Lady *Wentworth* the wife of Sir *Henry Johnson* could not make title under that limitation, because she must in such case, derive all by females; whereas the old Lady *Lovelace* the daughter of the Earl of *Cleveland*, left a son the late Lord *Lovelace*, who left issue two daughters, of which the plaintiff, Sir *Henry Johnson's* Lady, was the survivor. A son's daughter cannot take by limitation to the heirs female of the body of the father, for such heirs female must derive all by females.

But then it was insisted that the old Lady *Lovelace* had suffered a common recovery.

Secondly, *Per Cur.* Whereas Sir *Henry Johnson* had examined witnesses in this cause, wherein he was plaintiff, to the same matters put in issue in the former causes; and in truth examined the same witnesses as had been examined in the former causes; those depositions were irregular, and therefore ordered to stand suppressed; for although the creditor's bill was to have the benefit of the former decree, so that the court might examine the justice of that decree; (1) yet that must be done upon the proofs in that cause, wherein the decree was made, and not upon any new proofs. In a bill brought to have the benefit of a former decree, plaintiff cannot examine witnesses, much less the same witnesses to the matters in issue in the former cause. But on such a bill, the court may examine the justice of the former decree; but then it must be upon the proofs taken in the cause, wherein that decree is made.

Thirdly, A doubt arising whether the settlement of 1683, was revoked, two issues were directed to be tried at law, viz.

First, Whether the settlement of 1684, was revoked.

Secondly, Whether the old Lady *Lovelace* suffered a good common recovery.

But Sir *Henry Johnson* afterwards submitted to become a purchaser of the estate under the trustees. [ 410 ]

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(1) Vide *Baker v. Child*, ante 226. per *Hardwicke Lord Chancellor*, "on a bill to carry a former decree into execution, the Court can only do that, and not vary; and the general rule is so. But there are several instances wherein the court has considered the directions and whether there was any mistake, to attain the justice of the case," *West v. Skip*, 1 Vez. 245.

CASE 376.  
LORDKEEPER.  
Feb. 5.

LYDIATT & Al', on the behalf of the Hos- }  
pital of *Felstead* in Essex, } Plaintiffs.

Sir JOHN FOACH,

Defendant.

THE Lord *Rich*, who founded the *Hospital*, amongst other rules, directs that no lease should be made for any longer term than *twenty-one* years, and that thereon should be reserved the old rent, and no more, and that the fine to be taken on such lease should not exceed *two* years value.

The farm at *Bromley*, part of the *Hospital* lands, had been leased accordingly at *eighteen* pounds *per ann.* and some corn-rent; but the price of provisions increasing, the *Hospital* in 1640, made a lease reserving the old rent, but took a deed of covenants from the lessee to pay an additional rent of *thirty-two* pounds *per ann.* over and above the rent reserved.

In 1659, the *Hospital*, at the recommendation of the Lord *Warwick*, made a lease to *John Atwood* senior, for *twenty-one* years, reserving the old rent of *eighteen* pounds *per ann.* and by deed of covenants the lessee covenants to pay *thirty-two* pounds *per ann.* additional rent, and the *Hospital* covenants from time to time to renew until the term should be made up *sixty* years; and in 1679, made a new lease accordingly; and in 1682 the lease was renewed again at the old rent; and at the same time an indorsement was made on the deed of covenants of 1659, that during the term in the last lease, the lessee would pay the additional rent of *thirty-two* pounds *per ann.*

[ 411 ]

Rules on the foundation of an hospital, that no lease should be made for above 21 years. The hospital make a lease for 21 years, with a covenant by renewal to make it up 60 years. This covenant is not binding in equity, as being equally prejudicial to the hospital as a lease for 60 years.

Sir *John Foach*, who had purchased of *Atwood*, brought a bill to have the lease renewed, pursuant to the covenant in 1659; and upon hearing his bill was dismissed, the covenant to renew until the term of *twenty-one* years was made up *sixty* years, being the same, and as much to the prejudice of the *Hospital*, as to grant a term for *sixty* years at first, which was contrary to the rules of the founder.

This covenant is not binding in equity, as being equally prejudicial to the hospital as a lease for 60 years.

And thereupon Sir *John Foach*, since he could not have the lease renewed, refused to pay the additional rent of *thirty-two* pounds *per ann.* and the *Hospital* could not recover it at law, that agreement not being indorsed on the lease of 1682, but on the deed of covenants of 1659, and the indorsement was that the corporation performing their covenants for renewing, he would pay the increased rent of *thirty-two* pounds *per ann.* during the term of *twenty-one* years granted by the lease of 1682.

And it was now insisted on by the defendant, that as the plaintiffs would not perform their agreement, by making up the term *sixty* years, so he ought not to be compelled to pay the additional rent; the agreement being mutual, it ought to be mutually performed. And although Sir *John Foach* purchased with notice of the agreement for the increase of rent; yet at the same time he took notice that the corporation had agreed to renew, and to make up the term of *twenty-one* years in the lease of 1659, to the term of *sixty* years.

LYDIATT &  
AL', v. SIR  
JOHN FOACH.

*Lord Keeper.* The corporation are but trustees for the charity, and might improve for the benefit of the charity, but could not do any thing to the prejudice of the charity, in breach of the founder's rules, and agreed Sir *John Foach's* bill was well dismissed; for the court could not have decreed a renewal pursuant to the covenant, without decreeing them to be guilty of a breach of trust, and said, although it was an indenture of mutual covenants on the lessor's part to renew, and on the lessee's to pay the additional rent of *thirty-two* pounds *per ann.* yet those covenants appeared in the deed to have been made on distinct considerations, viz. the covenant for increase of rent, because the price of provisions was raised; and the covenant for renewal, because the lessee undertook to lay out *one hundred* pounds in building, and so not dependant on each other; and he looked upon it as a fraud and imposition on the *Hospital*, that the agreement for the additional rent was indorsed on the deed of covenants of 1659, and not on the counterpart of the lease of 1682, and therefore decreed the additional rent and arrears to be paid during the term of *twenty-one* years in the lease of 1682, and that Sir *John* and his assigns paying the additional rent of *thirty-two* pounds *per ann.* and the reserved rent of *eighteen* pounds *per ann.* might hold and enjoy during the residue of the term of *twenty-one* years.(1)

[ 412 ]  
A Corporation  
for a charity,  
are but trus-  
tees for the  
charity, and  
may improve,  
but cannot do  
any thing to  
the prejudice  
of the charity,  
or in breach  
of the rules of  
the founder.

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(1) Defendant to pay the costs, Reg. Lib. 1700. B. fol. 180. vide *Taylor v. Dulwich Hospital*, 1 P. Wms. 655.

JOHN CLERK by Committee *versus* RICH. CLERK & AL'.  
*JOHN CLERK* the *Lunatick*, being seised of the manors of *Ardington* and *Isbury*, and being a very weak man, if not a *lunatick*, in 1665, made a settlement by deed, fine and common recovery, by which *five hundred* pounds apiece was to be raised for his brothers and sisters, who were left destitute of any provision, the father dying intestate, and subject thereunto

CASE 377.  
LORDKEEPER.  
Feb. 7.  
Eq. Ca. Ab.  
291. pl. 5. S.C.

[ 413 ]

JOHN CLERK <sup>v.</sup>  
 RICH. CLERK. the estate was limited to him for life, remainder to the heirs of his body, remainder to the heirs of *John Clerk* the father ; his mother joined in the settlement and it was openly transacted, with the concurrence of friends and relations.

*John Clerk* afterwards married the sister of one *Gerrard*, who got the *lunatick* home to him, and engaged him in many debts by bond, and otherwise ; and in 1685, the *lunatick's* son and only child being about *nineteen* years old died, and thereupon a commission was sued out and *John Clerk* found to be a *lunatick*, and had so been from 1658, and that without any lucid intervals. But this inquisition by the direction of Sir *Robert Sawyer* then *Attorney-General*, was taken off the file, and an agreement was made, that *Isbury* should be sold to pay debts in a schedule amounting to 6000*l.* and that *Ardington* should be settled to the use of the *lunatick* for life, and to his first and other sons by his then wife, remainder to the defendant *Richard Clerk*, &c. In 1698, another commission issued, and then he was found to be a *lunatick* on the day the commission was executed, without saying from what day he became a *lunatick*.

The bill was brought to set aside both the settlements, as well that in 1655, as that in 1685.

[ 414 ] For the defendant *Rich. Clerk* it was insisted, that the first settlement in 1655, was by deed, fine and common recovery, and fairly and openly transacted, and with the privity and concurrence of the friends and relations of *John Clerk*, who might be a weak man, but not a *lunatick*, or if a *lunatick*, might have lucid intervals ; and therefore if the conveyance was good at law, it ought not, after this length of time, to be impeached or questioned in a court of equity ; and the rather since it had been in a good measure executed, by the raising and paying the younger children's portions ; and that *Richard Clerk* the brother did not profit by the second settlement ; but for payment of the *lunatick's* debts joined in a sale of *Isbury*, and so barred himself of the inheritance of *Isbury*, and so ought in equity to be looked upon as coming in upon a good consideration, and not having been guilty of any fraud or ill practice, his title ought not to be impeached in equity.

A settlement if made by a lunatick, though reasonable, and for the convenience of the family, ought to be set aside in equity.

*Per Cur.* If *John Clerk* was in fact a *lunatick*, although the settlement in other respects is reasonable, and for the convenience of the family, yet it ought to be set aside in equity.

But there not being any sufficient proof of his being a *lunatick* in 1655, and that settlement by deed and fine having been

acquiesced in, the court directed an issue to try if he was a *JOHN CLERK*  
*lunatick* in 1685, and if with lucid intervals, whether the settle- *v.* *RICH. CLERK.*  
 ment was executed in such interval. (1)

(1) Vide *Sackvill v. Ayleworth*, ante 1 vol. 105. *Ex-parte Sir Benjamin Wright*, *ibid.* p. 155.

|   |                                |   |
|---|--------------------------------|---|
| Sir WILLIAM RERESBY,<br>FARRER School-Master, DUN Usher of }<br>Pocklington School, | Exceptant.<br><br>Respondents. | CASE 378.<br>LORDKEEPER.<br>March 7.<br>Eq. Ca. Ab.<br>100. pl. 7. S.C. |
|---|--------------------------------|---|

*DR. DOWNHAM* having given several lands for the mainten-  
 ance of a *Master* and *Usher* of the free-school of *Pocklington*,  
 and they being incorporated by act of parliament in 1661, in  
 consideration of a fine of 20*l.* and the surrender of a former  
 lease, (1) granted a term of *eighty-one* years of the lands in  
 question to the *exceptant's* father at 24*l. per ann.*

Charity-lands  
being let at a  
great under-  
value, lease  
set aside, and  
the lessee de-  
creed to pay  
the arrears of  
rent according  
to the full  
value of the land, and to deliver up the possession.

Upon a commission of charitable uses, it was found by in-  
*quisition*, that the lands contained 164 acres, and were of the  
 value of 133*l.* 16*s.* 8*d. per ann.* and the commissioners there-  
 upon decreed the *exceptant* to deliver possession to the trustees  
 therein named, and to pay the arrears of rent after the rate  
 of 133*l.* 16*s.* 8*d. per ann.* (2)

[ 415 ]

To which decree Sir *William Reresby* having taken excep-  
 tions, the court confirmed the decree, as to the making of the  
 lease void, and delivering possession; and directed a commis-  
 sion to set out and ascertain the charity lands, from the other  
 lands of Sir *William Reresby's*, the same lying intermixed. (3)

(1) And also in consideration that the *exceptant's* father should procure a living for the master, he being a clergyman, R. L.

(2) Amounting to the sum of 3569*l.* 6*s.* 8*d.* and to set out the abut-  
 tings and boundings of the lands, and a true terrier or particular thereof, and that the then present Master and Usher and their successors, should in future make no leases thereof for more than 21 years, and the lease above granted to be void, R. L.

(3) But decreed the account of the

arrears to be taken only from the time of the respondent *Farrer* being Master of the school, and the *exceptant* to be examined on interrogatories for the production of deeds relating to the land. And the Commissioners to examine and certify the value of the charity-lands, Reg. Lib. 1700. B. fol. 311. As to appeal from, or exceptions to a decree of commissioners of charitable uses, vide *Mallet v. Trigg*, ante 1 vol. p. 42. *Man v. Ballet*, *ibid.* and cases cited in not. there respectively.

CASE 379.

March 14.

Eq. Ca. Ab.  
18. pl. 11. Pre.

Ch. 138. S. C.

A. on the mar-

riage of his

daughter to

B. covenants

that B. should

have his land

called C. for

1500l. less

than any other

would give for

it, and after-

wards devises

this estate to his

grandson for life,

with remainders

over and dies.

The Court refused

to decree a specific

execution of this

agreement, by

reason of the un-

certainty of it,

and it not

being mutual.

BROMLEY *versus* JEFFERIES & AL'. (1)

SIR *Rowland Berkley* settled his manor of *Cotheridge* on trustees to be by them sold after his death, and the money thereby arising to be disposed of as in the settlement is mentioned, and as he by his last will and testament should appoint, with a power of revocation, and afterwards on the marriage of the plaintiff, with one of his daughters, covenanted that if the plaintiff survived Sir *Rowland*, and had issue by his daughter, that the plaintiff should have *Cotheridge* 1500l. less than any other purchaser would give for the same. (2)

this estate to his grandson for life, with remainders over and dies. The Court refused to decree a specific execution of this agreement, by reason of the uncertainty of it, and it not being mutual.

[ 416 ]

Sir *Rowland* lived *twenty* years after this, and by his will revokes his settlement, and devises *Cotheridge* and the manor of *Acton Beacham* unto the plaintiff, and to the defendant, and other trustees for the term of *ten* years upon trust, to apply the profits as therein mentioned, remainder to his grandson *Green* for life, with remainder to his first and other sons in tail, he and they taking upon them the name of *Berkley*, and thereby (*inter alia*) gave a legacy of 1000l. (3) to the plaintiff, and 500l. to his daughter the plaintiff's wife; &c.

The court upon the hearing refused to decree a specific execution of this agreement from the uncertainty of it, because if the estate was not to be sold, but the plaintiff was to have it, it was not practicable to know what a purchaser would give for it. (4) Secondly, that the agreement was not mutual, (5) the plaintiff was not bound to take it at any price; and it was observed, that as the covenant was worded, if the plaintiff had died in the life-time of Sir *Rowland*, the covenant was of no effect; and it was said if Sir *Rowland* after this had a son, that should have discharged the covenant, like as in the case

1 Co. 100. b.

of *Fitzherbert*, fol. 23, cited in *Shelley's* case, where the father

(1) [2 Freem. 245. nom. *Bromley v. Fettiplace*.]

(2) The plaintiff at the time of this settlement, was under age, but there was also therein a covenant on his behalf, that in case the plaintiff should purchase the said premises, (i. e. *Cotheridge*), and have the allowance of the said 1500l. that then the plaintiff should, in further augmentation of the jointure of the plaintiff *Margaret* his wife, convey lands, &c. of 100l. per ann. to the use of the plaintiff *Marga-*

*ret*, for her life, over and above the lands and tenements agreed to be settled to her use, as therein mentioned. Note, there was issue of the marriage, two daughters, R. L.

(3) 1500l. R. L.

(4) [*Emery v. Wase*, 5 Ves. 849. *Blundell v. Brettargh*, 17 Ves. 232. *Gourlay v. Somerset*, 19 Ves. 431.]

(5) See as to mutuality, *Armiger v. Clarke*, Bunb. 111. [*Lawrenson v. Butler*, 1 Sch. & Lef. 13.]



lying sick, directs his trustees to convey to his only daughter, and afterwards he recovered and had a son, who was relievable even by the opinion of the *Judges*. (6)

BROMLEY v.  
JEFFERIES.

(6) These points do not appear in the Register's Book. By one of the answers it appears, that the original settlement was found in Sir Rowland's study after his death, cancelled; and that by his will, he charged the several legacies given thereby on the said estate of *Cotteridge*. The decree as to the execution of the covenant in specie, contains merely a dismissal of the bill; but it goes on to direct that if the plaintiff would accept of the said legacy of 1500*l.* with interest, from Sir Rowland's death, it must be taken to be in full performance of the covenant in the said deed, together with his costs, Reg. Lib. 1700. A. fol. 533.

### YATES *versus* PHETTIPLACE.

THE defendant's father had mortgaged his manors of *Pudlicot*, and afterwards intailed the equity of redemption on the defendant his son; and by will devised some leasehold and personal estate to be applied for the payment of his debts and legacies; directing that if his personal estate was applied to pay off his mortgage, the same should be kept on foot to \*make good his daughter's portion, and thereby devised to his daughter 3000*l.* to be paid her at *twenty-one*, or marriage, if married with consent, if not, then but 1000*l.* and died, leaving issue the defendant his only son, and a daughter; the daughter died when but *six* years old, to whom the mother, late the wife of the plaintiff *Yates*, took administration; and Mr. *Yates* was her executor as also administrator *de bonis non* to the daughter, and was now plaintiff to have the 3000*l.* portion. The plaintiff gives her 3000*l.* to be paid at 21, or marriage, if married with consent, if not, but 1000*l.* she died at six years of age. The portion shall not be raised for the benefit of her administrator.

CASE 380.

LORD

KEEPER.

Eodem die.

Pre. Ch. 140.

S. C.

A. having entailed his land on his son subject to a mortgage, by will devises his leasehold and personal estate to pay his debts and legacies, and directs if his personal estate is applied to pay the mortgage, it should be kept on foot to make good his

[\*417]

And for the plaintiff it was insisted, this was not within the reason of the case of *Pawlet* and *Pawlet*, that the portion should extinguish in the land for the benefit of the heir.

Vol. I. Case  
201.

*First*, There the settlement was by deed, here the portion is provided by will.

*Secondly*, There it was to be raised only out of the land; here the personal estate is liable as well as the land, and has been applied in part to pay off the mortgage that was on the land.

But the Court (1) dismissed the bill, and declared it to be within the reason of the Lord *Pawlet's* case and besides the

Post. Ca. 385.  
403.

(1) The *Lord Keeper* and the *Master of the Rolls*, Reg. Lib. 1700. B. fol. 186. and decree affirmed on appeal to Dom. Proc.

YATES v.  
PHETTIPLACE.

A devise of a  
legacy to one  
at 21, or to be  
paid at 21, is  
all one.

devise being of 3000*l.* at *twenty-one* or marriage, which marriage was to be with consent, it did not vest in the daughter, but was contingent ; and the *Lord Keeper* was of opinion that a devise to *J. S.* of 1000*l.* to be paid at *twenty-one*, and a devise to him at *twenty-one* was all the same, and the testator's intention the same in both cases ; and said the distinction taken by *Swinbourne* and *Godolphin* between the age being mentioned in the body of the devise, and where in the time of payment, he looked upon it as a *distinction without a difference*, and that the authorities they cited did not come up to what they laid down. (1)

(1) Vide *Pawlet v. Pawlet*, ante 1 vol. 204, 321. S. C. and cases cited in not. there.

[ 418 ]

CASE 381.

LORD

KEEPER.

March 20.

Eq. Ca. Ab.

258. pl. 3. 314.

pl. 4. S. C.

*A.* mortgages

in 1639, and

in 1663, his

heir brings a

bill to re-

deem ; he

dying the suit

is revived by

his co-heirs

who obtain a

decree in 1672,

but do not

prosecute it,

and *B.* having purchased the equity of redemption of them, he now brings a bill to have the benefit of the former decrees. Bill dismissed by reason of the difficulty of the account and length of time.

### ST. JOHN *versus* TURNER.

*JOHN ST. JOHN* in 1639, demised the lands in question in *Cold Overton*, in *Com. Leicester* to Sir *Richard Holford* to counter secure him against debts, for which he stood bound as security, amounting to about 4000*l.* In 1649, Sir *Richard Holford* having been arrested and imprisoned for the debts of *St. John*, entered on his security, and by his will devised 1000*l.* apiece to his two grand-daughters, 500*l.* to his son *Richard* out of this estate, and the surplus to his sons *Thomas* and *Richard*, whom he made executors. In 1662, the executors allot to each grand-daughter part of the lands for their 1000*l.* apiece, and *Richard* takes part for his 500*l.* and the residue was divided between *Richard* and *Thomas*.

In 1663, a bill was brought by *Benjamin St. John* the heir, to redeem, and decreed to an account ; and afterwards he dying, the suit was revived by his three daughters and co-heirs, and thereupon again in 1672, decreed to an account ; and particular directions given as to part of the lands purchased by Dr. *Amy*, Sir *Richard Holford* having encouraged him to purchase without discovering that those lands were comprised in his security ; and the plaintiff being of the same name had purchased from the co-heirs of *St. John* several lands, and amongst the rest their equity of redemption of the lands in question, and brought his bill to redeem, and to have the benefit of the former decrees.

*Lord Keeper* dismissed the bill, and would not allow the

plaintiff to redeem by reason of the difficulty of the account after such great length of time ; for that the mortgagor himself acquiesced from 1639 to 1663, and neither paid the debt, nor sought a redemption; and although there were infants, yet the time having begun upon the ancestor, it shall run even upon infants, as it is at law in the case of a *fine*; (1) and although they afterwards obtained a decree, yet not having prosecuted it, and the cause being now within one year of the *Grand Clichemacterick*, it is fit it should rest in peace. (2)

upon the ancestor, it shall run on against his infant heir, as in the case of a *fine* at common law.

ST. JOHN v.  
TURNER.

[ 419 ]

Though infancy may be an answer to the objection of the time in not coming to redeem a mortgage; yet where the time begins

(1) Vide *Allen v. Sayer*, ante 368, and cases cited in not. there. ing, *ibid.* 418. *Frazer & Al' v. Moore*, on demurrer, Bun. 54. *White v. Ewer*,

(2) On this head, vide *Newcomb v. Bonham*, ante 1 vol. 7. *Orde v. Hem-* 2 Vent. 340.

#### WHARTON & Ux' versus TILLY MIL' & Ux, & Al'.

CASE 382.  
LORD  
KEEPER.  
March 22.  
Ant. Ca. 344.

**ENNICE BROWN**, now the wife of the plaintiff *Wharton*, being a niece of Sir *John Roberts*, whose widow and executrix and devisee the defendant had married, they set on foot a demand of 1500*l.* by bond from Sir *John Roberts*, and there being great reason to suspect it was forged, upon the action at law the plaintiffs first suffered a nonsuit upon full evidence; upon a *second* trial there was a verdict against the bond; but before judgment was entered up, the plaintiffs moved and obtained a new trial, and therein prevailed and had a verdict, and now brought a bill to have satisfaction out of a trust-estate for the bond-debt, there being not personal assets; but Sir *John* had subjected his real estate to the payment of his debts.

And the single question was, whether the court upon the circumstances of this case would decree a satisfaction out of the trust-estate upon the credit of the verdict, without directing an issue, or giving the defendant an opportunity to try it again; and the court decreed for the plaintiffs. But upon *Appeal* to the *Lords* in *Parliament*, a new trial was directed, and the bond found to be forged. (3)

(3) On the head of Court granting new trial vide the cases referred to in not. to *Barbone v. Brent*, ante 1 vol. 177.

DE

## TERMINO PASCHÆ, 1701.

IN CURIA CANCELLARIÆ.

## CASE 383.

LORD

KEEPER.

May 13.

Eq. Ca. Ab.

345. pl. 13.

S.C.

Where a term is limited to raise portions for younger children by rents and profits, the heir may have the portions raised by a sale, though the younger children oppose it, as well as he may insist on a sale if he think fit.

WARBURTON *versus* WARBURTON.

UPON rehearing of this cause, (1) the *first* question was, whether the younger children's portions should be raised by sale, or only out of rents and profits, as the same should arise. By the settlement a term of *ninety-nine* years was lodged in trustees for raising the portions of the younger children by rents, issues and profits; and subject to the term, the estate was limited to the plaintiff the eldest son for life, and to his first and other sons in tail, with other remainders over; and in the mean time only 40*l. per ann.* limited to the plaintiff for his maintenance. The defendants the younger children insisted that their portions might be raised by annual rents and profits, and the plaintiff the heir confined in the mean time to his allowance of 40*l. per ann.* The heir insisted that the portions should be raised by a sale, that he might thereby be let into the immediate possession of the residue of the estate.

[ 421 ]

Post Case 385.

The *Lord Keeper* confirmed the former decree; for as the younger children might have compelled a sale; so in this case it being for the benefit of the heir to have a sale made, he might justly insist thereon, although the younger children opposed it; they opposing the same not for their own benefit, but in prejudice to the heir. (2)

A. gives 400*l.*

to his two daughters his executrixes, to be distributed amongst themselves and their brothers and sisters according to their necessity, as in their discretion they thought fit. The Court settled the distribution (3) and decreed a double share to one of the children.

The *second* point was, that the personal estate, and 400*l.* to be raised out of the trust-estate should be distributed by the executrixes, to be distributed amongst themselves and their brothers and sisters according to their necessity, as in their discretion they thought fit. The Court settled the distribution (3) and decreed a double share to one of the children.

(1) The decree, 8th Nov. 1700, was for the sale, "It being admitted that "if the daughters had been plaintiffs "this Court might decree a sale for the "raising the said portions, and they "having by their answer to the plaintiff's bill *desired a speedy raising thereof*, his Lordship declared it "ought to be as well done for the "plaintiff." And confirmed *ut infra*.

(2) Reg. Lib. 1700. B. fol. 314. Vide on this head *Anon.* ante 1 vol. 104. *Heycock v. Heycock*, *ibid.* 256. *Meynel v. Massey*, ante p. 1, and cases cited in not. there respectively.

(3) So *Harding v. Glyn*, 1 Atk. 470, where on the ground of uncertainty or non-performance of the power, the power was held to devolve on the court.

two daughters his executrices amongst themselves, and their brothers and sisters, according to their need and necessity, as in their discretion they should think fit, and insisted on their power to dispose thereof, as they thought fit; and that the defendants were not entitled to any part thereof.

The *Lord Keeper* decreed a double share thereof to the plaintiff the heir, as looking upon him to stand most in need thereof, and confirmed his former decree, (1) which was also upon an appeal in *Parliament* affirmed. (2)

WARBURTON  
v.  
WARBURTON.

(1) Reg. Lib. ub. sup.

Lords, 17 vol. 279. Bro. P. C. 1 vol.

(2) 15th Feb. 1702. vide Jour. Ho. p. 34.

### CITY OF LONDON *versus* RICHMOND & AL'.

CASE 384.

LORD

KEEPER.

May 16.

Pre. Ch. 156.

S. C.

Equity will decree an assignee of a lease to pay the rent become due, since his assignment, and which shall become due, whilst he continues in the possession, but not during the continuance of the lease; for he may, if he can, get rid of the lease by assigning it to another.

[\*422]

THE City of *London* articulated with *Aldersea* to lay a new leaden pipe of five inches diameter for the carrying of water to *Cheapside* and *Stocks-Market*, which it was affirmed would carry twenty tun of water each hour; and whilst this was doing, the City by a committee treat with *Houghton* to grant him a lease of the water, reserving sufficient\* to serve the conduits and prisons with water, and he agreed to pay a fine of 2750*l.* and a rent of 750*l. per ann.* for fifteen years; and a lease was made accordingly. *Houghton* the lessee assigns over the lease to the defendants *Richmond*, *Delanoy*, *Glover*, and *Bowater*; but it did not appear that *Glover* and *Bowater* accepted the assignment. The assignment was in trust for such person as should buy shares, the whole being divided into 900 shares, valued at 10*l.* each share. It so fell out that the pipe would not discharge above six tun per hour, and so instead of being a beneficial concern it would not produce, after the conduits, prisons, and tankard-bearers were served, above the 300*l. per ann.* *Houghton* became insolvent, and the rent in arrear.

The bill was brought against *Richmond* and others the assignees of the lease, as also against several who had bought shares, to have the arrear of rent paid, and the growing rent, and the performance of the covenants in the lease.

It was objected that the plaintiffs had not proper parties, for *Houghton* the lessee, who had assigned over, was liable, and no party; and the plaintiffs had not all the owners of shares, that ought to contribute to the rent, before the Court. The first part of the objection was allowed that *Houghton* ought to be a party, the original lessee ought to be a party. But if the assignee has divided his interest in the lease into a great number of shares, it is not necessary to make all the sharers parties.

Upon a bill brought against an assignee of a lease to pay the rent, and perform the covenants in

LONDON v.  
RICHMOND.

be a party ; but as to the latter part, that all the sharers were not parties, was disallowed ; the assignees by dividing of it into so many shares, had made it impracticable to have them all before the court. (1)

[ 423 ]

*Secondly*, That the defendants as assignees, if liable, were liable at law, and the plaintiffs ought to take their remedy there ; and no good ground to decree them to be farther liable in equity than they were at law ; and an assignee may by law assign over, and then remains no longer liable.

5 Co. 16. a.

To which it was answered, that possibly the assignees might not be liable at law, if it was an incorporeal inheritance, for they had no privity of estate ; yet they enjoying the thing demised, ought in equity to answer the rent : but it was agreed the decree ought only to be for the arrears of rent since the assignment, and what should incur and become due whilst they should continue the possession ; but if they could get rid of it by assigning over, they were not to be prevented from so doing in equity, or to be decreed to pay the rent during the residue of the term, or longer than they continued the possession ; and how far an assignee named or not named is bound to perform covenants in the *Spencer's* lease, cited case.

*Thirdly*, It was objected, that the rent reserved being 700*l.* *per ann.* and the real value not 300*l.* *per ann.* it was against the rules of equity, to decree *in specie* such a hard and unreasonable bargain.

As a beneficial  
bargain will  
be decreed in  
equity ; so if  
it proves a  
loosing one, it

*Lord Keeper.* As a beneficial bargain will be decreed in equity ; so if it happens to be a losing bargain, for the same reason it ought to be decreed.

loosing one, it ought by the same reason to be decreed.

*Fourthly*, It was objected, that the assignees in this case were but in the nature of trustees for the other sharers, and equity ought to decree against the *Cestuy que trust*, and not against the trustees. *Sed non allocatur.* (2)

(1) So part of the proprietors of an undertaking may bring others of them to an account, it being impracticable, by reason of their number to make them all parties by name, *Chancey v. May*, Pre. Ch. 592. and cases there referred to, *Barker v. Wyld*, ante 1 vol. 140. [See generally as to suits by or against some on behalf of all of a class of persons, *Adair v. New River Company*, 11 Ves. 429. *Good v. Blewitt*, 13 Ves. 397. *Cockburn v. Thomson*,

16 Ves. 321. *Meux v. Maltby*, 2 Swan. 277. *Attorney-Gen. v. Heelis*, 2 S. & S. 67. *Gray v. Chaplin*, ib. 267.] As to *Cestui qui trust* being made parties in case of bill filed on account of the trust, *Anon.* ante 1 vol. 261. *Franco v. Franco*, 3 Ves. 75. As to part owners, *E. I. Company v. Neave*, 5 Ves. 173.

(2) And the decree in this case was affirmed in Dom. Proc. on appeal, 9. Feb. 1702. 1 Bro. P. C. 30. Journ. Ho. Lords, 17 vol. p. 275.



JACKSON *versus* FARRAND.

CASE 385.

LORD  
KEEPER.  
May 17.Eq. Ca. Ab.  
268. pl. 8. Pre.  
Ch. 109. S. C.A. by will  
gives 500*l.* to  
his daughter,  
to be paid by  
his executors  
at her age of  
21, out of his  
personal es-  
tate, and rents  
of his real ;  
and if not  
raised by that  
time, the exe-  
cutors to stand

**THOMAS FARRAND** having only a son and daughter in 1682, made his will and devised 500*l.* portion to his daughter, to be paid by his executor at her age of *twenty-one*, out of his personal estate, and rents, and profits of his lands ; and if not raised by that time, his executor should stand seised, and receive and take the rents, issues, and profits of his lands until the 500*l.* should be raised and paid, and after payment devised the lands to his son. The plaintiff married the daughter at her age of *eighteen*, and she died before she attained the age of *twenty-one*, leaving issue a daughter. The plaintiff as administrator to his wife, brought his bill to have the 500*l.* raised out of the land.

seised and take the rents, till the 500*l.* was raised, and after payment gives the land to his son. The daughter marries at 18, and dies under 21 ; the husband takes administration. Decreed the portion to be raised, and that by a sale, though the land by reason of the incumbrances would produce little more than the 500*l.*

For the defendant the heir it was insisted, *first*, that the portion ought not to be raised, because the daughter died before the age of *twenty-one*. *Secondly*, if to be raised, yet by the profits only, and not by a sale. Ant. Ca. 380. Post Ca. 403.

The court decreed the portion to be raised with interest and costs, and *that* by a sale ; wherein the defendant the heir was forthwith to join ; and this, although the incumbrances were so great, that the whole inheritance would produce little more than the 500*l.* (1) Ant. Ca. 383.

(1) It had been referred to the Master, to take an account of the personal estate and of the debts and incumbrances on the real estate, and by the report it appeared that the real estate was worth 80*l.* *per ann.* above taxes, out-rents, &c. and that the same was, at the time of the testator's death, subject to a mortgage for 500*l.* bearing an interest of 30*l.* *per ann.* and to another mortgage for 200*l.* bearing an interest of 12*l.* *per ann.* the principal money of both which mortgages then still remained unsatisfied ; and that there was an annuity of 25*l.* *per ann.* payable out of the said real estate to the said testator's widow for life : and the decree declared, " That the 500*l.* before mentioned vested in *Barbara*, the plain-

" tiff's late wife, being given to her  
" by her father as a portion, and that  
" the plaintiff in her right is well in-  
" titled thereto ; and inasmuch as it  
" appears that the said 500*l.* cannot  
" be raised in any reasonable time,  
" out of the rents and profits of the  
" testator's real estate ; his Honor  
" doth think fit and so order and de-  
" cree that the said real estate be  
" forthwith sold, &c. and that the  
" defendant do join in the sale there-  
" of." Reg. Lib. 1700. A. fol. 332.  
vide *Pawlett v. Pawlett*, ante 1 vol, 204.  
and cases cited in not. there. *Bruen v.*  
*Bruen*, post 439. *Cave v. Cave*, 508.  
*Carter v. Bletsoe*, post 617. and as to  
the authority of the principal case,  
vide *Hardwicke*, Lord Chancellor's  
judgment in *Prowse v. Abingdon*, 1

Atk. 486. *Boycot v. Cotton*, *ibid.* 556. The decree in the principal case was reversed in Dom. Proc. as to the sale of the intailed estate, but without prejudice to the general question, 2 Feb. 1703. 1 Bro. P. C. 61. where the case is more amply and accurately stated, et vide Jour. Ho. Lords, 17 vol. p. 394.

[ 425 ]

CASE 386.

May 22.

Eq. Ca. Ab.  
272. pl. 4. Pre.  
Ch. 162. S. C.

Land is devised to trustees to sell, and out of the money arising by the sale, amongst other sums to pay 100*l.* to his heir at law; and no disposition is made by the testator

of the surplus of his estate. The land shall not be turned into personal estate, nor more sold than is necessary to pay the legacies, and the heir shall have the surplus.

RANDALL *versus* BOOKEY.

**ROBERT RANDALL** having a wife, but no child, and two brothers and two sisters, by will gave a moiety of a banker's debt to his nephew and nieces, and the other moiety to his wife, and made his wife his sole executrix; and devised several lands unto *two* trustees and their heirs, in trust to permit his wife to receive the profits for life, and then to sell, and out of the money to be raised by sale to pay 100*l.* to his brother *George*, (who was his heir at law,) 120*l.* to his brother *Thomas*, and 100*l.* to his sisters. Defendant *Bookey* married the widow, and was her administrator.

Freem. 263. *Per Cur.* *First*, the wife, by the devise of a moiety of the said banker's debt, was excluded from the surplus of the personal estate, as executrix, although there was no child, and that legacies were given to the brothers and sisters out of the land; which had not been necessary, unless the testator intended the surplus of his personal estate for his wife, that otherwise had been sufficient to pay those legacies. (1)

*Secondly*, Although the land is devised to trustees and their heirs in trust to sell, and thereout to pay the several legacies therein mentioned, and amongst the rest a legacy of 100*l.* to his brother *George* his heir at law; yet the land shall not be turned into personal estate, nor more sold, than what is necessary for the payment of the legacies, and the heir shall have the surplus. (2)

(1) And decreed the surplus to go in a course of administration, R. L.

(2) As to this, "His Lordship declared he conceived the said land ought to stand and be only in the nature of a security for the payment of the said legacies, and that the said plaintiff might come in and redeem the same as well now it is devised by will, as if had been settled as a

"security by deed." Reg. Lib. 1700. B. fol. 312. entered *Randall v. Randall*, Vide *Cunningham v. Mellish*, ante p. 247. And note in 1 Eq. Ca. Ab. 273. pl. 8. it is said, the case of *Cunningham v. Mellish* was affirmed in Parl. but in *Hill v. Smith*, Tr. 12 Geo. 2d. Lord Hardwicke said he had looked into the Journals of the House of Lords, and could not find it was so.

BROWN and SANDYS *versus* TRANT and BRIDGES  
& Al.'

CASE 387.

May 31.

Eq. Ca. Ab.  
135. pl. 5. Pre.  
Ch. 153. S. C.  
by the name  
of *Brown v.*  
*Bradshaw.*

Assignees un-  
der a commis-  
sion of bank-  
ruptcy, bring  
a bill for an

PLAINTIFFS as assignees under a statute of bankruptcy pray an account of the estate of *Hind* the banker seised by the defendants, on pretence of debts owing to the *King* by virtue of several extents sued out for that purpose, viz. one original extent for the *King*, and two other extents *in aid* by the defendants, who were farmers of the excise.

account against some persons who had seised the bankrupt's estate by virtue of three extents, one for the *King*, and the other two were extents *in aid*. Bill dismissed, the matter being properly cognizable in the Court of Exchequer, which is the *King's* Court of Revenue.

It being objected that this matter was properly cognisable in the court of *Exchequer*, which was the *King's* court of *revenue*, and that this court would not examine what was the *Quantum* of the debt due to the *King*, or how far the extents were necessary, the *Lord Keeper* allowed the objection, and dismissed the bill.

Court of  
Chancery will  
not examine  
the quantum  
of the *King's*  
debt, nor how  
far extents  
sued out are  
necessary.

And as to the precedents, which had been produced, where this court had held plea in like cases, he said they did not come up to this case.

In the case of *Capel* and *Brewer*, (1) the defendant, who sued the extent *in aid*, confessed by answer he had sufficient of his own estate to pay the *King's* debt.

But otherwise  
it is where the  
defendant,  
who has sued  
out an extent

*in aid*, confesses by answer, he has sufficient estate of his own to pay the *King's* debt;

And in the case of *Cholmley* and *Sturt*, it appeared to be a fraudulent contrivance by an extent *in aid*, to gain a preference to a debt of an inferior nature. (2)

Or where it  
appears to be  
a fraudulent  
contrivance  
by an extent

*in aid*, to gain a preference to a debt of an inferior nature.

(1) Ante 1 vol. p. 454.

(2) *Dickinson v. Molineux*, Pre. Ch. 47.

DE

## TERM. S. HILLARII, 1701.

IN CURIA CANCELLARIÆ.

CASE 388.

LORD  
KEEPER.

Jan. 24.

A devise to trustees and their heirs in trust for *A.* for life and to his first, &c. sons in tail; but if *A.* dies without an heir male of his body begotten, then to go over. *A.* is only tenant for life; and the words, if he dies without an heir male, &c. does not give him an estate tail by implication. Post Case 414.

Sir COPLESTON WARWICK BAMFIELD *versus*  
POPHAM AL'.

*HENRY ROGERS* by will devised his estate to trustees and their heirs, in trust for the defendant *Popham* for life, and to his first and other sons in tail; *but in case the defendant Popham died without an heir male of his body begotten*, the trust to be void; and in such case he gave the estate to defendants: the bill was brought to stay waste, and for an account of timber already sold, Mr. *Popham* having no son.

The question was, whether the words, *if he die without an heir male of his body begotten*, gave him an estate tail by implication; and it was held it could not enlarge an express estate devised to him for life.

[ 428 ]

CASE 389.

Jan. 24.

MASTER of the  
ROLLS.Eq. Ca. Ab.  
392. pl. 3. S. C.

Where a trust

is limited to a man and the heirs of his body with remainders over, the Court will not decree the trustees to convey to him an estate in fee, but an estate-tail only.

SAUNDERS *versus* NEVIL.

(1) And in default of heirs of the plaintiff's body, or according to the answer, if he should die without heirs of his body, then remainder over; the rents and profits to be applied in his maintenance till 24, and the surplus, if any, to be paid to him, R. L.

(2) 'This is not correct, the bill was for a conveyance to plaintiffs *and the heirs of his body*, he having attained 24, and had two children in marriage, and the defendants insisted that the will being so worded it was the intention of the testatrix, that the plaintiff

should not have the legal estate, nor be enabled to dock the entail; but that the premises should be preserved for the heirs of the body of the plaintiff, if he should leave any at his death, or in default thereof, for the persons in remainder; and the decree was, that the defendants the trustees, should execute a conveyance of the estate in question, to the plaintiff *and the heirs of his body*, Reg. Lib. 1701. B. fol. 163. vide *Phillips v. Phillips*, post 430. and 1 P. Wms. 34. S. C.

The *Master of the Rolls* decreed them to convey an estate-tail only, and refused to decree a conveyance in fee; and the case of *Mr. Cook and Woodward* was cited, where the Lord *Jefferies* did refuse to decree a conveyance in fee, the remainder after an estate-tail being limited to a *charity*.

SAUNDERS v.  
NEVIL.

PETERS & Al' *versus* SOAME & Al'.

CASE 390.

Jan. 27.

LORD  
KEEPER.

**DARWIN** the receiver of the *New-River* rent, assigned to the plaintiff *Peters* a bond, wherein the defendants *Soame* and *Green* were bound to him in 700*l.* for payment of 350*l.* and this assignment was to indemnify him against two debts, for which he stood bound as surety for *Darwin*, and in satisfaction of 30*l.* he owed the plaintiff. *Darwin* became a bankrupt, so *Peters* could not sue in the name of *Darwin* at law, and brought his bill to have the money decreed to him in equity. Defendant *Soame* insisted *Darwin* is indebted to him for rent received for four *New-River* shares, and insisted to retain it out of the bond; and the assignees insisted to have the bond, they being just creditors as well as the plaintiff, and had the law, as well as equity, on their side.

Eq. Ca. Ab. 44.  
pl. 3. S. C.  
*A.* being bound in a bond to *B.* the bond is assigned by *B.* to *C.* in satisfaction of a debt due from *B.* to *C.* *B.* becomes a bankrupt, and *C.* not being able to sue at law in *B.*'s name; brings a bill against *A.* to be paid the money due

on the bond. Whether *A.* out of the money due on the bond shall retain a debt due to himself from *B.*

*Per Cur.* The assignees can have no better right than the bankrupt himself; and as the bankrupt is bound by the assignment, the assignees under the statute must be bound likewise, and stand in his place; (1) but they insisting *Darwin* was a

[ 429 ]

(1) So *Winch v. Keeley*, 1 Term Rep. 619. So in the case of assignment of a simple contract debt, *Row v. Dawson*, 1 Vez. 331. So in the case of a mortgage, *Pope v. Onslow*, ante 286. So where bankrupt debtor to the Crown, and under promise to pay the debt of another to the Crown, and extent issued, assignees not permitted to have the extent discharged without paying both debts, *King v. Lacy*, Bunb. 337. So in the case of an award made after bankruptcy, but not known, *Whitacre v. Pawlin*, ante p. 229. And the general principle seems to be, that assignees take a bankrupt's property in the same condition, and subject to the same burthens as the bankrupt himself had it; and that they stand in his place, and are bound by all acts

fairly done by him, in relation to his property. *South Sea Company v. Wymondsell*, 3 P. Wms. 144. *Walker v. Burrows*, 1 Atk. 94. *Mitford v. Mitford*, 9 Ves. 100. and by whatever equity the bankrupt was liable to, *Taylor v. Wheeler*, post 564. *Brown v. Heathcote*, 1 Atk. 162. *Hinton v. Hinton*, 2 Vez. 633. *Tyrrell v. Hope*, 2 Atk. 562. *Pye v. Daubuz*, 3 Bro. Ch. Rep. 595. *Mitford v. Mitford*, ub. sup. And the principle arises on this ground, that they are considered not as purchasers for a valuable consideration, in the proper sense of those words; but as voluntary assignees and personal representatives, and are therefore distinguished from particular assignees, *Drake v. Mayor of Exeter*, 1 Ch. C. 71. *Jewson v. Moulson*, 2

PETERS v.  
SOAME.

bankrupt before he assigned the bond; he directed *that* to be tried at law.

But said, he was in doubt whether *Soame* might not retain for his debt, and that *stoppage* seemed to be a good equity in such case. (2)

Atk. 420. *Worrall v. Marlar*, cited in not. to *Bosvil v. Brander*, 1 P. Wms. 459. *Mitford v. Mitford*, ub. sup. but the rule is not universal, for the Court will not carry a voluntary conveyance into execution against assignees, though they would as against the bankrupt himself, *sic dict.* per *Hardwicke*, Lord Chancellor, *Tyrrell v. Hone*, 2 Atk. 562, and the rights and powers of the assignees appear to be in some cases more extensive than those which were in the bankrupt, for they may impeach transactions which the bankrupt himself might be stopped from impeaching, *sic dict.* per *Lough-*

*borough*, Lord Chancellor, *Anderson v. Maltby*, 2 Ves. jun. 255. And that upon the ground that the assignees have all the equity of the creditors, *ibid.*; et vide further on the general subject of the interest of assignees in the rights and effects of bankrupt, *Cullen Bank. Law*, p. 185, 228.

(1) On the doctrine of stoppage vide *Curson v. African Company*, ante 1 vol. p. 121. and cases cited in not. there. And further *ex parte Stephens*, 11 Ves. 24. in which the cases and doctrine of set off are a good deal considered.

CASE 391.  
Feb. 1.

### COOKE versus PARSONS.

Eq. Ca. Ab.  
280. pl. 4.  
Pre. Ch. 184.  
S. C.

Lands are devised to be sold for payment of debts. The lands may be decreed to be sold without giving the heir, who is an infant, a day to shew cause, when he comes of age. Otherwise if he is decreed to join in the sale.

ON a bill of review an error assigned was that lands were decreed to be sold pursuant to the will for payment of debts without giving the heir a day to shew cause after he came of age. (3)

The lands may be decreed to be sold without giving the heir, who is an infant, a day to shew cause, when he comes of age. Otherwise if he is decreed to join in the sale.

*Lord Keeper* confirmed the decree, for the lands being devised to be sold for payment of debts, there is nothing descends to the heir, and an immediate sale may be decreed without giving him a day to shew cause, though an infant; but if he had been decreed to have joined in the conveyance, there he must have had a day after he came of age. (4)

(3) Some lands also, that were by the will directed to be set and let only, were decreed to be sold. The validity of the will was disputed, R. L.

(4) This does not appear to be the point; it came on upon a rehearing; a demurrer to the bill of review and revivor having been overruled, and, according to the statement in the Register's Book, Feb. 6th, it appears that the plaintiff in the bill of review, who

was the grandson and heir at law of the testator, was an infant at the time of the making the decree on the original bill, and the errors assigned were,  
 " That the said decree was made before  
 " the testator's will was proved in any  
 " Court that had the proper cognizance  
 " thereof, as to the personal estate, and  
 " that it is directed by the said decree,  
 " that the defendant *Bennet* should  
 " forthwith prove the said will in the



“ prerogative Court, whereas the validity thereof, as to the personal estate, was properly cognizable in the spiritual court only, and the said defendant, the plaintiff in the bill of review, having by his plea and answer insisted that the said will was not duly signed and published according to the statute made to prevent frauds and perjuries, the said will ought not to have been established, and a sale directed by the said decree, without liberty given to the said defendant to try the validity thereof at law; and if any sale ought to have been directed of the real estate, yet an account ought to have been first taken of the personal estate, and only so much of the real estate decreed to be sold, as should appear necessary to supply the defect of the personal estate; and that

“ the lands by the will only devised to be let, ought not to have been decreed to be sold.” And by the decree an account was ordered to be taken of the personal estate, and of the rents and profits of the real until the sale, and also of the debts due from the testator at the time of his death, and the securities for the same, and for what the real estate was sold, and what was then the yearly value thereof, and reserved further directions touching the same, until the Master should have made his report, and the plaintiff in the bill of review was at liberty to try the validity of the will at law if he thought fit, Reg. Lib. 1701. A. fol. 195. For points incident to bill of review, vide *Sir Thomas Standish v. Radley*, 2 Atk. 177. *Harrison*, Ch. Pr. 1 vol. 137.

### PHILLIPS *versus* PHILLIPS.

[ 430 ]

CASE 392.

Feb. 10.

Eq. Ca. Ab.

292. pl. 6.

Pre. Ch. 167.

1 P. Wms. 34.

S. C.

A. by will devises lands to trustees and their heirs, in trust, that the profits should be equally divided between his wife and daughter, during the wife's life; and after her death he devised the

*WILLIAM PHILLIPS* by will devised his lands to *Powell* and *Jennings* and their heirs, in trust that the profits should be equally divided between *Elizabeth* his wife and his daughter *Martha*, during the life of *Elizabeth*; and that after her decease he gave and devised the same to his trustees and their heirs, to the use of his daughter *Martha* and the heirs of her body, with remainders over. *Martha* the daughter died without issue, *Elizabeth* the wife yet living. *David Phillips* the heir at law was plaintiff against the defendant *Elizabeth* the widow, and the trustees, for an account of a moiety of the profits, though the defendant the widow insisted, that she by implication or survivorship, was intitled to the whole for her life.

same to the use of his daughter in tail, with remainders over; the daughter died during the mother's life.—Decreed this to be a tenancy in common between the mother and daughter, and that during the mother's life, the daughter's moiety did not descend or result to the heir, but was an interest undisposed of, and in nature of a tenancy *pour autre vie*, and should go to the administrator of the daughter.

The matter being referred to the *Judges* of the *Common Pleas* for their opinion, they unanimously certified, that it was a *tenancy in common* between the wife and daughter; so that the mother had no title to the daughter's moiety, either by survivorship or by implication; nor did that moiety during the life of *Elizabeth*, either descend or result to the heir; but as to that moiety during the life of *Elizabeth*, it was an interest

PHILLIPS v.  
PHILLIPS.

undisposed of, and in the nature of a tenancy *pour autre vie*, and consequently belonged to the administrator of *Martha* the daughter, and decreed accordingly. (1)

(1) With costs to be taxed or 60 *B.* fol. 483. vide *Kew v. Rouse*, ante marks in lieu thereof, Reg. Lib. 1701. 1 vol. 353.

[ 431 ]

### NEVILL *versus* NEVILL.

CASE 393.

LORD

KEEPER.

Feb. 25.

A legacy of 500*l.* is given to the eldest son of *A.* to be begotten, to place him out apprentice. *A.* has a son born after the tes-

tator's death, who brings a bill for the legacy, and it is decreed to be paid him, though not born in the testator's life-time; and though the 500*l.* was given for a particular purpose.

SIR *Christopher Nevill* devised (*inter alia*) 500*l.* to the eldest son of *John Nevill* to be begotten, to place him out apprentice, and died; after his death *John Nevill* had a son born, the plaintiff, who brought a bill for this legacy. It was objected he was not capable to take, because not born at the testator's death; or if he might take, yet being given for a particular purpose, *viz.* to place him out apprentice, (1) he was not intitled, until fit to be placed out.

Not allowed, but the legacy decreed to be paid. (2)

(1) For putting him forth either to law or merchandize, R. L.

(2) With interest from the time of filing the bill, Reg. Lib. 1701. *B.* fol. 106. and a legacy to an infant, to bind

him an apprentice, and the infant die before he is of an age competent to be put out, this shall go to his executor or administrator, *Barlow v. Grant*, ante 1 vol. 254.

CASE 394.

March 2.

The act of parliament relating to the New River Water Company ought to have a liberal construction, so as the town in general may be served with water.

### NEW RIVER COMPANY *versus* GRAVES.

BILL to be quieted in their enjoyment of pipes laid through a field, called *Long Field*, first laid there by consent of the tenant, who had a long term for years, upon satisfaction made to him for the damage; and the lease being now expired, and the field lately purchased by the defendant *Graves*, he plucked up the pipes.

For the defendant it was insisted, *first*, that by the act of *Parliament*, the Company had only a power to bring the water in a trench ten foot wide of brick or stone, and not to lay pipes.

[ 432 ]

*Secondly*, They had liberty given by the act, only to serve the City with water, and not any parts adjacent; and those

pipes were used to serve *Hackney*, *Shoreditch*, and *White-chapel*. (1)

NEW RIVER  
COMPANY  
v. GRAVES.

*Per Cur.* The act is to be taken in a liberal sense, that the Town in general might be served with water, without regard to its being within or without the liberties of the City; and although a trunk or trench of *ten* foot wide is mentioned in the act of parliament, yet the intent of the act was to give power in *alieno solo* not exceeding *ten* foot wide; and agreeable thereunto was the decree made by the Lord *Sommers* between the *New River Company* and *Henley*, where although the act of parliament mentions the serving the *North* part of the town with water there, it went *Southward* and *South-west*, to serve *Westminster* and *Chelsea*, &c.; and yet held to be within the benefit of the act: and therefore decreed a commission to issue to ascertain the damages the defendants sustained, and the plaintiffs to be quieted in the possession of their pipes. (2)

(1) The act gave power to the City of London to dig up such ground as should be convenient for placing cisterns or wooden pipes, for conveying or distributing the said New River to

the inhabitants of *London* and the parishes *within the bills of mortality*. Vide Statute, 3 James 1st. cap. 18. 4 James 1st. cap. 12.

(2) Reg. Lib. 1701. A. fol. 255.

### TOULSON *versus* GROUT.

*WILLIAM DAWSON* having devised a legacy of 600*l.* to his son, payable at *twenty-one*, for which he had obtained a decree, and 637*l.* reported due; before he received the money he became a bankrupt, and the commissioners assigned the legacy, and benefit of the decree.

CASE 395.  
March 4.  
Eq. Ca. Ab. 53.  
pl. 5. S. C.  
A legacy given  
to a bankrupt  
before his  
bankruptcy,  
may be as-  
signed by the  
commission-  
ers.

The bill was by the assignees to have the benefit of the decree, to which the defendants the executors demurred, insisting that a legacy was not within the compass or provision of any of the acts made against bankrupts to be assigned to the creditors.

[ 433 ]

But the demurrer was over-ruled, and said, that the Act of Parliament ought to be taken in the most beneficial sense, for the advantage of the creditors. (3)

(3) Vide *Tudway v. Bourn*, 2 Burr. 716. and as to the nature and extent of the interest that vests in the assignees of a bankrupt, vide *Cooke Bank. Law*.

1 vol. 265. et seq. *Cullen*, 173. et seq. [And see *Ex parte Ansell*, 19 Ves. 208.]

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**NY 100-106141**

1. The first  
 2. The second  
 3. The third  
 4. The fourth  
 5. The fifth  
 6. The sixth  
 7. The seventh  
 8. The eighth  
 9. The ninth  
 10. The tenth

around her mirror. She saw the same face, that she loved and she hated and that her mother was proud of. Her father, who had changed her in the world. William looked at her.

the like case *Vane v. Lord Willoughby* cited in our text. But Lord Chancellor inclined to grant it if the affidavit has clearly shown it to be a mistake, *ibid.* And it seems to be settled, that where the Court is clear that a mere mistake has been made in an answer, it will suffer the defendant to rectify it, and the mode now is, to permit a supplemental answer to be filed, "that course leaving the parties the effect of what has been sworn before, with the explanation given by the supplemental answer," per *Eldon, Lord Chancellor, Dolder v. the Bank of England*: 10 Ves. 265. which see also as an authority for amending exceptions; and further on the principal point, *Jennings v. Merton College*, 8 Ves. 79. *Wells v. Wood*, 10 Ves. 401. From these cases, and indeed from the nature of the thing, it appears that, though the Court will, under circumstances, permit an answer after it is on the file to be altered or rectified; yet, 1st, that it is very jealous of so doing. 2dly, that the proposed alteration must be stated in the affidavit; and 3dly, that it is com-

pletely at the discretion of the Court, and that no general rule can be laid down on the subject. Note in the report of the principal case in Eq. Ca. Ab. ub. sup. it is said, "one reason" why the Court denied this motion "was because the father was an arbitrator of the defendant's (i. e. *Lady Anderson's*) own chusing," but this circumstance does not appear in any

part of the statement in the Register's Book. [*Livesy v. Wilson*, 1 V. & B. 149. *Strange v. Collins*, 2 V. & B. 163. *Edwards v. M'Leay*, ib. 256. *White v. Godbold*, 1 Mad. 269. *French v. Myles*, 4 Mad. 404. And in the Exchequer, *Tennant v. Wilsmore*, 2 Anst. 362. *Harris v. Daubeny*, 3 Anst. 717. *Taylor v. Obee*, 3 Price 83.]

FRETWELL *versus* STACY.

CASE 397.  
May 2.

A LEGACY given to executors for care and pains, if a deficiency of assets, they must abate in proportion with the other legatees. (1)

(1) The cause appears 14th *March*, but only a general direction, that legatees should abate in proportion in case of a deficiency, Reg. Lib. 1701. A. fol. 205. So as to the point in the printed report, *Attorney-General v. Robins*,

2 P. Wms. 25. dict. *per Cur.* *Heron v. Heron*, 2 Atk. 171. As to abatement of legacies in general, vide *Brown v. Allen*, ante 1 vol. 31. and cases cited in not. there.

WHITE *versus* TAYLOR.

[ 435 ]  
CASE 398.

THE bill was brought for an account of the personal estate of one *Thomas Ely*; the defendant having answered, and witnesses being examined, it happened that in the title of the interrogatories the plaintiff was called *Tho. White*, instead of *John*. (2) *Per Cur.* cannot read the depositions, nor can the title be amended, and this, although most of the witnesses were since their examination gone to sea. (3)

Eq. Ca. Ab. 36. pl. 7. S. C. The plaintiff's christian name being mistaken in the title of the interrogatories, the depositions could not be read, nor

would the Court permit the title to be amended, though most of the witnesses since their examination were gone to sea.

(2) [See *Curre v. Bowyer*, 3 Swan. 357. *Perry v. Silvester*, Jacob 83.]

(3) Vide *Spearing & Ux. v. Lynn*, ante p. 376. And in a case of *Nisbett v. Murray*, 30th April, 1795, not reported, plaintiff having take exceptions to defendant's answer, to which he submitted, and had left town to go to *Jamaica*; motion for leave to amend for the mere purpose of praying *ne Exeat*. and that the amendment might be without prejudice to the examination, *Lord Loughborough*, Chancellor, granted the order, but *Dickens* refused to draw it up, as no notice had been served on defendant. Application was again

made to the Court, suggesting, that the giving notice would defeat the whole object of the application by giving to defendant an opportunity to abscond. The Chancellor approved of the reason, and ordered the Register to draw up the order as prayed. As to amendment of original (in the like case) at law, *Arthur Blackamore's case*, 8 Co. Rep. 156, 7. *Westby's case*, 2 Vent. 152. *Cromwell v. Grunsden*, 2 Salk. 462. And for a general view of the cases and doctrine of amendment at law, vide Com. Dig. tit. amendment. *Jacob Law Dict.* verb. amendment.

## CASE 399.

SHEPPARD *versus* KENT.

Eq. Ca. Ab.

142. pl. 6. Pre.

Ch. 190. S. C.

After creditors have joined in a bill, and obtained a decree for payment of their debts out of legal and

equitable assets, none of them shall be permitted to obtain a preference of the others by obtaining judgments against the executors.

MR. *Kent* having by will devised his lands to his executors, to be sold in aid of his personal estate, and the creditors having joined in a bill, and obtained a decree for the payment of their debts out of assets, and the trust-estate; some of the creditors that were plaintiffs in that cause, to gain a preference of the rest, had obtained judgments against the executors.

Upon a bill now brought by the other creditors to be relieved against those judgments; the *Lord Keeper* was of opinion, first, since all the creditors had joined in a bill, and had obtained a decree for payment of all their debts without any preference; and the decree being since prosecuted, and monies paid under it, that such of the creditors as were plaintiffs in the cause, wherein such decree was obtained, should not now gain a preference by judgments obtained by confession.

[ 436 ]

Where there are legal and also equitable assets, the creditors, who will take their satisfaction out of the

legal assets, shall have no benefit of the equitable assets, until the other creditors, who can only be paid out of those assets, have thereout received an equal portion of their respective debts.

And declared his opinion to be, that where there were legal and also equitable assets, the creditors who would take their satisfaction out of the legal assets, should have no benefit of the equitable assets, until the other creditors, who had only a remedy out of the equitable assets, had thereout received an equal proportion to their respective debts. (1)

(1) Vide the case of the creditors of Sir *Charles Cox*, 3 P. Wms. 341. and particularly note (2) p. 344 there. The decree in the principal case was affirmed on appeal to Dom. Proc. 21 Dec. 1702. *Colles*, P. C. 253.

## CASE 400.

BATEMAN *versus* BATEMAN.

LORD

KEEPER.

May 7.

Eq. Ca. Ab.

218. pl. 3. 382.

pl. 10. S. C.

A. purchases lands in his eldest son's name, and puts him into possession, and the son falling sick, takes a declaration of trust

from him, and after the son's recovery, he is permitted to continue in possession. The son marries and dies, and the father gets a conveyance from his younger son. The eldest son's wife shall have dower in these lands.

JOAS BATEMAN the father in 1691, purchased an estate at *Erith*, in *Kent*, in the name of *William Bateman*, his eldest son, and he was put into possession, and about a year afterwards falling sick, his father *Joas* got him to execute a deed, declaring his name was used only in trust for his father; but he recovering of his sickness continued the possession as formerly; and in 1695, married the defendant, the widow of *Vanackre*, she having a jointure of 600*l.* per ann. and an inheritance of 400*l.* per ann. more. Upon the marriage an agree-



ment was made, that, in case she survived *William Bateman*, he would leave her 4000*l.* and gave a bond to perform covenants. As to dower nothing was mentioned one way or other. *William Bateman* dying without issue, Sir *James Bateman* his brother and heir conveyed to *Joas Bateman* the father.

BATEMAN v.  
BATEMAN.

The defendant the widow of *William*, brought her writ of her dower. *Joas Bateman* the father brought his bill to be relieved against it, and obtained a decree at the *Rolls*. Now upon an *appeal* to the *Lord Keeper*, he dismissed the plaintiff's bill, declaring it to be a secret and fraudulent deed of trust, to deceive creditors and purchasers. (1)

(1) 12th *June*, The bill was dismissed with costs, and the defendant was declared to be at liberty to prosecute her writ of dower, and also to proceed at law for the recovery of the 4000*l.* as she should be advised; and in any action to be brought for the 4000*l.* the

plaintiff *Joas Bateman* was to produce the deed of purchase of the lands at *Erith*, and was not to give in evidence the deed of trust, Reg. Lib. 1701. A. fol. 366. Note, the report of the above case in Eq. Ca. Ab. 149. pl. 6. 315. pl. 2. Pre. Ch. 198. is on another point.

### TOVEY & Al' versus YOUNG & Al'.

THE plaintiffs being *London* cheesemongers, and having formerly bought cheese in *Suffolk* by factors, found, that although they paid their factors, yet the dairy-men not being paid by the factors, many times sued the merchant and made him pay for the cheese again. They gave notice publicly that they would not buy by factors, nor be answerable for them; yet after such notice given were sued by such as acted as factors, and verdicts were obtained against them in *Suffolk*. The bill was for a new trial in an indifferent county, and cited for precedents the cases of *Humphrys* and *Peyton*, 11 Nov. 15 Car. 2. A new trial after a trial at bar. *Henvill* and *Graham* versus *Holland*, 28 Car. 2. after a verdict on a *plene administravit*, a material witness being absent at the trial, and a voucher since discovered to make out the payment of the sum of 50*l.* (2) *Ives* and *Hankey*, 8 Dec. 3. Jac. 2. in the case between the *Cheshire* dairy-men and the *London* cheesemongers, *Tilly* and *Wharton*, (3) new trial upon a bond supposed to be forged. *Scott* and *Hilton* the like, there being *five* trials in all.

[ 437 ]  
CASE 401.  
May 1.  
Eq. Ca. Ab.  
378. pl. 7. Pre.  
Ch. 193. S. C.  
Verdicts being  
recovered in  
*Suffolk* by the  
factors there,  
against the  
*London*  
cheesemon-  
gers, the *Lon-*  
*don* cheese-  
mongers  
brought their  
bill for a new  
trial in an in-  
different  
county. Bill  
dismissed.  
Ante Ca. 382.

But the Court would not relieve in this case, but dismissed the bill. (4)

(2) *Hennell* v. *Kelland*, Eq. Ca. Ab. 377. pl. 2. probably S. C.  
(3) Ante p. 419.

(4) The cause was heard 30th Nov. 1700. before the *Master of the Rolls*, and bill dismissed with costs, Reg. Lib. 2 c 2

1700. *B.* fol. 37. reheard before the *Master of the Rolls*, 18 Nov. 1701. and decree confirmed, and the present de-

cree was on a rehearing before the *Lord Keeper*, Reg. Lib. 1701. *B.* fol. 35. 284.

CASE 402.

LORD

KEEPER.

May 12.

Eq. Ca. Ab.

62. pl. 4. 316.

pl. 10. S. C.

*A.* joins with

*B.* her hus-

band in mak-

ing a mort-

gage for years

of her inheri-

tance, to raise

money to buy

a place. *B.*

covenants in

the mortgage

to pay the mo-

ney, and on

payment

thereof by the

proviso the

term is to

cease. The

mortgage is afterwards assigned, and the proviso is that on payment by them, or either of them, the term is to be assigned as they or either of them shall direct. *B.* by letter soon after the mortgage, promises his wife to apply the profits to pay it off. He pays off the mortgage and takes an assignment in trust for himself, and by will gives it to a second wife; the son and heir brings a bill to have the mortgage assigned to him. The Court would not relieve him, but on payment of principal, interest and costs; but this decree was reversed upon an appeal to the House of Lords.

[\*438]

Com' HUNTINGTON *versus* Countess of HUNTINGTON.

**THEOPHILUS** Earl of *Huntington* and the Countess *Elizabeth* his *first* wife, the mother of the present Earl, join in a \*mortgage of her inheritance for 4500*l.* to supply the Lord's occasions, to pay for the place of Captain of the *Band of Pensioners*; and subject to the mortgage, which was for a term of years, the estate was settled to Countess *Elizabeth* for life, remainder to the now plaintiff her son in tail; and the late Earl in the mortgage-deed covenants to pay the money, and the proviso was, that on payment of the mortgage-money the term was to cease. The mortgage was several times assigned, and particularly in 1683, and the Countess joined in it; and there the proviso was, that on payment of the money by them or either of them, the mortgage-term was to be assigned, as they or either of them should direct or appoint.

The mortgage bore date *Aug.* 1, 1682. On the 5th of the same *Aug.* the late Earl by letter thanked the Countess for having sealed the mortgage; and added, that the profits of the office should be religiously applied to pay off the incumbrance: But yet afterwards, when money came in, he paid off the mortgage; but took an assignment thereof in trust for himself, and by will devised his personal estate to the defendant, the Countess his *second* wife, and the benefit of this mortgage.

The plaintiff's bill was to have the mortgage assigned to him. But the *Lord Keeper* declared he could not decree for the plaintiff, but upon the usual terms of a redemption on payment of principal, interest and costs, discounting profits. (1)

But upon *appeal* to the *Lords* in *Parliament*, the plaintiff obtained a decree to have the mortgage assigned to him. (2)

(1) Reg. Lib. 1701. *A.* fol. 295.

(2) And that the profits of the estate, which grew due and were received by the late *Earl* after the death of the late *Countess*, or by his executors since his

death, should be accounted for without being discounted out of the money pretended to be due on the mortgage, but the master to make the respondent just allowances for the appellant's mainte-

nance and education, and for all monies expended in the management of the estate, and such other allowances as directed in the decree. 1 Bro. P. C. 1. Jour. Ho. Lords, 17 vol. p. 236. et vide *Tate v. Austin*, 1 P. Wms. 264.

BRUEN *versus* BRUEN.

[ 439 ]

CASE 403.

May 13.

Eq. Ca. Ab.  
267. pl. 2. Pre.  
Ch. 195. S. C.

A term is created by marriage-settlement to raise 3000*l.* for daughters' portions within twelve months after the death of the survivor of husband and wife.

By the marriage-settlement, a term was lodged in trustees, to commence after the decease of the father and mother, in trust to raise 3000*l.* in *twelve* months after the death of the survivor, for portions for daughters; there being issue only one daughter of the marriage, the father by will devised the trust-lands to make good his wife's jointure of 200*l.* *per ann.* and for raising 3000*l.* for his daughter's portion; and died, leaving issue a daughter, who died when *five* years old. The mother took out administration to her, and claimed the 3000*l.* against the uncle and heir.

There being one daughter, the father by will devises the trust lands to make good his wife's jointure, and to raise 3000*l.* for his daughter's portion. The daughter shall not have two portions of 3000*l.* and she dying at the age of five years, and the portion being to be raised out of land, it shall not be raised for her administrator.

*Per Cur.* First that the will shall be taken as relative to the settlement, and construed as for the better securing the 3000*l.* by the settlement, and not as a devise of another 3000*l.*

*Secondly*, It being for a portion to be raised out of the land, and the daughter dying when but *five* years old, before she had occasion for a portion; although no time was appointed for the payment of it, it shall merge in the land for the benefit of the heir, and not go to the administrator. (1)

(1) The 3000*l.* also being to be raised on a term which had not commenced at the death of the daughter; this was decreed on a rehearing, Reg. Lib. 1701. A. fol. 290. Vide *Jackson v. Farrand*,

ante 424. and cases referred to in not. there, and as to the authority of the principal case, *Boycott v. Cotton*, 1 Atk. 556.

DE  
TERM. S. MICHAELIS, 1702.

IN CURIA CANCELLARIÆ.

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CASE 404.  
Decemb. 5.

KENDAR *versus* MILWARD. (1)

*A.* dies intestate leaving a wife and two daughters; after his death 200*l.* is found hid in a wall, and 200*l.* in a box. The widow lays out this money in land, and settles it to the use of herself for life, remainder to her daughters in tail, remainder to her own right heirs. After the death of the mother and two daughters, plaintiff as administrator to the daughters, brings a bill against the heir at law, to have two thirds of the 400*l.* out of the land as personal estate, and the Master of the Rolls decreed for him; but the decree was reversed by the Lord Keeper, money having no ear-mark.

**THOMAS CHALKLEY** a meal-man of *Uxbridge* died intestate, leaving a widow and two daughters. It was proved that 200 guineas were found hid in a hole in the wall, and 200*l.* in silver in a box, besides his stock in trade. The widow invests the 400*l.* in a purchase of lands of inheritance, and settles the same to herself for life, remainder to her two daughters in tail, remainder to her own right heirs; both the daughters died without issue intestate; the defendant as heir to the mother entered on the lands.

[ 441 ]

The plaintiff, as next of kin, and as administrator to the daughter, brought his bill to subject the land to the 400*l.* that is to refund *two thirds* thereof, as being personal estate belonging to the daughters; and several witnesses were examined, proving that the 200*l.* so found in the wall, and the 200*l.* in the box was invested in this purchase.

The *Master of the Rolls* decreed for the plaintiff; but upon an appeal to the *Lord Keeper*, the decree was reversed, being within the reason of the case of *Kirk* and *Webb*, lately affirmed upon an appeal in *Parliament*, (2) that money had no ear-mark, and could not be followed when invested in a purchase. (3)

Post Ca. 435.  
S. C.

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(1) *Kinder v. Miller*, Pre. Ch. 172. S. C.

(2) Pre. Ch. 84. S. C.

(3) Reg. Lib. 1702. *A.* fol. 58. Entered *Kender v. Hayes*. Et vide note (1) in *Merreitt v. Eastwicke*, ante 1 vol. 265. And the doctrine that seems to result from the cases on this subject

seems to be, that though the proof of the money being invested in the purchase is never so plain, yet if it rest in parol, and do not appear on the face of the deed it will not be sufficient, vide *Ryal v. Ryal*, 1 Atk. 59. and the cases cited in not. there.

HAINES *versus* HAINES.

THE uncle having devised his real estate, part to the plaintiff, and other part to other relations, and disinherited his nephew and heir at law; at the funeral of the uncle, a younger brother of the heir at law snatched the will out of the hands of the executor, and tore it in many small pieces; and most of them, and particularly such part wherein it was the devise of the land, were picked up and stitched together again.

hands, and tears it in pieces. The pieces being gathered up, and stitched together, a bill is brought to establish the will, and decreed the devisees to hold and enjoy. and the heir to convey to them.

CASE 405.  
Eq. Ca. Ab.  
402. pl. 3. S. C.  
A. devises  
lands to several persons,  
and after his death, one who was a friend to the heir at law, snatches the will out of the executor's

The bill was to have the will established; and decreed that the devisees should hold and enjoy against the heir, and he to convey to the devisees, (1) although no direct proof made that the heir directed the tearing of the will.

(1) "At his own charge," and perpetual injunction against all proceedings by the defendant as heir at law, in respect of the lands in question, and the defendant to pay the costs, Reg. Lib. 1702. A. fol. 78. 31 Oct. Et vide *Etheringham v. Etheringham*, Aleyn, Rep. 2.

Sir JOHN HEATHCOTE *versus* Sir JOHN FLEETE.

BILL to discover, who was owner of a wharf and lighter, to enable the plaintiff to bring an action for the damages his goods sustained by the lighter's being over set, by negligence of the lighter-man. The defendant demurred.

plaintiff to bring action for damages his goods had sustained by the negligence of the lighter-man. Defendant demurred. Demurrer over-ruled. See the next case.

[ 442 ]  
CASE 406.  
Eq. Ca. Ab.  
76. pl. 6. S. C.  
Bill to discover who was owner of a wharf and lighter, to enable the

DE

[ 443 ]

TERM. S. MICHAELIS, 1703.

IN CURIA CANCELLARIÆ.

MORSE *versus* BUCKWORTH.

THE ship called the *Turkey Merchant*, taking fire by the neglect of the master, or ship's crew, the plaintiff who was one of the freighters, and had his goods burnt, brought his bill to

CASE 407.  
Octob. 18.  
Eq. Ca. Ab.  
76. pl. 7. S. C.  
See the preceding case.

MORSE v.  
BUCKWORTH.

discover who were part owners of the ship, to enable him to bring his action. The defendant demurred.

In both these cases it was insisted on for the defendant, that it was a hard demand in its nature. The plaintiff might recover at law, as he could, but was not to be assisted in equity; and compared it to the case where a fire happens in a man's house, and burns his neighbours also; although he is liable to damages at law, yet the plaintiff in such case shall not be assisted in equity.

[ 444 ]

*Per Cur.* The cases are not alike. In the case put, it is true, the law gives an action; but it doth not arise out of any contract or undertaking of the party; but in the cases before the Court, the lighterman receives a premium, or wages, for undertaking to conduct the goods to the wharf; and so the masters or owners are by agreement to have freight for carrying and transporting of the goods; and it is within the reason of the case of any common carrier; and therefore over-ruled the demurrers, and ordered the defendants to answer. (1)

(1) Reg. Lib. 1702. B. fol. 546. forfeitures and penalties, *Bird v. Hardwicke*, ante 1 vol. p. 109.

CASE 408.

WEBSTER *versus* BISHOP.

Octob. 23.  
Eq. Ca. Ab.  
51. pl. 1. Pre.  
Ch. 223. S. C.  
An award is  
made a rule of  
Court accord-  
ing to a sub-  
mission for  
that purpose,  
and an attach-  
ment is taken

out for not obeying the award, and then the party dies, against whom the attachment issues. By the act of parliament the attachment is gone, and the remedy lost.

*WEBSTER* having submitted to an award, and that the same should be made a rule of Court, the same was accordingly made a rule of this Court; and an attachment issued out against him for not performing the award. *Webster* was afterwards found a *lunatic*. *Bishop* took out a *subpœna scire fac'* against the executrix and heir, to carry on the rule of Court to an execution.

*Per Cur.* The Act of Parliament (1) directing it to be carried on by an attachment, as is done in other Courts for disobeying a rule of Court; by the death of the party the attachment is gone, and the remedy lost.

(1) 9 and 10 Will. 3. cap. 15. And by the report in Pre. Ch. it appears the opinion of the Court was given on consultation with the judges. And for the

doctrine of the interference of equity, in respect of awards, vide *Brown v. Brown*, ante 1 vol. 157.



HUMBLE *versus* BILL & A<sup>r</sup>.

CASE 409.

Octob. 29.

Eq. Ca. Ab.  
358. pl. 4. S. C.*A.* having a  
term in the  
printing-office  
for 21 years,  
by will directs  
that 2000*l.*shall be raised  
out of the  
profits for his  
daughter andher children, and made *B.* executor; *B.* mortgages the term. Decreed the daughter and  
her children should redeem, or be foreclosed; but this decree was reversed by the House of

[ \*445 ]

*BILL* having a term for *twenty-one* years in the *Printing-office*, devised (amongst other things) that 2000*l.* should be raised out of the profits of the *Printing-office* for his daughter, the wife of *Darcy Savage*,\* and their children, and made one *Garret* executor; who first mortgaged the term in the *Printing-office* to *Dr. Brown*, and the same was afterwards assigned to *Sir William Humble* for 1800*l.*

her children, and made *B.* executor; *B.* mortgages the term. Decreed the daughter and her children should redeem, or be foreclosed; but this decree was reversed by the House of Lords.

It was insisted, here was no occasion to sell to pay debts, and *Sir William* having notice of the will, was to take the estate subject unto the 2000*l.*

But the Court was of opinion, that the executor of a testamentary estate had the power over it so as to alien or sell as he should judge necessary; and that if he sold in prejudice of a residuary or specific legatee, they might have their remedy against the executor, but not follow the estate into the hands of a purchaser; for should that be allowed, no one would venture to buy of an executor; for it would be unreasonable that a purchaser should take upon him to make out the account, as to the *quantum* of the debts or assets; nor is he intitled to have the vouchers to make out such an account; and if such difficulties be put upon purchasers of chattels, &c. from executors, it will follow, that executors will be under an incapacity, and disabled to sell, though there be never so much occasion for it, for payment of debts; and therefore the Court decreed an account to the plaintiff of the rents and profits, and to hold and enjoy the *Printing-office*, and defendants to redeem, or be foreclosed. (1)

*Note*; This decree was afterwards reversed upon an *appeal* to the *House of Lords*. (2)

(1) Reg. Lib. 1703. *A.* fol. 596. vide *Cotterel v. Hampson*, ante p. 5. And as to executor following the assets of his testator, *Hill v. Simpson*, 7 Ves. 160.

(2) 6th March, 1703. 1 Bro. P. C. 71. by the name of *Savage v. Humble*. Et vide on the subject of sale by an exe-

cutor, *Ewer v. Corbet*, 2 P. Wms. 148. [*Dickenson v. Lockyer*, 4 Ves. 36. *Hill v. Simpson*, 7 Ves. 152. *Taylor v. Hawkins*, 8 Ves. 209. *M'Leod v. Drummond*, 14 Ves. 353. 17 Ves. 152. *Ray v. Ray*, Coop. 264. *Drohan v. Drohan*, 1 Ba. and Be. 185. *Keane v. Robarts*, 4 Mad. 332.]

CASE 410.

Nov. 13.

Eq. Ca. Ab.  
89. pl. 3. Pre.  
Ch. 165. S. C.  
Decree  
grounded on  
two verdicts  
at law; re-  
versed by the  
House of  
Lords.

[\*446]

STRIBBLEHILL *versus* BRETT.

DEFENDANT had a lease made by *Thomas Thynn*, Esq. of the impropriation of *Thame* for two lives, in reversion after another lease for life of Mr. *Thynn* of *Egham*.\* On the death of Mr. *Thynn* without issue, the estate came to the Lord *Weymouth*, who had made a lease, under which the plaintiff claimed.

The plaintiff's bill was to set aside the defendant's lease upon surmise, that the consideration of the lease was Colonel *Brett's* undertaking to procure a marriage to be had between Mr. *Thynn* and the Lady *Ogle*.

It was objected by the defendant's counsel, that the Lord *Weymouth* being a remainder-man, claimed by settlement paramount, and came not in privity of estate; and therefore neither he nor his lessee intitled to controvert whether the lease was made on good consideration or not; but not allowed.

Lease granted  
by tenant in  
tail in consi-  
deration of  
procuring  
a match, set aside at the suit of the remainder-man.

*Per Cur.* If the lease was gained by fraud, or an unjust consideration, it is to be deemed void, and the estate discharged of it as if no such lease had been made.

The Court directed an issue to be tried at the bar of the Court of *Common Pleas*, whether the lease was made in consideration of Colonel *Brett's* assisting to effect or procure the said marriage. Two verdicts for the defendant, and thereupon the bill was dismissed. (1)

Upon an appeal to the *Lords* in *Parliament*, the decree was reversed, and without regard to the verdicts, the lease was set aside. (2)

(1) Decreed on a rehearing. Reg. Lib. 1703. B. fol. 61.

(2) 1 Bro. P. C. 57, 60. and not there. Jour. Ho. Lords, 17 vol. p. 389. Et vide *Hardwicke*, Lord Chancellor's observations on the judgment in Dom. Proc. *Cole v. Gibson*, 1 Vez. 509, and for the principle on which equity decrees against marriage brokage bonds,

vide cases cited in not. (2) to *Drury v. Hooke*, ante 1 vol. p. 412. Note the case of *Hall v. Potter*, 3 Lev. 411. Show. P. C. 76. S. C. is exactly similar to the principal case, except only, that in that case there was a *bond* instead of a lease. The decree in that case also was reversed, 11 Jan. 1695. Vide Jour. Ho. Lords, 15 vol. p. 638.

RICHARDSON *versus* SYDENHAM.

CASE 411.

Nov. 16.

Eq. Ca. Ab.

47. pl. 5. S. C.

ONE *Alley* demises six acres of pasture land at *Lambeth*, being copyhold, for three years at 13*l.* per ann. The tenant, who was by trade a gardener, covenants to lay out 100*l.* in improvements, and in consideration thereof, the lessor covenanted at the end of the term to grant a new lease under the same rents and covenants. The defendant having purchased the estate, refused to grant the new lease. Decreed *pro Quer'*. (1)

*A.* makes a lease for three years, and in consideration of the lessees laying out 100*l.* in improvements, covenants at the end of the term to grant

a new lease at the same rent and covenants. Purchaser of the inheritance decreed to make good this covenant.

(1) So where lessee of a college made an under-lease, and covenanted with his lessee, that he would renew his lease, and add to it a further term of three years; and he renews the lease, but instead of adding the three years he assigns it to *J. S.* *J. S.* having notice of the covenant will be obliged to add the three years. Nels. Ch. Rep. 212. And the same principle appears in *Caldcott v. Hill*, 1 Ch. Ca. 15, where *J. S.* purchased Church-lands under the title of the usurped government, and sold them to the defendant's testator, covenanting that he was lawfully seised; the Church being restored, *J. S.* was

relieved from his covenant; but it was upon proof, that at the time of the sale, he undertook for his own acts only. So *Taylor v. Debar*, 1 Ch. Ca. 274. & Ch. Ca. 212. S. C. But a promise by letter by *A.* (in consequence of covenant with plaintiff by *A.*'s late father, that *A.* should renew on coming of age,) to renew a lease in consequence of money already laid out considered as *nudum pactum*, because the intention of laying out further sums of money did not appear by the letter, nor any promise founded on it, *Robertson v. St. John*, 2 Bro. Ch. Rep. 140.

NEVIL & Al' *versus* JOHNSON & Al'.

CASE 412.

Nov. 19.

Eq. Ca. Ab.

227. pl. 4. S. C.

THE Lord *Lovelace* by will devised his real estate for payment of debts, the surplus to the plaintiffs. The creditors brought a bill for the payment of their debts, and to set aside several conveyances fraudulently obtained, and made Sir *Henry Johnson* and his wife, and also the legatees, defendants; and obtained a decree for payment of their debts, and to set aside the conveyances, as unduly obtained by Sir *Henry Johnson*.

The creditors of Lord *Lovelace* obtain a decree for payment of their debts, and to set aside some conveyances gained by fraud, and

Sir *Henry Johnson* and the legatees are made defendants. The legatees having brought their bill against Sir *Henry Johnson*; the question was, if the depositions in the former cause touching the fraud could be read in this. *Per Cur.* The question being the same in both causes, and Sir *Henry Johnson*'s defence the same, the depositions ought to be read.

Now the legatees brought their bill against Sir *Henry Johnson* and his wife, praying to set aside conveyances, and to have an account of the surplus of the estate.

The question was, whether the depositions taken in the former cause, as to the fraud and undue obtaining of the

NEVIL v.  
JOHNSON.

deeds could be read in this cause for the legatees against Sir *Henry Johnson & ux,* who were co-defendants in the former cause.

*Per Lord Keeper and Master of the Rolls*, there being the same question in both causes; and Sir *Henry Johnson's* defence being the same in both causes, the depositions ought to be read. (1)

(1) Nov. 15. Entry of an order on the part of the plaintiffs to examine witnesses *viva voce* as to the execution of certain deeds by the late Lord *Love-lace*; but no point stated, Reg. Lib. 1703. B. fol. 128. and afterwards, 9th

Feb. the case and decree are fully stated, but nothing appears relative to the above point, Reg. Lib. ub. sup. fol. 215. vide *Coke v. Fountain*, ante 1 vol. 413. *Barstow v. Palmes*, Pre. Ch. 283.

CASE 413.

Decemb. 16.  
Pre. Ch. 186.  
S. C.

BASKERVILE *versus* BASKERVILE and Lady GORE  
& Al'.

A. on the marriage of his son with B. a widow, articles to make a settlement in consideration of a portion of 2600*l.* to be paid to him, 1000*l.* of the portion being tied up by

articles on B.'s first marriage, it could not be paid. On bill brought by the father, the articles were decreed at the Rolls to be performed in six months, or delivered up. Upon an appeal to the Lord Keeper, he decreed the son to make good the 1000*l.* he being a party to the articles, and also bound by the wife's covenant, who had thereby, whilst sole, covenanted for payment of the portion.

**BASKERVILE** the father, upon the treaty for the marriage of the defendant his eldest son, with Mrs. *Reyner* widow, the daughter of the Lady *Gore*, by articles of April 1, 1699, between *Baskerville* father and son on the one part, and Mrs. *Reyner* and *William Gore* uncle on the other part; *Baskerville* the father covenants, in consideration of the intended marriage had, and of payment of the portion of 2600*l.* he would settle on his son for life, part for jointure, remainder of the whole upon the first son, &c. (2) It fell out that 1000*l.*

(2) The covenant was, that in consideration that it was agreed that *Baskerville* the father should receive of the said *Jane Reyner* widow, the sum of 2,600*l.* as the marriage-portion, of the said *Jane*, he should, within six months after the said marriage, on payment of the said marriage portion, settle upon the defendant *Gore* and one *Popham*, and their heirs for ever, the premises in the bill mentioned, of the yearly value of 520*l.* for the use of defendant *Richard Baskerville* for life, without impeachment of waste, then charged with 250*l.* per ann. free from all taxes, to the defendant *Jane* for her life, for her jointure; remainder as to the whole

to the children of the marriage, as therein mentioned, remainder to the right heirs of the said defendant *Richard* for ever; and there was a further agreement, as to other lands of *Baskerville* the father, and that after the death of *Richard* such alterations should be made in the said settlement as all parties should agree upon, by limiting portions only to daughters in case of no son, or otherwise, as should be thought convenient, so as the annuity to the defendant *Jane* should not be prejudiced; the portions of the daughters to be 2600*l.* And it was further agreed, that the defendant *Richard Baskerville* should have the

part of the intended portion upon her first marriage with Mr. *Reyner*, was lodged in the hands of trustees to be invested in lands, and settled on *Reyner & ux'* for life, remainder to their issue, remainder to her children by any other husband, remainder to the right heirs of *Reyner*; so that this 1000*l.* could not be paid to complete the portion as was intended; and until the whole portion was paid, *Baskerville* refused to settle.

BASKERVILE  
v.  
BASKERVILE.

The marriage was had, and there were several children, and *Baskerville* the father wanting the portion to provide for his younger children, brought his bill against his son and daughter, and *William Gore* the uncle, to have the portion paid, or articles delivered up; and a cross bill was brought to have the articles performed, and a settlement made in proportion to so much of the portion as could be raised and paid.

[ 449 ]

The cause was first heard at the *Rolls*, and there decreed the articles to be performed in *six* months, or delivered up to be cancelled. (3)

Upon an appeal to the *Lord Keeper*, he held the decree so far to be good, that *Baskerville* the father could not be compelled to settle without having the portion paid; but inasmuch as the marriage was had, it would be very hard to discharge the marriage-articles; and the son being a party to the articles, he was of opinion, that the son was bound to pay the portion; and if he had not been a party to the articles, yet his wife, whilst *sole*, having covenanted for payment of the portion, the husband after marriage would be bound to perform that covenant; and therefore decreed the husband to make good the 1000*l.* of the portion. (4)

rents of the lands that were not let from the time of the marriage, and of such as were let, the rents due after the marriage, and that *Baskerville* the father should have the interest of the defendant *Jane's* portion after the rate of 5*l. per cent. per ann.* until the portion be paid or tendered to him. And it was further agreed that the said defendant *Richard* or his heirs, should within *six* months after the marriage, pay to *Baskerville* the father 400*l.* with interest, at *five per cent. per ann.* until paid; and that the lands settled on him in possession should be charged with the same, R. L.

(3) 16th *Feb.* 1702, afterwards 12th *May*, 1703, the case was re-heard at

the *Rolls*, and the decree affirmed, save that his Honor enlarged the time by the said decree given for payment of the 2600*l.* *six* months further, R. L.

(4) “ Within *six* months, and if he  
“ shall make default in payment of the  
“ said 1000*l.* then the defendant,  
“ *Lady Gore*, or the trustees, or any  
“ other person, are at liberty to lay  
“ down the said 1000*l.* if they think  
“ fit, and for security thereof to take  
“ a mortgage from the said *Richard*  
“ *Baskerville* of the reversion of a  
“ certain estate therein mentioned to  
“ be settled on him, reserving to him  
“ the equity of redemption thereof,  
“ and which mortgage the said *Richard*

**BAMPFIELD v. POPHAM.** heir; *that* shall not enlarge the estate by implication; but by express words it may be done; as in *Lewis Bowles's* case,

79 b.

11 *Rep.* Covenant to stand seised to the use of a man and his wife for their lives, remainder to the first and other sons, remainder to the heirs of their two bodies; there the remainder is express and good.

Decreed an injunction to stay waste, and an account of what timber was felled. (1)

(1) Reg. Lib. 1703, A. fol. 141. Vide ante p. 427. 1 P. Wms. 54. 6th edit. S. C. and cases cited in notes (1) and (y) there. *Humberston v. Humberston*, post 737. Pre. Ch. 455. S. C. et vide note to the report in this case in 1 Salk. 236. 6th edition, 1795; and the judgment of *Willis*, Ch. Just. in *Ginger v. White*, *Willis Rep.* p. 348, where the doctrine and cases are much discussed, but no mention either of *Sunday's* case, or of *Blackborn v. Edgley*. Sed vide the case of *Blackborn v. Edgley*, 1 P. Wms. 600, 605, where it is said "the Court exploded the notion" that words of implication should not "turn an express estate for life into an estate-tail, according to *Sunday's* case," 9 Co. 127, b. But in the report of the principal case, 1 P. Wms. 56, it is said—"As to *Sunday's* case, there was a devise to A. generally, (expressing no estate,) and if A. should have no issue male, remainder over:" the devise, as in the printed report of that case, is as follows: "if testator's son *Samuel* have no issue male then his son *Thomas* to have the house, (the subject of the devise in question) if *Thomas* marry, having a male issue of his body lawfully begotten, then his son to have the house after his decease, and the like devise *totidem verbis* to other sons." And in the will was a clause, that if any of testator's sons or their heirs males, issue of their bodies, go about at any time to alien, &c.; and this clause as explaining the first words to mean, that the male issue shall be heir and take by descent, is amongst the reasons stated to be given by the Court in *Sunday's* case, for resolving that *Thomas* should have an estate-tail. In the argument there against the estate-tail it was urged, that when the testator devised that *Thomas* should have the

house, if the will had not gone further he should have had but for life; of this no notice appears to have been taken by the Court, but the reasons for the judgment are—1st. Because he farther saith; if he hath no issue male, then over; which, said the Court, is as much as to say, if *Thomas* dies without issue male, which words are sufficient to create an estate tail in him. 2dly. The clause as above; and 3dly. The prohibition of alienation contained therein. If, therefore, the presumption is allowed, that from the silence of the Court on that point, the words "*have the house*" were considered by it as equivalent to a devise of an estate for life, then the doctrine of *Sunday's* case seems to be correctly considered in *Blackborn v. Edgley*, unless a clear distinction be held between an express devise for life, and a devise for life by clear implication, which a devise or grant that limits no estate clearly is, Co. Litt. 41. But which distinction on the principle of construction held in the cases, particularly in *Ginger v. White*, it is presumed is made. At all events the reasons stated in *Sunday's* case appear to establish the conclusion drawn by Mr. Cox in his note to the principal case, 1 P. Wms. 54, from the cases cited there, that Courts both of law and equity consider the raising estates by implication as depending upon such implication being necessary to effectuate the general manifest intention of the testator. Note. It appears that the trustees of *Warwick Bampfied*, Esq. petitioned the *House of Lords* for leave to proceed on a bill of review and reversal, brought by them against the decree in Chancery; but the petition was dismissed, 1 Colles, P. C. 1. under the name of *Popham* and *Horner*. Et vide *Journ. Ho. Lords*, 14 vol. 27, 261. 15 vol. 328, 331, 332. 16 vol. p. 197.



ASTON *versus* ASTON.

CASE 415.

SIR *Willoughby Aston* by will directed, that the portions of his then unmarried daughters (being *six*, plaintiffs) of 6000*l.* provided by his marriage-settlement, should be made up 4000*l.* a-piece out of his personal estate, and lands devised to be sold for that purpose; provided that each of his said daughters be married with the consent of his wife, if living; and if dead, then with the consent of his eldest son, in writing, signed in the presence of *three* or more witnesses before marriage; and if any of my daughters shall marry without such consent, her portion shall go, first to make up the other daughters' portions 4000*l.* apiece, if the fund prove deficient; and if any surplus, *that* to go to his younger sons.

sent, her portion to go over. On a bill brought by the daughters for their portions, the Court decreed the portions to be paid; but on security to refund, if the condition should be broken.

The *Lord Keeper* decreed *first*, as to the 6000*l.* provided by the settlement, the father had only a power of appointing portions; that in case either of them died before her portion was payable, and unmarried, that the portion should extinguish in the land for the benefit of the heir, and he could not annex any condition to it or devise it over.

ment of them, or devise them over, in case of the death of any of the daughters, before their portions become payable.

*Secondly*, That although the devise be to them, if married with consent; yet it is but a condition subsequent, and not precedent, and the portions are vested portions. (1)

*Thirdly*, That in case of marriage without consent, although but a condition subsequent, the court cannot relieve against the forfeiture, by reason of the devise over; although it be a hard condition, no time being limited, but goes to a marriage at any time, even after the age of *twenty-one*.

Decreed the portions to be paid; but on security to refund, in case the condition should be broken. (2)

The cases of *Bellasis* and *Earl*, 1 *Chan. Rep.* 22. *Stratton* Ant. Case 323. and *Grimes*. (3)

Eq. Ca. Ab. 41. pl. 11. 1 Ch. Rep. 164. Pre. Ch. 226. S. C. *A.* by will gives portions to his daughters, but mentions no time when to be paid, but adds a proviso, that his daughters should marry with consent of his wife; and if any married without such consent, the

Where portions are provided for daughters by a settlement, the father cannot by his will annex any condition to the pay-

[ 453 ]

(1) On the subject of conditions, vide *Popham v. Bampfield*, ante 1 vol. p. 83. [*Peyton v. Bury*, 2 P. Wms. 626. 6th edit. and cases in notes (1) and (v).]

(2) Vide observations on this decree, by *Hardwicke*, Lord Chancellor, *Rey-*

*nish v. Martin*, 3 Atk. 335.

(3) Et vide *Jervoise v. Duke*, ante 1 vol. p. 20. *Peyton v. Bury*, 2 P. Wms. 626. and the note to the principal case as reported in Pre. Ch. ub. sup.

CASE 416.  
December 17.  
Eq. Ca. Ab.  
172. pl. 7. S. C.  
Tenant in tail  
devises lands  
for maintenance of a  
school-master, and other  
charitable purposes. Decreed to be a good appointment within the statute of charitable uses, tho' no fine was levied or recovery suffered.

ATTORNEY-GENERAL *at the relation of* PETTIFER *versus*  
RYE and WARWICK & Al'.

**WILLIAM FOXLEY**, tenant in tail, by will devised the premises in question for the maintenance of a *schoolmaster* and other *charitable* uses. The question was, whether a devise by tenant in tail, who levied no fine, nor suffered any recovery, be a good appointment within the statute of *charitable uses* against the defendants, who claimed under the intail. The commissioners below had decreed it to the charity; and upon exceptions now taken to the decree, it was confirmed by the *Lord Keeper*, (4) who said, he was of opinion, that the intent of the act of the *Queen* for *charitable uses*, was to make the disposition of the party as free and easy as his mind; and not to oblige him to the observance of any form or ceremony either of *lease* or *release*, or *common recovery* or *fine*, &c. and cited the case of *Collison* in *Hobart*; where before the Statute of *Wills*, a will of land made 15 H. 8, devising the same for repair of highways, was adjudged to be good within the statute of the *Queen*, (5) though made long after, *Moor*, 888, the same case, but there called *Rolle's* case.

[ 454 ]  
Hob. 136.

*Griffith Flood's* case in *Hobart*, a devise to *Jesus College* being in *Mortmain*, and void at law; yet allowed good within the statute of the *Queen*.

*Damus's* case, *Moor*, 822, a feme covert administratrix devised to charity, and held good.

*Rivett's* case, *Moor*, 890. Devise of a copyhold without a surrender to the use of the will held good; and so in *Reppington* versus *Reppington*, and the town of *Chaid* and *Opie*.

*Higgins* ver. *Town of Southampton*, on the will of one *Mill*, June 26, 1671, a devise out of a manor held in *capite*, decreed good, being to a charity; although otherwise the will void as to a third part; *Wild* and *Windham*, who assisted in that case, saying, that the statute of the *Queen* was an enabling act, giving power in any manner to dispose to charitable uses.

In the case of Sir *John Platt* and *St. John's College*, in 27 Car. 2. a misnomer supplied. 1 Chanc. Rep. 267. (6)

(4) Without costs, unless the defendants (who were the heirs at law of *William Warwick*, the nephew of the testator) should put the plaintiff to any further trouble, and in such case they were to pay costs. Reg. Lib. 1703. A. fol. 635.

(5) 43 Eliz. cap. 4. 9 Geo. II. cap. 36.

(6) So *Attorney-General* v. *Burdet*, post 755. *Tay* v. *Slaughter*, Pre. Ch. 16. So money concealed by wife from the husband, and disposed of to charities, shall not be made good to the husband, so as to disappoint the charities. *Pilkington* v. *Cuthbertson* 1 Bro. P. C. 337. So where testator settled

lands with power of revocation by writing, to be executed in the presence of three witnesses; deed of revocation was ordered to be prepared, but testator died before it could be executed, having by will given the lands to charitable uses, held a good appointment though no revocation. *Piggot v. Penrice*, Gilb. Eq. Rep. 137, though not the point then in question. *Attorney-General v. Sawtell*, 2 Atk. 497. So though legacy lapsed at law it shall subsist in equity for a charity. *Attorney-General v. Hickman*, 1732, W. Kel. 4. So where bequest to executors to purchase lands that would be void by the statute of Mortmain, with an alternative "or otherwise," as they shall be advised, to provide for the charity; held the alternative might be taken for the charity, *Soresby v. Hollins*, 9 Mod. 221; and on the same principle *Grimmet v. Grimmet*, Amb. 210. But a will of freehold lands not executed according to the statute of frauds, not good as an appointment to

a charity, *Attorney-General v. Baines and Ux'*, Pre. Ch. 270. and note, in that case there was a codicil duly executed for passing real estates which recited the will, but nevertheless, so decreed. And no case has yet been decided, in which the Court has executed a charitable purpose unless the will contained a description of that which the law acknowledges to be a charitable purpose, or devoted the property to the purposes of charity in general, sic. dict. per *Eldon*, Lord Chancellor, *Morice v. The Bishop of Durham*, 10 Ves. 540. And the Court is cautious of extending the principle, *English v. Orde*, Tr. 1754, printed in Highmore on Mortmain, p. 82. And Court will sustain a bequest to a charity, where otherwise it would be void, as exceeding the limits allowed by the law, *White v. White*, 7 Ves. 423. And on the point of equity supplying defective conveyance for a charity, *Attorney-General v. Tancred*, Amb. 351. Et vide Duke on Charitable Uses, 110.

DE

[ 455 ]

## TERM. S. HILLARII, 1703.

## IN CURIA CANCELLARIÆ.

PYKE *versus* WILLIAMS, & é contra.CASE 417.  
Feb. 7.

THE defendant *Williams* having mortgaged the lands in question to one *Marsh* for 760*l.* died, leaving an infant; and it being for the advantage of the infant that the estate should be sold, an act of parliament was procured for that purpose; and the widow and trustees held a public survey for the sale of it; at which *Pyke* appeared, and offered 1250*l.* for it; but one *Goulson* bid 1350*l.* and signed the contract, but shortly after-  
*A.* is put into possession; but disputes arising about settling the conveyances, *A.* gets an assignment of a mortgage to which the estate is subject, and antedates it, and refuses to go on with the purchase: though the agreement was only parol; yet on the circumstances of this case, *A.* was decreed to proceed in the purchase.

A public survey is held for sale of an estate, and *A.* offering 1250*l.* for it, it is accepted and agreed to, and conveyances ordered to be got ready, and

**PYKE v.  
WILLIAMS.**

wards died ; and then the plaintiff *Pyke* offered again 1250*l.* which was accepted, and agreed unto ; conveyances directed to be made, and possession actually delivered in *June*, 1692 ; but disputes arising about settling the conveyances ; *Pyke* in *Sept.* 1692, got an assignment from *Marsh* of the mortgage, and gets it antedated as in *July*, 1692.

[ 456 ]

The plaintiff *Pyke's* bill was, that the defendant might redeem or be foreclosed ; the cross bill was to compel *Pyke* to go on with his purchase. *Pyke* by answer confessed he agreed to purchase for 1200*l.* that directions were given for drawing the conveyances, touching which disputes afterwards arose between them ; denied he entered pursuant to his contract for the purchase, but under the assignment of the mortgage ; and denied the mortgage was antedated ; in all which particulars his answer was fully disproved ; and the single question was, whether upon circumstances of this case, although the agreement was only *Parol*, it should be decreed, and *Pyke* held to his purchase.

And as instances where *parol* agreements, in part executed by delivering of possession, &c. had been decreed since the statute against *frauds and perjuries*, were cited the cases of *Foxcroft* and *Lister*, (1) where the plaintiff pursuant to a *parol* agreement for a building lease of *Wild* house, proceeded to pull down part, and build part, and before any lease executed, the owner of the soil died ; the defendants his representatives knew nothing of the matter, and insisted on the statute made for the *prevention of frauds and perjuries*, and the *Lord Keeper* dismissed the bill ; but upon an appeal to the *Lords* in *Parliament*, that dismissal was reversed, and a building lease decreed ; and the case of *Butcher* and *Butcher*. (2)

The *Lord Keeper* decreed *Pyke* to proceed in the purchase, in case he could have a good title ; and for that purpose referred it to a master. (3)

(1) *Foxcroft v. Lester*, fully stated, *Colles*, P. C. p. 108. and cited *Gilb. Eq. Ca.* 4. 11. *Lockey v. Lockey*, Pre. Ch. 519. Et vide *Journ. Ho. Lords*, 16 vol. p 644.

(2) *Butcher v. Stapely*, ante 1 vol. 363. S. C.

(3) The cross bill charged that *Pyke* while in possession received the profits, and took the wheat growing upon eight acres of land, part of the premises in question before the assignment of the mortgage by *Marsh*, and that *Pyke*

had declared he was the purchaser at 1250*l.* and had done many acts as owner, and particularly, that he had contracted in writing with one *Skinner* for a lease for three lives for 600*l.* and had received part of such consideration-money, and had put *Skinner* in possession, but afterwards made void the bargain, and got again into possession of the premises, which was not denied by the answer, but said that he did so by virtue of his title as assignee of *Marsh*, and not under the agreement with the

plaintiff, in the cross bill; and the decree was as above, with this, that he was to pay the residue of the 1250*l.* (after a discount of the sum of 897*l.* 17*s.* 6*d.* paid by him to *Marsh*) together with interest for such residue from the time the same ought to have been paid, otherwise, and upon the defendant not paying *Pyke* what shall appear due, on an account therein directed to be taken before the Master, on the said mortgage so assigned by *Marsh* to him as aforesaid, the defendant to be foreclosed, Reg. Lib. 1703. B. fol. 288. Vide on the doctrine of parol agreement and part performance, and specific performance, *Hollis v. Edwards*, ante 1 vol. 160. and cases cited in not. there; and in addition as to agreement being binding if signed by vendor only, *Coleman v. Duck*, 5 Vin. Ab. 527. *Fowle v. Freeman*, 9 Ves. 351. where held good though signed by vendor only. The vendor had in that case subjoined a letter to his Solicitor desiring him to prepare a proper agreement for the vendor and vendee to sign, but that made no difference. [See the judgment in *Laurenson v. Butler*, 1 Sch. & Lef. 20. and as to the want of mutuality, *Bromley v. Jeffries*, ante 415.] So specific performance decreed of an agreement, the terms of which are contained in a letter, though the identical agreement be not signed, *sic dict. per Eldon, Lord Chancellor, Coles v. Trecothick*, 9 Ves. 250. So *Fowle v.*

*Freeman*, ub. sup. So per *Lord Chancellor*, said to be now clearly settled that an agreement in writing may be dissolved by *parol*, and also that an agent need not be authorised in writing, *Coles v. Trecothick*, ub. sup.; but it should seem the agreement made by an agent must be in writing, *Mortlock v. Buller*, 10 Ves. 311. As to the general principles that are to be adduced from the cases they seem to be few, and from the nature of the subject, nice and difficult in their application; it appears however, 1st. That this Court is not bound specifically to execute every contract, but that it is matter of judicial discretion; and 2dly. That where there are any circumstances of surprize, or that make it not fair and honest to call for an execution, the Court may neither decree a specific performance, nor order the contract to be delivered up, but leave the party to his remedy at law, *Twining v. Morrice*, 2 Bro. Ch. Rep. 326. *Wase v. Emery*, 5 Ves. 846. affirmed on appeal, 8 Ves. 505. *White v. Damon*, 7 Ves. 30. *Mortlock v. Buller*, 10 Ves. 292, 305. [As to specific performance of parol agreements on the ground of part performance, see *Aveling v. Knipe*, 19 Ves. 446. *Blore v. Sutton*, 3 Mer. 237. *Morphett v. Jones*, 1 Swan. 172. *Savage v. Carroll*, 1 Ba. & Be. 282. *Toole v. Medlicott*, ibid. 393. *Kine v. Balfe*, 2 Ba. & Be. 343.]

### LAURENCE *versus* BLATCHFORD & Al'.

[ 457 ]

CASE 418.

Feb. 26.

A daughter's portion secured by a trust-term not extinguished by a devise of the lands to the daughter in tail.

*EUSTACE MAN* upon his marriage, settled to the use of himself for life, to his wife for life, to his first and other sons in tail male; in default of such issue to trustees for 500 years in trust, if but one daughter, to raise 2000*l.* for the portion of such daughter, payable at *twenty-one* or marriage. He left issue only one daughter, and by will devised all his lands to trustees for the term of *sixty* years, to pay debts and legacies, remainder to his daughter in tail; in default of issue to the defendants, the *Blatchfords*, his sister's children, and devised some fee farm rents to his daughter and her heirs.

The plaintiff, with the consent of the friends and relations, married the daughter, when *sixteen* years of age; and articles

LAURENCE  
v.  
BLATCHFORD. were entered into, whereby the plaintiff covenanted to pay the legacies charged upon the estate, amounting to 1500*l.* within six months after the marriage; and on the behalf of the wife it was covenanted by her friends, that she, when of age, should settle her estate on the plaintiff for life, &c.

The plaintiff gave a statute, and likewise a mortgage of his own estate to secure payment of the legacies, and by an indorsement on the mortgage the same was to be void, unless the wife's estate was settled on the plaintiff for life. (1) The wife died an infant, the plaintiff not having paid the 1500*l.* legacies, nor received the 2000*l.* portion.

[ 458 ] The bill was to have the 2000*l.* portion paid to him as administrator to his wife; and to have up the statute and mortgage, and articles, without paying the 1500*l.* legacies, being he could not enjoy his wife's estate for life.

The questions were first, whether the portion was extinguished by the devise of an estate tail to the daughter, expectant on the trust term for sixty years for payment of debts and legacies; and it was insisted it could not be extinguished; because nothing descended or came to her in possession, only a reversion expectant on the sixty years term, and *that* also but of an estate-tail. Whereas in the case of *Kemish* and *Thomas*, the fee-simple in present possession descended on the daughter; yet *that* was no extinguishment of the portion, but held to be subsisting, and to go to her administrator.

Ant. Ca. 320.

*Secondly*, If not extinguished, whether what was given by the will should be deemed a satisfaction?

*Thirdly*, If the indorsement on mortgage only was sufficient to discharge the statute and articles also; and held it was sufficient for that purpose; all being executed at one and the same time; the same witnesses, and part of the same agreement, and all to be looked upon as but one conveyance. (2)

(1) The indorsement on the mortgage was, "That no advantage should be taken of the said security until the plaintiff should be well assured of an estate for life in the premises." And it was therein recited, that such expected estate for life was the only reason that induced the plaintiff to give such security, R. L. The answer stated, that the articles and statute were subsequent to the mortgage and indorsement.

(2) The decree declared, "that the said 2000*l.* portion secured by the

"said term of 500 years, is a debt  
"subsisting and ought to be raised  
"and paid to the plaintiff accordingly,  
"with interest for the same from the  
"time of the plaintiff's intermarriage  
"with the said *Elizabeth*, discounting  
"what he had received by rents and  
"sale of wood, since such intermarriage,  
"and that the said defendants  
"the legatees, ought to be paid their  
"said legacies, amounting to 1500*l.*  
"with interest for the same, from the  
"end of 6 months next after the said  
"marriage, out of the 2000*l.* and in-



“terest payable to the said plaintiff  
“*John Laurence* as aforesaid.” The  
decree then directs the account to be  
taken in the usual way, and that upon  
payment of the balance to the plaintiff  
*Laurence*, the term of 500 years should  
be assigned to the defendant *Robert*  
*Blatchford*, who was entitled thereto,  
and that the said marriage articles, and

mortgage deed be delivered up to the  
plaintiff, and that the said recognizance  
or statute should be vacated, and that  
the said *Robert Blatchford* should pay  
the plaintiff 50*l.* for his costs, the other  
costs to come out of the trust estate,  
Reg. Lib. 1703. B. fol. 293. Vide  
*Lady Poulet v. Lord Poulet*, ante 1 vol.  
p. 204. and cases in not. there.

ELIZABETH GERRARD, Spinster, *versus* Sir FRANCIS  
GERRARD.

CASE 419.  
LORD  
KEEPER.  
Feb. 29.

By settlement of *Jan.* 20, 1675, on the marriage of *Honoria*  
*Seymour*, sister to the Duke of *Somerset*, with Sir *Charles*  
*Gerrard*, (1) the lands in question were limited to Sir *Charles*  
for life, to dame *Honoria* for her jointure; \*remainder to the  
first and other sons in tail; but if Sir *Charles* should die  
without issue male, having one or more daughters, then to  
trustees for the term of 500 years, in trust (2) to raise 5000*l.*  
if one daughter, to be paid at *twenty-one* or marriage, which  
should first happen, next after the decease of Sir *Charles* and  
*Honoria*, or within *six* months after either of those days or  
times; so as such daughter do not marry before *eighteen*,  
without the consent of parent or grand-parent, (3) if then  
living. Sir *Charles* died without issue male, left only the  
plaintiff a daughter, who in 1698, attained *twenty-one*, the  
mother still living.

By marriage-  
settlement a  
term is limited  
to raise 5000*l.*  
if but one  
daughter, to  
be paid at 21  
or marriage,  
which should  
first happen  
after the death  
of the father  
and mother,  
or within six  
months after  
either of those  
days or times.  
There being  
one daughter  
only, and she  
having attain-  
ed 21, and her  
father being  
dead, her  
portion was

decreed to be raised in the life-time of her mother.

The question was, whether the portion should be raised in  
the life-time of the mother; for, if not, the daughter, as she  
was already *twenty-one*, if she is to expect after the decease  
of her mother, a portion may come too late to prefer her in  
marriage; and besides, according to the strict letter of the  
deed, if she should marry in the life-time of her mother, she is  
not to have any portion even after the decease of her mother,  
the portion being made payable at *twenty-one* or marriage,  
which should first happen after the decease of Sir *Charles* and  
*Honoria*; and therefore it was insisted that the words, or  
*within six months after either of the days or times aforesaid*,

[ \*459 ]

(1) In consideration of 4000*l.* por-  
tion which was paid, R. L.

(2) By the rents and profits, or by  
mortgage of the said estate, R. L.

(3) One of her parents or grand-  
parents, if any of them be living, pro-

vided if Sir *Charles*, or any other per-  
son entitled to the inheritance, paid or  
secured the portion to such daughter at  
the time aforesaid, the term should be  
surrendered.

GERRARD v.  
GERRARD.

were intended to provide for the case, which hath happened; viz. that if the daughter attained *twenty-one* or married in the life-time of the mother, there should be *six* months time afterwards allowed for raising of it; if she married, or attained *twenty-one* after her mother's decease, then to be raised immediately, or in any of the cases within *six* months after *twenty-one* or marriage; and the portion was decreed to be raised accordingly. (4)

(4) The decree gave the remainder-man in the settlement who was in possession of the estate in question, 12 months to pay the 5000*l.* and interest, at 5*l.* per cent. from the filing the bill, and that thereupon he should hold discharged of the term, otherwise the portion with interest as aforesaid to be

raised by mortgage or sale of the term, Reg. Lib. 1703. A. fol. 271. Note, it is stated in the pleadings that there was no maintenance appointed in the mean time, but no notice of this is taken in the decree. Vide *Staniforth v. Staniforth*, post 460.

[ 460 ]

STANIFORTH and CLERKSON *versus* STANIFORTH.

Case 420.

Feb. 29.

In Court.

MASTER of the  
ROLLS.

Eq. Ca. Ab.

337. pl. 4. S. C.

By marriage-  
settlement,

lands are

limited to

husband and

wife for their

lives, remain-

der to the

heirs male of

their bodies;

and if there

should be no

issue male of their bodies, and one or more daughters, then to trustees for five hundred years from the decease of the survivor, in trust by sale or mortgage, to raise 1000*l.* for daughters' portions; but there is no time appointed for the payment of them. The father dies leaving a daughter only. The portion vesting in the daughter in the life-time of the mother, it was decreed to be raised by a sale, with reasonable maintenance in the mean time, though no maintenance is provided by the settlement.

March 13.

The cause being now further heard, upon view of precedents, viz. *Hilliar versus Jones*, and the case of *Shouldham versus*

Ant. Ca. 308. *Shouldham*, where future terms have been decreed to be sold to raise portions, although not to commence in possession, until after the death of the father or mother, and the case of

Ant. Ca. 419. *Gerrard and Gerrard*, lately decreed by the *Lord Keeper*.

The *Master of the Rolls* declared, first, that by the contingency of the father's death without issue male of that marriage, leaving a daughter, the term did arise, though not to take effect in point of profits, until after the death of the mother.

*Secondly*, That the portion doth vest in the daughter, in the life time of the mother. STANIFORTH  
v.  
STANIFORTH.

*Thirdly*, No time being appointed for the payment of the portion, nor any maintenance in the mean time, that she was intitled to a reasonable maintenance, not exceeding the interest of the portion, from the death of the father; or at leastwise from such time as the portion might have been raised by a sale. [ 461 ]

And decreed the portion to be raised by sale with a reasonable maintenance in the mean time. (1)

(1) Vide on this subject *Butler* and *Ux. v. Duncomb*, 1 P. Wms. 448. and particular note (2) p. 452 there; and in addition, *Codrington v. Lord Foley*, T. 1801. 6 Ves. 364. in which the cases and doctrine on this subject are stated and considered, and where, per *Eldon*, Lord Chancellor, "The raising or not raising must depend upon the particular penning of the trust, and the intention of the instrument."

### ROOKE *versus* ROOKE.

CASE 421.

March 1.

*J. S.* seised in fee devised *Blackacre* to *A.* for life, and devised to *B.* all his lands not before devised, to be sold, and the money to be divided between his younger children. Eq. Ca. Ab.  
210. pl. 17.  
Pre. Ch. 202.  
S. C.

*A.* seised in fee devises *Blackacre* to *B.* for life, and devised to *C.* all his lands not before devised, to be sold. By this devise of all his lands, &c. the reversion of *Blackacre* was well devised to *C.*

The question was, whether the reversion of *Blackacre* past by the devise of all his lands not before devised; and it having been referred to the *Judges* of the *Common Pleas*, they unanimously agreed and certified, that the reversion was well devised; and it was decreed accordingly. (2)

(2) That the reversion upon particular estates, will pass by such words as in the principal case, and by the words *Lands, Messuages, Tenements*, and *Hereditaments*, is considered as the established doctrine at law, and in this Court. Vide *Wheeler v. Watson*, *Aleyne*, 28. *Hawes v. Cony*, Cro. Eliz. 159. *Cook v. Gerrard*, 1 Lev. 212. *Hyley v. Hyley*, 3 Mod. 228. *Lydcott v. Willows*, *ibid.* 229. and cases there referred to, and note in *Lydcott v. Willows* the assets were sufficient without the reversion, although in *Hawes v. Cony*, *ub. sup.* *Wray, Just.* said, had it been found that the land in possession was sufficient, this might peradventure have altered the case: as to the cases of *Hyley v. Hyley*, and *Lydcott v. Willows*, vide *Chester v. Chester*, 3 P. Wms. 56, 61. So *Kingsman v. Kingsman*, post 559. *Ridout v. Pain*, 3 Atk. 486, 492. 1 Vez. 10. S. C. [And see the cases cited in notes (1) (x) and (y) to *Chester v. Chester*, 3 P. Wins. 61. 6th edition.] As to reversion passing by general terms of release of a debt, vide *Lord Braybroke v. Inskip*, 8 Ves. 417, 423.

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## TERM S. MICHAELIS, 1704.

IN CURIA CANCELLARIÆ.

CASE 422.

BRANDLING *versus* OWEN, and e contra.

November 8.

THE plaintiff having first made a lease to the defendant *Owen*, of a Colliery, and after mortgaged to him the manor of *Felling* and the Colliery, the bill was to redeem. The plaintiff insisted the defendant had broken the covenants in his lease, by not having left sufficient *baulks* and *pillars* to support the work : and *secondly*, being by his lease to pay 10s. for every tun of coals ; (1) he had made his waggons of a larger size than ordinary, to defraud him in that particular.

The Court left him to recover damages at law, as he could, on the collateral covenants for not working of the colliery ; and such damages were not to be brought into the account of redemption.

But as to the over size of the waggons, directed an issue at law. (2)

(1) Every tun of coals to contain twenty waggon loads, *Newcastle-upon-Tyne* usual coal measure. R. L.

(2) Reg. Lib. 1704. A. fol. 217.

[ 463 ]

CASE 423.

HALL & Ux. *versus* ATKINSON and DANIEL.

Eq. Ca. Ab.

168. pl. 5.

333. pl. 4.

Bill for a discovery whe-

ther in a mort-

gage made by

A. to B. which

had been

assigned to the

defendant,

there was not

some trust

declared for the benefit of the plaintiff. Defendant by answer denied there was any trust declared for the plaintiff. The answer being replied to, the question at the hearing was, Whether the defendant should be obliged to produce the deed. The Court would not compel him to do it. Q.

THE plaintiff by his bill charged that in the mortgage made by one *Withinbrooke* to *Atkinson*, there was a trust declared for the benefit of the plaintiff ; but the said *Atkinson* having since conveyed to *Daniel*, he refused to discover the trust. The defendant *Daniel* by answer said, that in the said mortgage there was no trust declared for the benefit of the plaintiff ; whereto the plaintiff replied ; and the question now at the

hearing was, whether the defendant *Daniel* should be obliged to produce the deed or not. (1)

HALL v.  
ATKINSON &  
DANIEL.

*Lord Keeper.* I will not oblige him to produce it; by this method all purchases may be blown up. *Q. tamen.* (2)

(1) [The Court will not compel a defendant to produce the deeds under which he makes out his title, but only such as might sustain the title of the plaintiff, *Shaftesbury v. Arrowsmith*, 4 Ves. 66. *Hylton v. Morgan*, *ibid.* 293. *Aston v. Exeter*, *ibid.* 288. *Atkyns v. Wright*, 14 Ves. 211. *Sampson v. Swettenham*, 5 Mad. 16.]

(2) The bill in this case was brought by *Hall* and his wife against *Atkinson* and *Daniel* and his wife and another, and prayed an account against *Atkinson*, as the manager, and having possessed himself of the property of one *Elizabeth Heene*, in her life time, and become executor of her will: it states the mortgage to *Atkinson* by *Withinbrook*, and the will of *Elizabeth Heene*, and that *Atkinson* having obtained the equity of redemption from *Withinbrook* let the premises on lease to one *Washford*, and obtained a large sum of money thereon by way of fine, but no charge of a conveyance to *Daniel* on any secret trust; nor does it pray the discovery of any trust. By the answer of *Atkinson* and *Daniel* and his wife, however, it appears that *Atkinson* mortgaged the premises, so leased to *Washford*, for 150*l.* and the defendant *Daniel* by his answer says, that no such trust is declared in *Atkinson's* lease (mortgage) as is insisted on by the plaintiff's bill; and then the Register's book states, that the plaintiff's counsel insisted that the defendant *Daniel* ought to produce the title, and that there was an order obtained for that purpose, but that the defendant's counsel afterwards opposing the same, they being purchasers without notice, the decree declared that the defendant *Daniel*, as this case is, ought not to produce the said deeds, and that the said order ought to be discharged, and decreed an account against *Atkinson*, Reg. Lib. 1704. A. fol. 102. But where two persons claim under the same settlement, the Court will order that it be brought into court that both parties may use it and take copies,

*Banbury v. Briscoe*, Hil. 1681. 2 Ch. Ca. 42. So where a peer is disinherited he may have the family deeds brought before the master, to see whether any thing can be discovered for his advantage on bill and answer, *Earl of Suffolk v. Howard*, 2 P. Wms. 177.— So for a person claiming by virtue of remainder in tail, on motion without notice before hearing, Sir *Edward Bettison v. Farrington & Al.* 3 P. Wms. 363. But merely for an heir to say, he wants writings, or where, admitting the will by his answer, he says only, he is the heir of the testator, that will not do, unless he claims under some deed of intail concealed by a widow or executor, *Tanner v. Wise*, Forr. 284. 3 P. Wms. 296. S. C. or as it should seem points out what deeds he wants, in whose custody they are, and specifying the nature or substance of the deeds he requires, *Potter v. Potter*, 3 Atk. 719. which was on motion. So *Buden v. Dore*, 2 Vez. 445. but it seems that such cases depend much upon the circumstances, *Potter v. Potter*, *ub. sup.* and plaintiff, heir at law, need not state every link of his pedigree, *Ford v. Peering*, 1 Ves. jun. 72. nor need he first of all establish his title at law, per *Hardwicke*, Lord Chancellor, *Harrison v. Southcote*, 1 Atk. 539, where it is laid down as a general principle that every heir at law has a right to inquire by what means, and under what deed he is disinherited, and for the distinction in such cases between heir at law and heir in tail, vide *Lady Shaftesbury v. Arrowsmith*, 4 Ves. 66. But the Court, where the bill sought relief as well as discovery, would not upon motion aid the plaintiff in proceeding at law, and took a distinction between a mere bill of discovery in aid of ejectment, and a bill for relief as well as discovery, as improperly proceeding at once both in equity and at law for the same thing, *Aston v. Lord Exeter*, 6 Ves. 288. Nor will it order a plaintiff to produce a deed, though stated in his bill, at the instance of a

defendant; before hearing he must file a cross bill, per *Thurlow*, Chancellor, *Anon. Dick.* 773. As to costs in such cases, it should seem that if the heir had fair probable cause either as plaintiff or defendant he shall have his costs, and that too in the case of heir to the honour of the family only, *Shales v. Sir John Barrington*, 1 P. Wms. 481. and cases cited in not. there, et vide particularly *Berney v. Eyre*, 3 Atk. 387, for rules laid down on this head by Lord *Hardwicke*, Chanc. *Leman v. Alie*, Amb. 163. As to the right of remain-

der men, it appears to have been formerly held that every remainder man had a right to the aid of equity to compel persons to bring into court the deeds and evidences relating to the estate, *Reeves v. Reeves*, 9 Mod. 128, 132. but now not extended beyond an estate expectant on a mere tenancy for life, *Ivie v. Ivie*, 1 Atk. 431.—The cases referred to in not. there as corroborative of this restrictive doctrine seem to justify it by inference, but do not appear to decide upon it.

## CASE 424.

Nov. 17.

Eq. Ca. Ab. 224. pl. 4.

Upon an appeal from the *Rolls*, it was objected to the evidence of a witness examined in the cause, and read at the former hear-

ing, that he had since, by answer to a bill exhibited against him, confessed that on the day he was examined, the plaintiff gave him a bond, that if he recovered the land in question, he would convey part of it to the witness. By the opinion of the Lord Keeper, assisted by two Judges, this answer was ordered to be read.

[ 464 ]

The question now was, whether that answer should be now read to take off his evidence; and the *Lord Keeper*, assisted with the Lord Chief Justice *Holt*, and Justice *Powel*, were all of opinion, that the answer ought to be read.

Upon an appeal from the *Rolls* the cause is intirely open.

After publica-

tion you may examine to the competency, as well as the credibility of a witness.

Justice *Powel*. The cause upon an appeal from the *Rolls* is intirely open; and if the answer had been in then, it might have been read there, and you may now read it here upon the appeal: (1) and as to the objection that was made, that after

(1) So upon party giving up his deposit, he having neglected to read his evidence at the *Rolls*, *Hedges v. Cardonnel*, 2 Atk. 408. and in *Rawlins v. Powel*, 1 P. Wms. 300, per *Cowper*, Lord Chancellor, upon plaintiff's petition to rehear, the cause is open as to the whole with respect to the defendant, while with respect to the plaintiff it was only open as to those parts of it complained of by the petition; but as to such parts it is presumed the plaintiff is let into new evidence; for in *Wright v. Pilling*, Pre. Ch. 496. *Par-ker*, Lord Chancellor, says, the appeal

is only to give the Chancellor an opportunity of hearing why he should not inroll it as it was to be inrolled as his decree, and therefore the cause was intirely open, and the party at liberty to offer what he could against his signing and inrolling the decree, et vide *Gilbert*, Eq. Rep. 151. S. C. In *Thompson v. Waller*, Pre. Ch. 295, it is, however, said, per *Harcourt*, Lord Keeper, that upon an appeal either from the *Rolls* to him, or from him to the *House of Lords* no new matter not in issue in the cause below should be suffered or insisted on; but it seems to be clear

## NEEDHAM versus SMITH.

UPON an appeal from the *Rolls*, it was objected to the evidence of one *Norris*, a witness examined in the cause, and read at the hearing at the *Rolls*, that since that hearing, in answer to a bill exhibited against him, he had confessed, that on the day on which he was examined as a witness, he took a bond of the plaintiff, that if the plaintiff recovered the estate in question, he would convey part of it to the said *Norris*.



publication you may examine as to the credibility, but not as to the competency of a witness, it was a difference without colour of reason; if you may examine to the credibility, which goes to part, you may certainly examine to the competency, which goes to the whole, and totally destroys his evidence. And as to the objection, that by taking the advantage of an answer to take off the evidence of a witness, the adverse party looseth the opportunity of cross-examining of him: it was answered, that it being proved, the witness was a party interested; no proof is to be admitted to shew him not to be interested.

NEEDHAM v.  
SMITH.

*Lord Chief Justice.* If after the hearing, a witness is convicted of perjury, you may take advantage of it upon a rehearing. If after hearing a witness is convicted of perjury, the party may take advantage of it upon a re-hearing.

*Lord Keeper.* Though a witness is examined an hour together at law, if in any part of his evidence it appears that he was a party interested, the Court will direct the jury, that he is no witness, nor any regard to be had to his evidence.

The answer thereupon was read. (2)

that an appeal from the *Rolls* to the *Lord Chancellor*, is only in the nature of a rehearing, and not of appeal from an inferior jurisdiction, [*Dashwood v. Bulkeley*, 10 Ves. 236. *Buckmaster v. Harrop*, 13 Ves. 456. *White v. Fussel*,

1 V. & B. 153. *Walker v. Symonds*, 1 Mer. 37 n.]

(2) A cause of the above name is entered 18th November; but no mention of the above point appears. Reg. Lib. 1704. B. fol. 129.

### LASSELLS & Al'. versus DOMINUM CORNWALLIS & Al'.

[ 465 ]

CASE 425.  
Eq. Ca. Ab.  
242. pl. 7.  
Pre. Ch. 232.  
S. C.  
A. by marriage-settlement having a power to charge the estate with any sum not exceeding 3000l. for such purposes as he thought fit, by deed appoints the 3000l. as a collateral security for quiet enjoyment of an estate he had sold; and if no incumbrance did appear the appointment was to be void; and by will devises the 3000l. to his daughter. Upon a bill by the creditors of A. the 3000l. was decreed to be applied to the payment of his debts.

THE late Lord *Cornwallis*, on his marriage with the daughter of Sir *Stephen Fox*, reserved to himself in the marriage settlement, a power to charge the estate with 6000l. 3000l. part thereof for younger children's portions, and any sum not exceeding 3000l. for such purposes, as he should think fit. (3) The Lord *Cornwallis* by deed appointed 3000l. for his daughter of that marriage; and having sold some lands to Sir *Stephen Fox* as he thought fit, by deed appoints the 3000l. as a collateral security for quiet enjoyment of an estate he had sold; and if no incumbrance did appear the appointment was to be void; and by will devises the 3000l. to his daughter. Upon a bill by the creditors of A. the 3000l. was decreed to be applied to the payment of his debts.

(3) By the indenture of settlement Lord *Cornwallis* conveyed the manor of *Wilton*, in *Yorkshire*, to trustees therein named for a term of 500 years, "in trust to raise 6000l.; 3000l. whereof he had by the same inden-

ture power given him by deed or will to give to his younger children for their portions, and the other 3000l. he had power by the like ways to give to such persons, and for such uses as he should think fit." R. L.

LASSELLS v.  
CORNWALLIS.

*phen Fox*, appointed the other 3000*l.* to him as a collateral security for the enjoyment of his purchase; and if no incumbrance did arise, the appointment as to him was to be void; and by his will he devised the last 3000*l.* to his daughter. (4)

The plaintiffs as creditors to the Lord *Cornwallis*, brought their bill to have the last 3000*l.* raised, and applied for payment of debts.

*Lord Keeper.* The Court has not gone so far, as where a man has a power to raise money, if he neglect to execute that power, to do it for him; although he thought that might be reasonable enough, and agreeable to equity in favour of creditors; (5) and the case of the Lady *Beaufoy* came something near that; there was a power to charge portions for younger children not executed; but Dr. *Walker*, the trustee, had covenanted that he would execute his power; but in the principal case, the power was executed by appointing the 3000*l.* as a collateral security to Sir *Stephen Fox*; and no incumbrance arising upon his purchase, resulted back to the Lord *Cornwallis*; and he accordingly took upon him to devise it to his daughter; which brings it within the reason of the case of

[ 466 ]

(4) 9th October, 1697. Lord *Cornwallis* made his will, and therein recited that he had by deed limited and appointed the last 3000*l.* to the defendants *Baber* and *Fenn*, in trust for the defendant, Sir *Stephen Fox*, as a collateral security for the quiet enjoyment of some lands sold by him to the said Sir *Stephen*, and then he thereby devised and gave the said 3000*l.* collateral security, and also the said other 3000*l.* for younger children's portions to the defendant *Isabel*, his daughter, and appointed the same to be paid to certain persons, defendants in trust for her. R. L.

(5) It is said to be clear that equity will never aid the non-execution of a power, although under circumstances it has helped a defective execution. *Arundell v. Phillpot*, ante 69. *Piggot v. Penrice*, Com. Ch. Rep. 250. *Coventry v. Coventry*, 2 P. Wms. 227.—*Tollet v. Tollet*, ibid. 490. *Mac Adam v. Logan*, 3 Bro. Ch. Rep. 310. *Holmes v. Coghill*, 7 Ves. 499. 12 Ves. 206. *Brown v. Higgs*, 8 Ves. 561. [*Harrington v. Harte*, 1 Cox 131. *Reid v. Shergold*, 10 Ves. 370.] But where the party to whom the power is given is intrust-

ed and required to execute it, there the Court, considering it in some degree in the nature of a trust, will supply a non-execution. *Harding v. Glyn*, 1 Atk. 469, cited per *Eldon*, Lord Chancellor, in *Brown v. Higgs*, 8 Ves. 571. [18 Ves. 192. *Crossling v. Crossling*, 2 Cox 396. *Cruwys v. Colman*, 9 Ves. 319. *Gower v. Eyre*, Coop. 156.] But the particular jurisdiction of equity to supply defects in the execution of a power has nothing to do with the question, whether it is well or ill executed, which cannot receive different determinations in different courts, *Butcher v. Butcher*, 9 Ves. 394. But it seems the Court will supply non-execution, where it appears the intention was to execute, as where covenant to execute, *Alford v. Alford*, Gilb. Eq. Rep. 167, and will receive evidence of such intention, *Coventry v. Coventry*, 2 P. Wms. 227. As to the differences between naked powers and powers coupled with an interest, vide *Hearle v. Greenbank*, 1 Vez. 306. and that the former are construed strictly, the latter liberally, vide *Duke of Marlborough v. Lord Godolphin*, 2 Vez. 79.

*Thompson and Town*, where the vendor left 500*l.* part of the consideration-money in the purchaser's hands, and took a bond in the name of *J. S.* that he should pay it as he should direct by will, and devised it to *J. S.* and made him executor; this 500*l.* was decreed to be assets, and the decree was confirmed upon an appeal to the *Lords* in Parliament.

**LASSELLS v. CORNWALLIS.** Ant. Ca. 306. *A.* sells an estate to *B.* and leaves 500*l.* part of the purchase-money in his hands, and

takes a bond in the name of *C.* to pay the 500*l.* as *A.* by will should direct.—*A.* devises the 500*l.* to *C.* and makes him executor. This 500*l.* was decreed to be assets.

Decreed the *three thousand pounds* to be raised and applied to the payment of debts. (1)

(1) 20th November. The decree declared "That the said 3000*l.* so made "a collateral security to the said Sir "Stephen Fox, as aforesaid, are assets "of the said late Lord Cornwallis, "and (subject to the said collateral "security) ought to be applied to the "payment of his debts and doth order "and decree the same accordingly, "and that the said defendants, the "trustees in the said indenture of settlement do raise the same by mortgage or sale of the said trust estate, "together with interest for the same, "to be computed from the end of the "first year after the death of the said

"late Lord Cornwallis." Reg. Lib. 1704. B. fol. 256. Lord Cornwallis died in October or November, 1697. Note, It appears by the answer of Lord Cornwallis, that the defendant, the daughter, had obtained a decree, 27th January, 1701, against the trustees in the settlement for raising and paying the said 3000*l.* collateral security to the defendants *Baber* and *Fenn*, subject to indemnify the said Sir Stephen Fox as aforesaid, and afterwards for the benefit of the defendant *Isabella*. Vide *Bainton & others v. Ward*, 2 Atk. 172. and cases cited in not. there [*Buckland v. Barton*, 1 H. Black. 136.]

### LAMLEE versus HANMAN & Ux.

THE mother, a widow, on the marriage of her son, agreed in consideration of a marriage-portion, to make a settlement of several lands, in which she had a jointure, which by agreement she was to release to her son. The son being possessed of a leasehold estate agrees to assign the lease to his mother; but no notice was taken thereof in the marriage-agreement, and therefore set aside, as an underhand and fraudulent agreement; and the cases of *Kyte* and *Coventry*, Sir *Richard Butler* and Sir *Henry Chancey*, &c. were cited. (2)

**CASE 426.** Decemb. 1. A widow on the marriage of her son, agrees to release her jointure that he might make a settlement, and the son privately agrees to assign a leasehold estate to his mother. This agree-

ment of the son's was set aside as fraudulent. Post Case 450, 664. Vol 1. Case 233, 344, 464.

(2) The defendant, the widow of *Edward Lamlee*, sen. deceased, and mother of the plaintiff's late husband, was intitled, independently of her jointure, to 10*l.* per ann. for her life, charged by her late husband on certain lands, to commence after the decease of one *Richard Lamlee*, and which lands, together with all the other pre-

mises settled upon her, were devised, charged as aforesaid by her late husband, to *Edward Lamlee*, jun. his son, and heir, and the late husband of the plaintiff *Elizabeth Lamlee*, and by indenture of settlement, dated 17th January, 1690, being the marriage settlement of the plaintiff and her said late husband, it was agreed that the lands

so charged as aforesaid, should be discharged of the said 10*l.* per ann. and that in consideration thereof the said *Edward Lamlee*, jun. should pay to the defendant the sum of 15*l.* per ann. by half-yearly payments, for her life. By another indenture bearing date the 29th *January*, 1690, and made between the said *Edward Lamlee*, jun. the plaintiff's late husband of the one part, and the said defendant, his mother, of the other part (but which was in fact executed by *Lamlee*, jun. before the indenture of settlement was executed by the defendant) reciting the said annuity of 10*l.* given to the defendant, and that by joining in the said settlement it would be extinguished, it was agreed that, notwithstanding such settlement, the said 10*l.* per ann. should be paid by the said *Edward Lamlee*, jun. his executors, administrators, or assigns, unto the said defendant for her life, from the death of the said *Richard Lamlee*, and her said son, for safe payment thereof, did demise and grant certain premises for the term of years therein mentioned ; the last mentioned indenture declared that the 10*l.* per ann. appointed to be thereby paid was in satisfaction of the like sum given her by the will of her late husband, and

there was a covenant on the part of *Lamlee*, jun. to pay the same at the times, and in manner therein appointed : and the decree declared, " That " there was no proof when the said " indenture 29th *January*, 1690, was " executed, nor any proof that the " plaintiff or the trustees had notice of " the said deed, and therefore the " plaintiff ought to be relieved against " the action of covenant for the 10*l.* " per ann." and decreed a perpetual injunction in respect thereof, " and " also (by consent) that the said defendants do re-convey or surrender " unto *Edward Lamlee*, the son and " heir of *Edward Lamlee*, the plaintiff's late husband, their interest in " *Sharp's* tenement, (the premises " demised by the indenture, 29th " *January*, 1690) and other the lands " and tenements demised to the defendant *Elizabeth Hanman*, for securing the payment of the said 10*l.* per ann. by the said indenture, " 29th *January*, 1690, free from incumbrances, by them done, &c." Reg. Lib. 1704. B. fol. 397. entered *Lamb v. Hanman*, vide *Hunsden v. Cheyney*, ante p. 150, and cases cited in not. p. 151. there.

## CASE 427.

## EELES and Ux' versus ENGLAND and Ux'.

December 4.  
Eq. Ca. Ab.  
297. pl. 3. Pre.  
Ch. 200. S. C.  
*A.* by will gives 300*l.* to *B.* and declares her will and desire, that he give the 300*l.* to his daughter at his death, or sooner, if there be occasion for her advancement. *B.* dies eight days before *A.* and the daughter dies at sixteen unmarried. The 300*l.* decreed to the administrator of the daughter.

ON an appeal from the *Rolls*, the case was, that *Elizabeth Heydon*, by will April 20, 1689, devised in \* these words : Item ; I give unto my loving Kinsman Richard Hammerton the sum of three hundred pounds, one hundred pounds part whereof he doth owe me, which I do intend to give to my cousin Susan Hammerton, his youngest daughter ; but my will and desire is, that he will give the said three hundred pounds unto his daughter Susan at the time of his death, or sooner if there be occasion for her better advancement and preferment.—The testatrix at the making of her will was in *England*, and it so fell out, that *Richard Hammerton* died in *Ireland* eight days before the death of the testatrix.

[ \*467 ] The cause was heard at the *Rolls*, July 1, 1702, when it was decreed, that the one hundred pounds bond to the testatrix

should be assigned to the plaintiffs, and the *two hundred pounds* paid with interest from the exhibiting the bill. (1) EYLES v. ENGLAND.

*Note*; The plaintiff's wife was administratrix to *Susan* the daughter, who died unmarried, when but *sixteen* years of age.

Now upon the appeal it was admitted, that the words, *I desire*, or *I will*, amount unto an express devise; (2) and that if a devise be to one for life, directing him at his decease to give it to *J. S.* that amounts only to a devise of the use of it to the devisee for life, remainder over to *J. S.* The words, *I desire*, or *I will*, in a will amount to an express devise. If a devise is to *A.* for life, directing him at his death to give it to *B.* that amounts to a devise of the use of it only to *A.* for life, remainder to *B.*

But it was insisted on by the defendant's counsel, that a benefit was designed to *Richard Hammerton*, and that he was not a bare trustee; for he was to have the interest of the *three hundred pounds* for his life, at least until there was occasion for it, for the better preferment, or advancement of his daughter *Susan*; and he had but a contingent interest, viz. if there was occasion for it to advance or prefer her; but she dying unmarried, and but *sixteen* years of age, could not have called for it, nor would her executor or administrator have been intitled to it, if her father had survived her.

[ 468 ]

But it was answered, that if *Richard Hammerton* had survived the testatrix, he had at most been intitled to retain it during his life, and whenever he had died, had the daughter been but *two* years old, it must have gone to her; but if there was occasion, it might have been called for by her, even in his life-time: and according to the rules of law in *Brett and Rigden's* case, if a devise be of lands to *J. S.* and his heirs, and *J. S.* die before the testator, the heir cannot take; but the devise is void: but if a devise be to *A.* for life, remainder to *B.* although *A.* die in the life-time of the testator; yet the devise to *B.* is good, and he shall take it immediately. (3) Plowd. 345. a.

It was also insisted, that if a legacy is given to *A.* in trust for *B.* although *A.* died in the life-time of the testator, the devise shall stand good for the benefit of *B.*

The *Lord Keeper* seemed to doubt of that point; but confirmed the decree at the *Rolls*, and dismissed the appeal. (4)

(1) The defendants who were the executors of *Elizabeth Heydon* to have so much of the interest on the 100*l.* bond as accrued due before her death, *R. L.*

(2) Vide on this point, the cases cited, latter part of note (1) to *Birk-*

Vol. II.

*head v. Coward*, ante p. 116.

(3) Vide *Levet v. Needham*, ante p. 138.

(4) Reg. Lib. 1704. *A.* fol. 70. and see on this last point *Birkhead v. Coward*, and cases cited in former part of note (1) ante p. 116.



## CASE 428.

BISHOP *versus* SHARP.

Dec. 9.  
Eq. Ca. Ab.  
172. pl. 5. 283.  
pl. 8. S. C.

*A.* by will  
after some le-  
gacies gives  
the residue of  
his personal  
estate to his  
daughter, and  
gives his real  
estate to her  
and her heirs;  
and if she  
died under 21,  
gives his real  
estate to his  
brother. The  
daughter dies  
at 16, and by  
will gives all  
her personal  
estate to *B.*  
The estate being  
subject to a mortgage,  
the brother who is  
both heir to the  
testator and his  
daughter, brings  
his bill to have  
the mortgage paid  
off, out of the  
personal estate.  
Whether the  
personal estate  
in the hands of  
*B.* shall be  
applied to  
exonerate the  
real.

**THANKFULL** *Bishop* having issue only a daughter an infant, devised some particular legacies, and gave the residue of his personal estate to his daughter, and devised his real estate to her and her heirs; but if she died unmarried, and before the age of *twenty-one*, to the plaintiff, who was his brother, and now become heir at law both to the testator and his daughter; and made the defendant's late husband executor in trust for his daughter: The daughter attained the age of *sixteen* years, and then died without issue and unmarried, having made her will, and devised her personal estate to the defendant. The testator had mortgaged the real estate for *four hundred pounds*, and the plaintiff's bill was, that being not only *Hæres factus*, but also heir at law, both to the testator and his daughter, the testator's personal estate ought to be applied to pay off the mortgage, and exonerate the real estate. (1)

A female may  
make a will at  
12, a male at  
15, if proved  
to be a person  
of discretion.

But for the defendant it was insisted, that the first testator devised some particular legacies, and devised the rest and residue of his personal estate to his daughter; and she having, though an infant, made a good will, as to her personal estate, (for it was agreed a female may make a will at *twelve* years, male at *seventeen*; at *fifteen*, (2) if proved to be a person of discretion) and devised it to the defendant, that the plaintiff by reason of such devise was ousted of his equity, and was not intitled to have the personal estate of the testator applied to exonerate his real estate.

[ 470 ]

Whereto it was replied, that there was no particular devise of any thing in certain to the daughter, but only a general devise of his personal estate, which can pass no more than what shall be left after debts and legacies paid; and as the personal estate is liable to debts, it must so remain, notwithstanding such devise; and there is nothing in the devise, that imports either that the debt in question, which is a debt on the personal estate, by reason of the covenant in the mortgage-deed, or any other debt of the testator's should not be paid out of his per-

(1) As to devisee praying in aid of the personal estate to discharge the real, vide *Pockley v. Pockley*, ante 1 vol. 36, 7. *White v. White*, ante p. 43. and cases cited in not. there respectively.

(2) At 14. *Hyde v. Hyde*, Pre. Ch. 316. but this is a matter within the jurisdiction of the spiritual Court and the Courts of law will not interfere.



BISHOP v  
SHARP.

sonal estate ; and manifestly his other debts must be thereout paid ; there being no other fund for the payment thereof : nor is there any thing in the will, that the personal estate should be freed or exempt from the payment of any debts ; or that the debt in question should remain a charge on the real estate only.

In case of the countess of *Gainsborough*, the proof was, that having devised his lands in *Rutlandshire* for the payment of his debts, he declared the same should be raised and paid out of that estate, and that his wife should have his personal estate freed and exempt from the payment of debts and legacies : and in the case of Mr. *Moore* and the countess of *Meath* his wife, and the Earl of *Meath*, the residue of the personal estate, after debts and legacies paid, was devised to the countess ; yet there the personal estate was decreed to pay off a mortgage, and the decree was affirmed upon an appeal to the *Lords* in *Parliament*. *Ant. Ca. 240.*

And although the devise here be not in the same words, *the rest and residue after debts paid* ; yet *that* is implied in every residuary devise : where there is an universal legatee, such legatees can take only what is left after debts paid, and the will performed.

*Quære*, If the bill was dismissed, as to this point. (1)

In this case, the defendant as guardian to the infant, took an assignment of the mortgage ; and although the mortgagee had never entered ; yet the *Lord Keeper* was of an opinion, that as to the profits received out of the mortgaged lands, the defendant should be taken to be in possession as mortgagee, and not as guardian. Q. (2)

[ 471 ]

(1) The bill seeking an account of the personal estate of *Thankfull Bishop*, and particularly of the tythe and parsonage of *Hawkhurst* therein mentioned was dismissed, Reg. Lib. 1704. A. fol. 238. on the head of personal estate being applied in exoneration of the real vide *Pockley v. Pockley*, ante 1 vol. p. 36.

(2) The words of the decree on this point are, " That the said defendant do come to an account for the rents and profits of the said mortgaged premises received or which might have been received by her since the assignment of the said mortgage," Reg. Lib. ub. sup. The mortgagee had not entered.

### COMBES versus SPENCER.

*WILLIAM SPENCER* having married one of the daughters and co-heirs of Sir *John Baker*, he and his wife levied a fine, and joined in a deed leading the uses of that fine, and thereby gave power to *William Spencer* to charge his wife's inheritance with *five thousand pounds* ; the plaintiff claimed part

CASE 429.  
Decemb. 8.  
Eq. Ca. Ab.  
228. pl. 7. S.C.  
A copy of a deed to lead the uses of a fine, and enrolled for safe custody only, allowed to be had as evidence at a trial at law.

COMBES v.  
SPENCER.

of that *five thousand pounds* by the appointment of Mr. *Spencer*, and brought his bill to have the same raised out of the estate.

[ 472 ]

The plaintiff, to make out his title, produced a copy of the fine, and likewise a copy of the deed of uses, the same being inrolled : But it was objected, that the copy from the inrollment of the deed of uses ought not to be read as evidence, especially against the defendant the wife ; first, because it was a deed that did not take effect by inrollment, but was only inrolled for safe custody, and is not evidence ; nor is the inrollment itself without particular circumstances to support it, as proving the original deed was in the defendant's custody or power, or accidentally lost, &c. so as to intitle a plaintiff to read a copy, or counter-part of a deed : and of that opinion was the *Master of the Rolls*, who said, that in case of an inrollment for safe custody, the deed may be said to be recorded (1) but where a bargain and sale is inrolled pursuant to the statute, the inrollment is a record, so that a copy of it may be read in evidence. (2) And it was also objected, that though the husband and wife were both parties to the deed, it was acknowledged by the husband only. (3)

*Note ;* Afterwards upon a rehearing, an issue at law was directed, whether such deed of uses was executed ; and upon the trial, a copy of the deed was allowed to be read, and a verdict for the deed. (4)

(1) Vide on this head *Taylor v. Jones*, 1 Raym. 746, where the inrollment appears to have been refused at a trial by *Rokeby* ; but resolved in C. B. that such a copy is *prima facie* evidence but the party could not be estopped by it as by the record ; et vide *Woodward v. Aston*, 1 Vent. 296. arg. Et vide certain rules laid down on this subject, Mr. H——t's case, 11 Mod. 109.

(2) So *Smarthe v. Williams*, 1 Salk. 280.

(3) But this seems to be no objection, in regard if husband and wife levy a fine of the land whereof they are seized, in right of the wife, and the husband alone declare the use of the fine, the declaration of the use shall bind the wife if her dissent doth not appear, although her assent to the declaration of the uses cannot appear,

for when she joins with her husband in the fine, it shall be intended, if the contrary cannot appear, that she joined also with him in agreement in the declaration of the uses of the fine, *Beckwith's case*, 2 Rep. 56. b. 57.

(4) All that appears by the entry of the above date in the Register's Book is, that on a dispute at the hearing as to reading the copy of the deed to lead the uses of the fine, the plaintiff's counsel desired time to find the original deed, and thereupon the cause was ordered to be continued in the paper, Reg. Lib. 1704. A. fol. 535. No further entry, nor any entry of the rehearing appears, vide *Combs v. Dowell*, post 591, where deed declaring uses of fine being lost, copy of inrollment allowed to be read on trial of issue at law ; but probably that is S. C.

CALLOW *versus* MINCE, and Al'.

CASE 430.

A WITNESS was examined, whilst she was interested, before the hearing; and the cause being heard and decreed to an account; she was re-examined after the hearing before the *Master*, on the account, having first released her interest.

Eq. Ca. Ab.  
223. pl. 2.  
Pre. Ch. 234.  
S. C.

A witness was examined before the hearing, whilst she was interested, but after the hearing she released her interest, and was examined again before the master. Her depositions before the master allowed to be read.

It was objected, that she ought not to be read, for having been examined whilst interested, and her depositions published, she was thereby engaged, and almost under a necessity of standing to what she had before sworn, and could not be free to retract or contradict it; and if, because an interrogatory is leading, *that* is sufficient to suppress the deposition, this is a much worse practice; and the witness not only lead, but obliged to swear, as she had sworn before. The tendering to a witness a deposition ready drawn, or if brought by the witness in writing, and delivered so in to the examiner or commissioner, is a sufficient cause to suppress a deposition; by the like parity of reason, the deposition in this cause ought not to be received.

But the *Lord Keeper* over-ruled the objection, and ordered the witness to be read. (5)

(5) This probably occurred on the arguing of several exceptions taken by the defendant *Mince* to the master's report, which is entered in the Register's Book, 19th *December*; but no notice is taken of it in the entry, Reg. Lib. 1704. A. fol. 97. Vide *Needham v. Smith*, ante 463. So the depositions of a witness disinterested at the time of

making them, ordered to be read in the cause wherein he was afterwards plaintiff, *Goss v. Tracy*, 1 P. Wms. 287. *Haws v. Hand*, 2 Atk. 615. *Glynn v. Bank of England*, 2 Vez. 42. [*Swire v. Bell*, 5. T. R. 371. *Cunliffe v. Sef-ton*, 2 East 183. *Cope v. Parry*, 2 J. and W. 538.]

DE

## TERM. S. HILLARII, 1704.

IN CURIA CANCELLARIÆ.

CASE 431.

Eq. Ca. Ab.  
24. pl. 6.  
Pre. Ch. 235.  
S. C.

*A.* in 1683, makes a voluntary settlement of an estate, subject to some annuities, in trust for his grandson and his heirs, and afterwards in 1690, he makes another voluntary settlement of the same estate, to the use of his eldest son for life, and to his first, &c. sons in tail, with remainders over; and by will gives a considerable estate to his grandson. Although it was proved that *A.* always kept the settlement of 1683 in his custody, and never published it; and it was after his death found amongst waste papers; and the deed of 1690 was often mentioned by him; and he told the tenants, the plaintiff was to be their landlord after his death; yet the son could not be relieved against the first settlement.

[ \*474 ]

HENRY CLAVERING,

Plaintiff;

Sir JAMES CLAVERING &amp; Al'.

Defendants.

OLD Sir *James Clavering* having three sons, *John*, *James*, and the plaintiff *Henry*, in 1663, settled six hundred pounds per ann. on *John* his eldest son; and having increased his estate, settled about five hundred pounds per ann. on *James* his second son; and in 1684, settled the manor of *Lamedon* on trustees, in trust from and after his decease, to pay to the plaintiff his third son for life, (he having been extravagant, and in disgrace with his father) and likewise to pay his daughter *Katharine* one hundred pounds per ann. for her life; and to pay the surplus profits to Sir *James* his grandson, and after the death of the annuitants to convey the said manor to his said grandson Sir *James* and his heirs. After this old Sir *James* having greatly increased his estate in the year 1690, without regard to the settlement of 1684 conveyed the manor of *Lamedon* to the plaintiff for life, and to his first and other sons in tail, remainder to *James* and his first\* and other sons in tail; remainder to his grandson Sir *James*, and his first and other sons in tail; and about the same time made another provision for his daughter *Katharine*, by assigning to her a mortgage of eighteen hundred pounds; and in 1697, by will devised his personal estate to be invested in lands, and settled on Sir *James* for life, and his first and other sons in tail; which personal estate was of the value of fifteen thousand pounds, or thereabouts. (1) After the death of old Sir *James*, the plaintiff entered and took possession of *Lamedon*, and received the arrears of rent, which were devised to him by the said Sir *James*; and the deed of 1690 was often mentioned by him; and he told the tenants, the plaintiff was to be their landlord after his death; yet the son could not be relieved against the first settlement.

(1) And by his said will bequeathed to the plaintiff 20*l.* in gold, and also the arrears of rent due from the farmers

and tenants of the estate at *Lamedon*, at his the said testator's death. R. L.

the will of his father, who intended the arrears to go along with the estate; but Sir *James* having found the settlement of 1684, got the tenants to attorn to him.

The plaintiff's bill was to be relieved against the settlement of 1684, and to have the benefit of the conveyance of 1690. And for the plaintiff it was insisted, he was proper to be relieved in equity; because it appeared on the proofs, that old Sir *James* had never delivered out or published the settlement of 1684, but had it in his own power, and it was after his death found amongst his waste papers; and it is to be presumed, he apprehended he had a power either to change or alter it, as he thought fit; he having always had it in his own possession or power, or possibly might have forgotten it; the deed of 1690 being often mentioned by Sir *James*, as the settlement of *Lamedon*, and so indorsed with his own hand; and in his life-time he told the tenants, that the plaintiff was to be their landlord after his decease; and the defendant had no reason to complain, his grandfather having by lands, and the devise of his personal estate, left him an estate of *three thousand pounds per annum*, great part of which he was not obliged to leave him by settlement or otherwise, but out of his bounty to his grandson; so that if in the settlement of 1690, he had done him any wrong, he had given him an ample recompence, by leaving to him estates, that were indisputably in his power to have given to the plaintiff, instead of *Lamedon*, had he been informed or apprised that it was not in his power to have given *Lamedon* to the plaintiff; but that the voluntary dormant settlement of 1684 would take place; and it would be very hard upon the plaintiff, who had no other provision; whereas *James* the second son had at least *five hundred pounds per annum* settled on him by old Sir *James*.

[ 475 ]

*Lord Keeper* declared, he was sufficiently satisfied that the manor of *Lamedon* was intended as a provision for the plaintiff, and that it was but a reasonable provision; yet the case was too hard to be relieved in equity.

*First.* Admitting it to be the intention of old Sir *James*, that the plaintiff should have *Lamedon*; yet *that* was not a sufficient foundation to decree upon. If a will be prepared and every thing done, but it is not published; or if published, and but one witness to it: if a deed is signed and sealed, and by accident not delivered; in all these cases the intention is plain; yet not relievable in equity; so if a will is made by a *feme covert* of lands of inheritance to *J. S.* and the husband dies, and then the wife; although her intention is plain; and

**CLAVERING v.  
CLAVERING.**

although after the death of her husband, when she became *sui juris*, she might have devised the lands to *J. S.* or by a republication have made the former will good; yet *that* case is not relievable in equity.

[ 476 ]

A rule in law, that the first deed and the last will, shall take place.  
Post. Ca. 476.

*A.* being displeased with his son, makes an additional settlement for his wife's jointure, but keeps the deed in his own custody, and being reconciled to his son, cancels it. The wife after her husband's death, finds the cancelled settlement, and recovers by virtue thereof.

In the Lord *Lincoln's* case, (1) it was intended the estate should have gone along with the honour, and was so devised by *five* or *six* wills successively; but no relief could be had against a subsequent voluntary conveyance, though made for a particular purpose only, which never took effect. It is a common rule in the law, that the first deed and the last will are to take place. (2) And if a prior deed, without more, might be discharged by a subsequent deed, there would never be occasion to insert powers of revocation; and *that* had been an idle and unnecessary provision in deeds, and would not have been so long used and practised by learned men; and although the settlement in 1684, was always in the custody or power of Sir *James*, yet *that* did not give him a power to resume the estate; and although voluntary conveyances, if defective, shall not in many cases be supplied in equity; yet where there hath been a covenant to stand seised to the use of a relation, although it is a voluntary settlement; yet this Court in the ancient of times always executed such uses. In the Lady *Hudson's* case, where the father, having taken displeasure at his son, made an additional jointure on his wife, but kept it in his power; and being afterwards reconciled to his son, cancelled the additional jointure, and died; the wife after his decease found the cancelled deed, and recovered by virtue of it. (3)

And as to the equivalent, or recompence given to Sir *James* in lieu of *Lamedon*, the voluntary settlement of 1690 being void by reason of the prior settlement of 1684, cannot give the plaintiff an equivalent out of the personal estate.—A recompence equivalent to a void settlement is nothing at all.

(1) Show. P. C. p. 154.

(2) Co. Litt. 112. b.

(3) Et vide *Barlow & Ux. v. He-neage*, Pre. Ch. 211, where settlement and bond in favour of children, and objected that they were both voluntary, and always kept by the father (the settlor and obligor) in his own hands,

and on bill for an account and satisfaction of the profits of the settled estate, and the money secured by the bond and interest, per *Lord Keeper*. "These were the father's deeds and he could not derogate from them."—But decree there at last made upon agreement between the parties.



Dismissed the bill as to any relief against the deed of 1684, but decreed the payment of the annuity and arrears. (4) CLAVERING v.  
CLAVERING.

*Note.* Afterwards this decree was affirmed upon an appeal to the *Lords* in *Parliament*. (5)

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| <p>(4) 26th <i>January</i>. “ And as to the<br/>“ arrears of the rents of the said estate<br/>“ at <i>Lamedon</i>, due at the said testator’s<br/>“ death, the plaintiff is at liberty in the<br/>“ names of the defendants, the ex-<br/>“ cutors of old Sir <i>James Clavering</i>,<br/>“ to sue for and recover the same</p> | <p>“ arrears.” Reg. Lib. 1704. A. fol.<br/>186. No costs given.<br/>(5) Bro. P. C. 1 Vol. 122. Vide<br/><i>Villers v. Beaumont</i>, ante 1 vol. 100.<br/>and cases cited in not. there, <i>Clavell v.</i><br/><i>Littleton</i>, Pre. Ch. 305.</p> |
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### HAWES *versus* WARNER.

[ 477 ]

THE testator *Hawes*, by his will mentions, that he computed, that the surplus of his personal estate, his debts and funerals being thereout first paid, would amount unto 5800*l.* and so distributes the 5800*l.* in several pecuniary legacies to his grandchildren; and wills if his personal estate fell short, they should abate in proportion; if the said surplus amounted to more, such surplus to go to his said grandchildren in the same proportions, as he had devised the 5800*l.* and by the same will devises to *Nathaniel* and *Thomas Hawes*, two other of his grandchildren, several houses and warehouses then mortgaged for 1400*l.*

CASE 432.  
3 Ch. Rep.  
206. S. C.  
*A.* by will  
computing  
the surplus of  
his personal  
estate, after  
debts and  
legacies paid,  
would amount  
to 5,800*l.*  
gives the  
5,800*l.* to  
some of his  
grandchil-  
dren in several  
proportions;

and wills if the surplus fell short, they should abate in proportion; if it amounted to more it should be divided between them in the same proportions. Decreed that a mortgage on an estate devised to two other grandchildren should be paid out of the personal estate, although by this means the personal estate would fall short of the 5,800*l.*

The question was, whether this mortgage should be paid out of the personal estate; for if so, the surplus would not amount to 5800*l.* as the testator had computed it; and the case of Captain *Bright* was cited, that a devisee of land shall not have aid of the personal estate, to pay off a mortgage, in prejudice of a pecuniary legatee.

*Lord Keeper.* An express devise shall not be defeated by applying the personal estate to pay off a mortgage, even for the sake of an heir, much less of a devisee of the land, who is but *hæres factus*: (1) but here the devise is not of 5800*l.* certain, but of the surplus after his debts and funerals paid, which he computed at 5800*l.* and if he was mistaken in the computation, *that* would not oust the devisee of his equity; it being mentioned that he computed the surplus would be 5800*l.* after debts and funerals paid, implies he intended his debts, of which

An express  
devise shall  
not be defeat-  
ed by applying  
the personal  
estate to pay  
off a mortgage  
in favour of  
an heir at law.

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(1) Vide *White v. White*, ante 43.

**HAWES v.  
WARNER.**

Legacies are given by a will to four grandchildren, upon condition that as they came of age they should release all claims to the testator's estate. This condition must be taken distributively; and such only as refused to release shall forfeit their legacies.

the debt by mortgage is one, should be paid out of the personal estate: and decreed it accordingly. (2)

And whereas the testator was indebted to the estate of his eldest son *Thomas Hawes*, who left a widow and several children, to whom the testator by his will had severally and respectively given legacies, upon express condition that the widow of his son *Thomas* within *three* months after his decease, and her *four* children respectively, as they came of age, should release all claims and demands out of his estate, which they might claim in right of his son *Thomas*, or by the custom of the city of *London* or otherwise; the legacies so given to them to be void, and to go over to the children of his daughter *Warner*.

The *Lord Keeper* was of opinion, that the condition or proviso was to be taken *distributively*; that such only should forfeit their respective legacies, who did not release; and those who did release should not be prejudiced by those who should refuse; their refusal should only forfeit their own legacies. (3)

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(2) 7th February. Reg. Lib. 704. real, vide *Bishop v. Sharp*, ante 469, A. fol. 294. and cases cited in not. there, *Hayward*

(3) Reg. Lib. ub. sup. and on the v. *Angell*, ante 1 vol. 222. head of personal estate exonerating the

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### ATKINSON *versus* WEBB.

CASE 433.

Eq. Ca. Ab.  
203. pl. 3.  
Pre. Ch. 236.  
S. C.  
A. gives bond  
to B. her ser-  
vant to pay  
her 20*l.* per

ann. quarterly for her life, free from taxes, and by will without taking notice of the bond, gives B. 20*l.* per ann. for her life, payable half yearly, but not said free of taxes. Decreed the annuity, by the will, not to be a satisfaction of the bond, and that B. should have both the annuities. Post Case 448.

THE Lady *Pratt* had by bond secured 20*l.* per ann. to Mrs. *Atkinson*, who had been her woman, payable quarterly, free of taxes, during her life: by will, taking no notice of the bond, devised to her 20*l.* per ann. for her life, payable half yearly; but not said to be free from taxes.

[ 479 ] *Lord Keeper*. The annuity devised not so beneficial, as that secured by bond; that which is less, not to be presumed in satisfaction of that which is greater; and decreed the annuity additional, and not as given in lieu or satisfaction of the bond. (4)

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(4) And the arrears to be paid by a time then with costs. 3d February, day certain; and if not paid by that Reg. Lib. 1704. A. fol. 243. On the

head of satisfaction, vide *Tunbridge v. Teather*, ante 1 vol. p. 345, and cases cited in not. p. 346, there. Et vide *Chancey's case*, 1 P. Wms. 408. and

notes (1) and (2) p. 410. 6th edition. *Meredith v. Wynn*, Pre. Ch. 312. *Roome v. Roome*, 3 Atk. 181, 3.

### GUNDRY versus BAYNARD.

CASE 434.

AN estate is given to Mrs. *Baynard* and the heirs of her body; if she left no sons, and only two daughters, the eldest to pay the younger 300*l.* and to have the whole estate. (1) She leaving only two daughters, and the eldest neglecting to pay the 300*l.* the younger brought a bill for an account of profits, and for possession of half of the estate; and at the *Rolls* obtained a decree, that the defendant should pay the 300*l.* with interest from the mother's death, in six months, or in default thereof, to account for profits of a moiety; and the moiety to be set out by commissioners, and the plaintiff to hold and enjoy it accordingly.

Eq. Ca. Ab. 282. pl. 6. Lands are given by will to a woman and the heirs of her body; and it is declared, if she left no sons, and only two daughters, the eldest should pay the younger 300*l.* and have the estate. There being only two daughters,

and the 300*l.* not being paid, the younger brought her bill for an account of profits, and for possession of half the estate. The Court may decree the defendant, though an infant, to pay the 300*l.* in six months, with interest from the mother's death, or in default, to account for profits of a moiety, and the moiety to be set out by commissioners; but the defendant being an infant, must have a day to shew cause, when she comes of age.

Upon an appeal to the *Lord Keeper*, the decree to stand as to the account of profits and partition; but the defendant being an infant, the words *hold and enjoy*, which amounts unto a foreclosure, to be struck out, or defendant to have a day after she comes of age, to shew cause. (2)

(1) 5th Feb. The settlement was made by one *Rachel Moore*, in May, 1657, whereby the plaintiff, as heir of *Grace Radford*, was to be paid the sum of 300*l.* within six months after the remainder of the estate therein limited took effect, and in case the same was not paid by that time, then a moiety of the said estate was to remain to the said *Grace Radford* and the heirs of her body, and the decree as to the above point was as follows:—"And when the said estate is divided, the said plaintiff is to have the possession of a moiety thereof, and to hold and enjoy the same against the said defendant *Rachel Baynard* and her heirs, unless the said defendant shall, within six months after she

"comes of age, pay off the said plaintiff what shall be reported due to him, discounting the profits received during the time, and when the said plaintiff shall be paid off what is due to him, he is to re-deliver the possession of the said moiety of the estate to the said defendant *Rachel Baynard* or her heirs." Reg. Lib. 1704. A. fol. 237. Vide, as to estate given to infant upon condition, *Lord Falkland v. Bertie*, ante 333, 343. and cases cited in not. there.

(2) As to infant having a day where the land devised to trustees, and trustees apply to the Court for direction to sell, vide *Cook v. Parsons*, Pre. Ch. 185.

HOOPER *versus* EYLES and RIDEOUT.

CASE 435.  
Eq. Ca. Ab.  
262. pl. 5.  
A guardian  
borrows mo-  
ney of *A.* to  
pay off an in-  
cumbrance on  
the infant's  
estate, and  
promises to give *A.* a security for his money, but dies before it was done. Though *A.*'s mo-  
ney was applied to pay off the incumbrance; yet the Court would not decree him a satisfac-  
tion of his debt out of the infant's estate.

*RIDEOUT*, the infant, having an estate charged with 150*l.* and the money being called for, *Anne Rideout*, his aunt and guardian borrowed it of the plaintiff, and paid off the incumbrance, and promised to give the plaintiff a security for it; but before she had so done, died; the defendant *Eyles* her administrator.

The plaintiff by his bill sought, *first*, to have a satisfaction out of the infant's estate, his money having paid off the incumbrance that was upon it: but the *Lord Keeper* refused so to decree. Without some contract or agreement, you cannot charge the land or follow the money, though invested in land, or applied to pay off the incumbrance: and for that purpose cited the

*Ante* Case 404. case of *Kirk* and *Webb*, and *Cuthbert* and *Lee*. (1)

But the aunt having disbursed more than she had received out of the infant's estate; decreed *that* account to be taken, and what was due to the aunt, to be raised out of the infant's estate, and applied as assets to satisfy the plaintiff's debt. (2)

(1) Vide on this head, *Lloyd v. Spillet*, 2 Atk. 150. and cases cited in not. (2) there.

(2) 9th Feb. the Court considered the 150*l.* as a simple contract debt, and that the same ought to be paid out of the estate of *Anne Rideout*, so

far as the same would extend in a course of administration, and decreed the account of what was due to her from the infant's estate, with directions as above, Reg. Lib. 1704. *A.* fol. 233.

CASE 436.  
Eq. Ca. Ab.  
63. pl. 5. 316.  
pl. 9.  
Pre. Ch. 237.  
S. C.  
Bond given to  
the wife be-  
fore marriage  
to leave 1000*l.*  
though extin-  
guished at  
law by the  
marriage, yet  
good in equity,  
and shall bind  
the real assets;  
and decreed the  
wife after her  
husband's death  
to redeem a mort-  
gage, and to hold  
over; though copy-  
hold, as well as  
freehold included  
in the security.

ACTON, Widow, *versus* PEIRCE and SAXBY and Al'.

*JOHN ACTON*, on his marriage, agreed to leave his wife, the plaintiff, 1000*l.* if she survived him: the drawing of \* the marriage-agreement was left to one *Nowel*, the parson of the parish, who made a bond from *Acton* to the plaintiff his intended wife in 2000*l.* conditioned to leave her 1000*l.* if she survived him. The marriage being had, *John Acton* mortgaged his estate, and died.

The plaintiff's bill was to have the benefit of the bond,

[ \*481 ]

although released at law by the inter-marriage; (1) and that she, as a bond-creditor, might be admitted to redeem the mortgage, and hold over, until satisfied what she should pay for the redemption, and also the bond-debt.

HOOPER v.  
RIOPER.

It was objected, *first*, although it might subsist as an agreement in equity, and intitle the plaintiff to a satisfaction out of the personal estate; yet the bond being void, it could not be looked upon as a specialty, or bind the real assets.

Hob. 216.

*Lord Keeper.* The bond, if set up, must be wholly and intirely set up, and not in part only, to bind the personal assets, and not the real. (2)

*Secondly.* It was objected, if a good bond, yet it could only affect the freehold, and could not give her any right to redeem the copyhold estate: but it was answered, that although a bond will not bind a copyhold estate, yet the free and copyhold being both in one mortgage, the plaintiff is intitled to redeem the whole.

Decreed for the plaintiff, to redeem, and hold over. (3)

(1) It is so at law, *Cage v. Acton*, 1 Lord Raym. 516. and cases cited there. Comyn. 67. Carth. 511. S. C. Bac. Ab. 1 vol. 291. and references. [*Milbourn v. Ewart*, 5 T. R. 381.] But in equity, husband and wife may sue each other, and such a bond is written evidence of the agreement, *Cannel v. Buckle*, 2 P. Wms. 243.—So *Watkins v. Watkins*, 2 Atk. 96, 97. and the principal case cited for that doctrine, *Arg. Bishop v. Church*, 2 Vez. 101. Et vide *Hardwicke*, Lord Chancellor's judgment, S. C. ibid. p. 373, 4. and there are several other cases in which bonds void or defective at law, are aided in equity, vide *Crosby v. Middleton*, 3 Ch. Rep. 99. *Sims v. Urry*, 2 Ch. Ca. 225. *Holtham v. Ryland*, Nels. Ch. Ca. 205. *Anon. Mose.* 37. *Butler v. Pendergast*, 2 Bro. P. C. 170. *Simpson v. Vaughan*, 2 Atk. 31. *Emes v. Hancock*, ibid. 509. *Archer v. Pope*, 2 Vez. 523. *Rippon v. Dawding*, Amb. 565. *Burt v. Barlow*, 3 Bro. Ch. Rep. 451. where though bill to establish bond mistakenly drawn up, dismissed, yet it was for want of sufficient proof of the mistake. And joint bond considered in equity as joint and several, *Thomas v. Frazer*, 3 Ves. 399.—So joint bond held several in bankruptcy,

*dict. per Loughborough*, Lord Chancellor, *Burn v. Burn*, ibid. 575. and so decreed in that case against creditors, in the administration of assets, and for the ground of such a case, vide *Gray v. Chiswell*, 9 Ves. 125. et vide *Underhill v. Horwood*, 10 Ves. 225, 227. As to covenant or agreement between parties who afterwards become husband and wife being extinguished at law by the marriage, vide *Darcy v. Chute*, 1 Ch. Ca. 21. *Haymer v. Haymer*, 2 Vent. 343. *Pridgeon v. Pridgeon*, Mich. 1668. *Fursor v. Penton*, ante 1 vol. 408. and cases cited in not. there.

(2) But where the condition of a bond consists of different parts, some lawful and others not, it is good for the lawful parts, and void for the rest, *Yate v. Rex*, Bunb. 58. 2 Bro. P. C. 381. S. C.

(3) According to the report of the principal case in Pre. Ch. an issue was directed to try whether the bond was executed. And note, this case seems to be the same with that in Salk. 325. where *Holt*, C. J. is said to have differed in opinion from *Gould* and *Turton*, Just. the former holding that the bond was absolutely extinguished on the marriage, the other that it was but

suspended, and revived on the death of the husband; but the *Chief Justice* allowed, that, had it been a covenant or a promise made to the wife (*dum sola*) these, in regard they would have been executory and have raised no present duty, would have been good, they would have depended on a future contingency, which could not happen during the coverture.

[ 482 ]

CASE 437.

Feb. 22.

*A.* on the marriage of his son, covenants for himself, his executors, without naming his heirs, to settle lands of 150*l.* a year on the son, and the issue of

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ROUNDELL & Ux'. *versus* BREARY.

*HENRY BREARY*, on the marriage of his son to the daughter of Dr. *Hitch*, covenants for himself, his executors and administrators, in one month after the marriage, to settle lands of the value of 150*l.* *per ann.* but no lands in particular are mentioned in the articles, to the use of the husband, and *first* and other sons, and for raising portions for daughters. The marriage took effect.

but dies before any settlement made. The son enters on the real estate, as heir to his father, and settles it for the jointure of a second wife, who has no notice of the articles. Decreed the articles to be a lien on the lands, whereof the father was then seised, though no particular lands are mentioned in the articles.

*Henry Breary* died, having never made any settlement; his son thereupon entered upon the lands, whereof his father died seised, as heir, and as descended to him, and married the defendant a second wife, and settled part of the lands upon her for a jointure, and *first* son, &c. and devised the residue to his son by the second wife, charged with portions for younger children.

The plaintiff's bill was to have 150*l.* *per ann.* of the lands whereof *Henry Breary* died seised, settled to the uses in the marriage articles.

For the defendant, it was insisted, *first*, that no lands in particular being mentioned in the articles, but to settle lands of the annual value of 150*l.* *Henry* after such covenant might sell or devise at his pleasure the lands, whereof he was then seised, notwithstanding the articles; there being no lien upon those lands; but only a covenant to settle lands of that value.

[ 483 ]

*Secondly*, That no lands in particular are bound, or mentioned in the articles; and *Henry Breary* having not performed his covenant, the plaintiff's remedy must be a satisfaction out of his assets; and that only his personal assets were liable, and not his real assets, or what descended from him to his son; because the covenant was only for him, his executors and administrators, and not for him and his heirs. (1)

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(1) As to the heir being bound either by deed or bond which at law he is not, unless expressly named, vide *Crosseing v. Honor*, ante 1 vol. p. 180, and cases



*Thirdly*, The defendant, the widow, a purchaser without notice, and could not be affected by the articles. ROUNDELL v. BREARY.

The *Lord Keeper* was of opinion, that although no lands were mentioned in the articles; yet the covenant should be a *lien* upon the land, whereof *Henry Breary* was then seised, (2) unless he had purchased and settled other lands within the time limited by the articles, and which were not settled on the *second* wife, who came in as a purchaser without notice. (3)

cited in not. (1) there; contra, where consideration good in equity to raise a trust, *Osgood v. Strode*, 2 P. Wms. 250, 254.

(2) But not a specific lien as against charge for payment of debts, *Freemoult v. Dedire*, 1 P. Wms. 429. [*Williams v. Lucas*, 2 Cox, 160.]

(3) So where covenant or bond to settle land of such a value, and covenantor or obligor has no land at the time, but afterwards purchases land,

that land shall be liable, and that against a voluntary devisee, *Tooke v. Hastings, & Al'* ante p. 97. and cases cited in not. there, particularly *Deacon v. Smith*, 3 Atk. 323. As to the effect of marriage articles not containing a particular covenant, nor mention of any particular lands to be settled giving a preference, or not to bond creditors, *Whitchurch & Al' v. D'nam Bayntun*, ante p. 272.

### TRELAWNY versus WILLIAMS.

THE defendant having a *tin-set* in the plaintiff's land, the plaintiff was to have an *eighth* part set out upon the grass, viz. the whole to be divided into *eight* heaps; a barrow-full to each heap, and so round again, and then to cast lots. The bill complained that the defendant had not divided into *eight* heaps, as he ought to have done; but laid the adventurers *seven* shares or parts on *one* heap, and the plaintiff's on another; and that the barrows which went to this heap were not so full, as those carried to the other heap; and the plaintiff prayed an account.

CASE 438.  
Stannary  
Court a Court  
of law, but not  
of equity.

The defendant insisted that the plaintiff gave leave, and consented to divide into *two* heaps only; and that if he had wrong done him, he ought to have sued in the *stannary* Court.

[ 484 ]

The *Lord Keeper* decreed an account, the defendant not proving that the plaintiff agreed to divide into *two* parts only: and as to the objection that the plaintiff ought to have sued in the *Stannary* Court, it was answered, that the *Stannary* Court was a Court of law, and not like the Counties *Palatine*, and Principality of *Wales*, who have Courts of equity, as well as law; and yet even there to oust this Court, the defendant

If the party insists the Court of Chancery has not jurisdiction of the matter in question, he must plead to the jurisdiction of the Court, and not object it at the hearing.

**TRELAWNY v. WILLIAMS.** must plead to the jurisdiction; (1) all the Queen's *Denizens* have a right to resort to her Courts of equity.

The agreement for the *tin-set* in this case was in writing, and no time was mentioned therein; but it was agreed on both sides, that the same by custom of the *Stannaries* is good for *tin*, as long as the adventurers will work it.

But the plaintiff insisted, that as to *Mundick* or to any other metals, as *copper*, &c. if found in the same mine, it was but in the nature of a lease at will.

(1) On the head of pleading to the jurisdiction of inferior Courts, vide *Strode v. Little*, ante 1 vol. p. 59. and cases cited in not. there.

CASE 439.  
Eq. Ca. Ab.  
307. pl. 9. S. C.  
*A.* devises his estate to *B.* his son charged with 500*l.* to his grand-daughter, the daughter of *B.* payable at 21 or marriage.—*B.* marries his daughter and gives her 1500*l.* portion, but no notice is taken of the 500*l.* legacy, nor any release given.—Twenty-one years afterwards, the daughter and her second husband bring a bill against the father for the 500*l.* Bill dismissed. The 1500*l.* shall be presumed a satisfaction of the 500*l.* especially after such a length of time.  
[\*485]

### MACKDOWELL & Ux' versus HALFPENNY.

**THOMAS HALFPENNY**, the grandfather, devised his real and personal estate to his eldest son, the defendant, charged with several legacies to his grandchildren, and (*inter alia*) with 500*l.* to the plaintiff, payable at \**twenty-one* or marriage; in 1684 the grandfather died. In 1685, within a year after the death of the grandfather, the defendant married his daughter to Mr. *Palmer*, her first husband, and gave her 1500*l.* as her marriage-portion; but no mention was made of the 500*l.* legacy, or any release or discharge taken for it; and now after *twenty-one* years, the *second* husband with his wife brought their bill against the defendant her father for the 500*l.* legacy.

—Twenty-one years afterwards, the daughter and her second husband bring a bill against the father for the 500*l.* Bill dismissed. The 1500*l.* shall be presumed a satisfaction of the 500*l.* especially after such a length of time.

And for the plaintiff was cited the case of *Chudleigh* and *Lee*, (2) where a greater portion given, yet afterwards decreed to pay a legacy, not taken notice of in the marriage agreement.

But the bill was dismissed; it being to be presumed that the 1500*l.* portion was intended in satisfaction of the 500*l.* legacy, especially after this length of time. (3)

(2) Pre. Ch. 228. S. C.

(3) Vide *Atkinson v. Webb*, ante p. 478.

HARRIS *versus* MITCHELL.

CASE 440.

Feb. 28.

Eq. Ca. Ab. 49.  
(C.) pl. 2. S. C.

IN the submission it was provided, if the arbitrators did not make their award within the time limited, they should choose a *third* person *umpire*, whose umpirage should be final. The *two* arbitrators did not make their award within the time limited; and not agreeing who should be umpire, the one proposing *Chaplin*, and the other naming *Ramsey*, they agreed to throw *cross* and *pile*, who should have the naming of the umpire, or whose man should stand.

Arbitrators, if they could not agree, were to choose an umpire; they make no award; and not agreeing about the person to be umpire, they throw

*cross* and *pile*, who should name him. The umpire chosen by lot makes his award. The Court set aside the award for that reason.

And by lot *Ramsey* was to be the umpire; and the arbitrators accordingly indorsed on the back of the bond, that they had appointed *Ramsey* to be umpire, who summoned both parties, and they attended him, and he afterwards made his umpirage.

[ 486 ]

The bill was to set aside the award, and amongst other things assigned for cause, that the umpire was not duly chosen, according to the intent of the submission, but by lot as aforesaid; and the *Master* of the *Rolls*, before whom the cause was heard, thought *that* a sufficient cause to set aside the award. An election or choice is an act, that depends on the will and understanding; but the arbitrators followed neither in this case, and it is a distrusting of *God's Providence* to leave matters to chance. (1)

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(1) For the cases on the doctrine of awards, vide not. (1) *Brown v. Brown*, ante 1 vol. p. 158.

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CLIFTON *versus* JACKSON.

CASE 441.

SIR *Gervas Clifton* purchased the manor of *Allwoodly* in the County of *York*, and on the marriage of his son *Robert* with *Sarah Parkhurst*, the plaintiff's father and mother, the same was settled to *Robert* for life, to *Sarah* his intended wife for life, remainder to the heirs of the body of *Robert* and *Sarah* to be begotten, remainder to *Robert* in fee.

A. on the marriage of his son B. settles lands to the use of B. for life, remainder to the wife for life, remainder to the heirs of their two bodies, re-

mainder to B. in fee. B. and his wife by deed and fine, mortgage in fee, and subject to the mortgage the lands are settled to the use of B. for life; and after his and his wife's death, to the heirs of her body by him begotten, remainder to his right heirs. The wife after her husband's death suffers a common recovery. Whether the estate of the wife for life by the first settlement, and the limitation to the heirs of her body by the second, did consolidate; and if it did, whether the estate of the wife was alienable within the statute of 11 Hen. 7.

Afterwards *Robert* and *Sarah* by deed and fine convey to the Earl of *Chesterfield* in fee, by way of mortgage for the securing 1000*l.* and after the 1000*l.* and interest paid, the estate was

CLIFTON v.  
JACKSON.

[ 487 ]

settled to the use of *Robert* for life, and after his and his wife's decease, to the heirs of the body of *Sarah* by him to be begotten, remainder to his own right heirs.—*Robert* the plaintiff's father died, *Sarah* the plaintiff's mother with the Earl of *Chesterfield*, the mortgagee, join in a *fine* and *common recovery*, and articles with *Robert Jackson* to sell to him for 3500*l*.

*Jackson* brings his bill against the mother and the plaintiff, then an infant of *two* years old, to have a specific performance of those articles; and in 1678, a decree was made by the Lord *Nottingham* for that purpose, and the money paid to the plaintiff's mother, and *Jackson* put into possession.

The plaintiff brought his bill of review to reverse the former decree; and the chief point insisted on was, whether the estate in the wife was alienable, or within the statute of 11 *Hen. 7.* as a provision made by the husband for the wife.

For the plaintiff it was insisted, that the wife being only tenant for life by the *first* deed, and the *second* settlement having limited the estate to the heirs of her body; *that* limitation is but a contingent remainder, and will not consolidate with the estate for life, it not being by the same, but by a distinct conveyance: but where one takes an estate of freehold, and by the same conveyance there is a limitation to the heirs of his body, there the heirs of the body shall not take as purchasers; but those words, the heirs of his body, will be taken to be words of limitation, and operate to enlarge the first estate: but where the estate for life is by one conveyance, and the grant to the heirs of his body by another, the estates do not consolidate; but the limitation to the heirs of the body will remain, as a contingent remainder, and cited *Litt. Sect. 352. Chudleigh's Case, 1 Roll. 317. Lane and Pannell's Case.*

[ 488 ]

*Secondly*, If the estates would consolidate, yet still it would be an estate-tail not alienable, as being the provision of the husband, and within the provision of the statute of 11 *Hen. 7.* and for that purpose cited *Crook Elizabeth, fol. 24.*—The plaintiff *third* husband and wife seised of a copyhold in fee; the husband purchaseth the freehold to him and his wife, and the heirs of their bodies, held to be within the statute of *Hen. 7.* the case of *Snow and Cutler, 1 Lev. 136.* copyhold to husband and wife, and the heirs of the husband, and the husband surrenders to the use of his will, and deviseth to the wife and the heirs of her body; the estate shall not consolidate; and cited the case of *Crocker and Kelsey* in *Jones's Reports* 60. *Baggott and Palmer, Moor* 250. and it was observed that the statute of *Hen. 7.* by express words extends to uses.

For the defendant it was insisted, that the statute of *H. 7.* is a penal statute, not to be extended, or assisted by any construction in a Court of equity; no more than the statute of *Gloucester*, which gives *locum vastatum*, and treble damages; and in many cases there are different rules in legal estates, and in estates in equity; at law the wife is to have dower, and the husband to be tenant by the courtesy, but not so of a trust.

CLIFTON v.  
JACKSON.

*Secondly*, The wife by joining in the mortgage, and subjecting her estate for life to the payment of the mortgage-money, became in the nature of a purchaser of an estate-tail in the *second* settlement; and the limitation to the heirs of her body ought not to be looked upon as the provision of the husband, but as her own purchase.

Whereto it was replied, that as to the objection that the statute of *H. 7.* was in the nature of a penal law; the plaintiff comes not for any penalty, or to make the wife forfeit any thing, but to discover whether she was a person disabled from aliening. And as to *dower* and *tenancy* by the *courtesy*, those are creatures of the common law, and depend intirely on the nature of the *seisin*: but where there is an act of parliament, that binds as well in equity as at law, and the rules of descents are to be sacred, and best preserved in our law, and the rules in law and equity are the same: but *dower* and *tenancy by the courtesy* are collateral to the estate; and although the estate for life to the wife by the *first* settlement, is to be allowed as valuable, yet not adequate to an estate of inheritance; and where the estate moves from the husband, be it in value more or less, yet it is of the provision of the husband, and within the Statute; and it is not a penal statute, but a remedial law, and therefore extended and construed favourably for the benefit of the heir, in all the cases in our books. A copyhold is not indeed within the statute, because the Lord shall not have a tenant put upon him that cannot alien; and as to the objection that the wife is to be considered as a purchaser; every jointress is so, either for a portion paid, land given in lieu, or in consideration of marriage, yet it is still of the provision of the husband, and within the statute of 11 *H. 7.* It is sufficient that the estate moves from the husband, though upon never so valuable a consideration paid by the wife. (1)

[ 489 ]

(1) The words of the statute as describing the nature of the estate of the wife, the alienation whereof is prohibited are, "in any manors, lands, tenements, or other hereditaments of the inheritance or purchase of her hus-

"band; or given to the said husband  
"and wife in tail, or for term of life,  
"by any of the ancestors of the said  
"husband, or by any other person  
"seised to the use of the said husband  
"or of his ancestors."

CLIFTON v.  
JACKSON.

*Lord Keeper* was of opinion, that a trust, or an equity of redemption was within the provision of the statute of 11 *Hen. 7.* which expressly extends to uses : but if it be a penal statute, as the statute of *Gloucester*, the heir shall not be aided or assisted in equity.

And he was in doubt whether the estates did not consolidate, though by several deeds. The authorities are only in the affirmative, that if by the same deed, it shall consolidate, not negatively, that if by different deeds, they should not ; and in the case of *Pibus* and *Mitford*, (2) there no express estate for life limited but ariseth by implication, and there held that the estate was consolidated. (3)

*Cur. advisare vult.* (4)

(2) 2 Lev. 75.

(3) For observations on the principal case and particularly on the doctrine here laid down by the *Lord Keeper*, and also on the case of *Pibus v. Mitford*, vide *Fearne* on Cont. Rem. 5th edit. p. 82, 96. et seq. And it is clearly a settled point, that the estate for life being by one instrument, and the limitation in tail by another, they cannot unite, *Doe v. Fonnereau*, Doug. Rep. 487, 508. which also see p. 491. for observations, arg. on the principal case,

and in which the doctrine and authorities on this point are so fully considered, that it seems unnecessary to cite here the older cases on the subject.

(4) A plea and demurrer appear to have been put in to this bill of review, and which after two arguments, the 21st *July*, 1704, and the 19th *Feb.* 1704-5 were ordered to be set down for judgment on a future day, and on the 20th *June*, 1705, were allowed, Reg. Lib. 1704. A. fol. 530.

[ 490 ]

CASE 442.

March 6.

Eq. Ca. Ab.  
148. pl. 4. S.C.

*A.* makes a bill of sale of his goods to a trustee, for one who lived with him as his wife, and so reputed. Bill of sale set aside as fraudulent against creditors.

FLETCHER & A<sup>r</sup> versus DOMINAM SEDLEY & A<sup>r</sup>.

THE cause having been heard, and coming on upon the Master's report ; the case appeared to be, that Sir *Charles Sedley* had by bill of sale made over his goods to a trustee for the defendant, who lived with him as his wife, and was so reputed ; and having also purchased a lease of a house in *Bloomsbury*, where he dwelt, in the name of Sir *Francis Winnington*, takes a declaration of trust to permit Sir *Charles* to enjoy for life ; then in trust for the defendant, during the residue of the term.

The Court upon the *first* hearing set aside the bill of sale of the goods and personal estate, as fraudulent against the plaintiffs the creditors ; and decreed an account thereof. (5)

*A.* purchases a lease of a house in the

name of *B.* and takes a declaration of trust to permit *A.* to enjoy for life, and then in trust for one who lived with him as his wife, and was so reputed. This lease is not assets of *A.* nor liable to his creditors after his death ; for when a man purchases, he may settle the estate as he pleases.

(5) Reg. Lib. 1704. A. fol. 227.



of Sir *Francis Winnington*, should be liable to the creditors, and brought into the account of the personal estate. FLETCHER v. SEDLEY.

For the defendant it was insisted, *first*, that it did not appear that Sir *Charles Sedley* was indebted, or that the plaintiffs were creditors at the time of the purchasing the lease.

*Secondly*, And principally, that it cannot be assets of Sir *Charles*, because he never had the term in him; was only to enjoy for life, remainder to the defendant, during the residue of the term; and it being so settled upon the purchase, it could not be liable to his creditors; for as in his life-time he might have given the money to the defendant to have purchased the lease herself; so he might by the same reason direct a conveyance to be made to her, or a declaration of trust for her benefit.

[ 491 ]

So if a man purchases a freehold estate to himself for life, remainder over to another; such remainder shall not be void or fraudulent, even as to creditors by bond or judgment; and said it is a new pretence to say, a man made a purchase fraudulently. A man may alien on purpose to defraud his creditors; and there the statutes against fraudulent conveyances will reach it; but as to purchasing, a man may do it, or let it alone at his pleasure; may purchase for years or for life, or in tail or in fee, as he pleases, and may take in what remainder men he pleases, and insisted *that* could never be assets, that a man never had in him.

The *Lord Keeper* inclined to that opinion, that fraudulent conveyances are made so only by the several statutes made for that purpose; as the statute of *Merton*, where the father enfeoffs his son and heir apparent, to defeat the Lord of his wardship, &c. (1)

(1) The *Lord Keeper* delivered no opinion but took time to consider, Reg. Lib. ub. sup. but no order on the point appears entered *Fletcher v. Bird*; there are also entries of the cause in the name of *Fletcher v. Stoughton*, and note, the bill was by creditors, and by a clause in the decree, it is ordered int. al. that the Master should take an account of the debts of the testator Sir *Charles Sedley*, and the nature of them: after the decree an order was obtained by certain creditors of the testator by bond and simple contract, for liberty to come in before the Master and prove their debts, and have the benefit of the

said decree, paying their proportion of the charges of the suit; by the Master's report, it appeared that in pursuance of the said order they came in before the Master and proved their debts, but on the ground of the above clause in the decree refused to contribute, and the order on this was, "that the creditors who prayed to be admitted to the benefit of the said decree do pay the said plaintiffs their proportions of the charges of the suit, to be ascertained by the said Master before they be admitted to have any benefit of the said decree." R. L. Vide *Twyne's case*, 3. Co. Rep. 80. for

some of the general principles governing the doctrine of fraudulent conveyances, et vide *Stamford's* case, 2 Lev. p. 223. *Fairebeard v. Bowers*, ante p. 202. *Peacock v. Monk*, 1 Vez. 127, and particularly p. 130. there where on the principal case being cited at the bar, *Hardwicke, Lord Chancellor*, is reported to say, "that case in Vern. 490. was only the inclination of the Court on argument of Counsel, and it would be dangerous to allow the arguments which are there." As to the general principle of voluntary settlements being fraudulent against creditors, and which arise where there is a wife or children, (not the fact in the principal case,) it is clearly settled, that in order to invalidate a settlement of that nature, it must depend upon this, whether he was in insolvent circumstances at the time: a single debt, and, as it should seem, the running debts of a man for the common bills of his house will not do, per *Arden, Master of the Rolls, Lush v. Wilkinson*, 5 Ves. 387. for a settlement being voluntary is not for that reason fraudulent, but an evidence of fraud only, *Russell v. Hammond*, 1 Atk. 13. et vide *Bovey's* case, 1 Vent. 193. *Shaw & Al' v. Lady Standish & Al'*. ante 327. *Lord Tenham v. Mullins*, 1 Mod. 119. Nor will equity shake it if the person is not indebted at the time, (i. e. it is presumed, in the sense of *Lush v. Wilkinson*,) *Russell v. Hammond*, ub. sup. *Walker v. Burrows*, 1 Atk. 93. *Middlecome v. Marlow*, 2 Atk. 520. *Lord Townshend v. Windham*, 2 Vez. 10. *Stephens v. Olive*, 2 Bro. Ch. Rep. 90. [*Lilly v. Osborn*, 3 P. Wms. 298. *Glaister v. Hewer*, 8 Ves. 200.] But the settlement is clearly void as against creditors, not only if the settlor be indebted at the time, *Beaumont v. Thorp*, 1 Vez. 27. and the cases ub. sup. but also, according to some of the cases, if any badges of fraud appear as if a man makes a settlement with a view to his

being indebted at a future time, *Stileman v. Ashdown*, 2 Atk. 481. *Fitzer v. Fitzer*, ibid. 511. *Taylor v. Jones*, ibid. 600. in *Walker v. Burrows*, 1 Atk. 93. and in a case of *Montague v. Lord Sandwich* in Chancery, 22d July, 1797, cited in not. to *Lush v. Wilkinson*, 5 Ves. 386. and in that case also, it appears to have been held, that the creditors must be creditors at the time: and to impeach a voluntary settlement, the suit must be by a creditor; and said that creditor must put himself into a situation to complain by getting a judgment for his debt, and stating that he is defrauded by the settlement, per *Thurlow, Lord Chancellor, Colman v. Croker*, 1 Ves. jun. 160. 1. As to the construction of the statute on the word "consideration," it is held, the consideration to take a settlement out of the statute must be a *valuable consideration*; and that consideration of blood, natural love and affection, &c. will not do, *Fitzer v. Fitzer*, 2 Atk. 513. but where there is a valuable consideration paid or given, the Court will not weigh it in too nice scales, per *Hardwicke, Lord Chancellor*, in *Fitzer v. Fitzer*, ub. sup. And note, it has been determined, that covenant by trustees in a voluntary settlement to indemnify husband against the debts which the wife might contract after the separation is a *valuable consideration*, and that therefore such settlement is good against a person being a creditor, at the time or before the execution thereof, *Stephens v. Olive*, 2 Bro. Ch. Rep. 90, 92. So if the debts of the settlor were all secured by mortgage, ibid. As to settlement of stock in the Public Funds, vide *Dundas v. Dutens*, 1 Ves. jun. 196. *Pringle v. Hodgson*, 3 Ves. 617. *King v. Dupine*, cited in not. to *Taylor v. Jones*, 2 Atk. 603. As to the jurisdiction of the Court over stock in favour of creditors, vide *Rider v. Kidder*, 10 Ves. 360. and particularly the judgment of *Eldon, Lord Chancellor*, there p. 368.

STEPHENSON *versus* HOULDITCH & A<sup>r</sup>.

CASE 443.  
Feb. 5, 1703-4.  
Eq. Ca. Ab.  
81. (K.) pl. 2.  
308. pl. 4.  
S. C.  
If upon a *Certiorari* bill the cause is brought on to hearing, the Court, if they think fit, may make a decree, or send it back to the Mayor's Court to be determined there; and sometimes the Court sends it back after publication passed, and a *subpœna* served to hear judgment, and before the hearing.  
[\*492]

THE plaintiff an apprentice had sued in the *Mayor's Court* to have 150*l*, repaid, which his mother had given to the defendant to take him as his apprentice in the trade of a linen-draper. The defendant brought his *Certiorari* bill; and\* upon bringing his bill, he entered into bond to prove his suggestions within the time limited, as usual; and upon reference to a *Master*, he certified the plaintiff had proved his suggestions; and thereupon, although a *procedendo* was several times moved for, it was denied: (1) so the defendant was necessitated to reply, and both sides examined their witnesses; and publication being passed, the plaintiff served the defendant to hear judgment: and upon opening the nature of the case, the *Lord Keeper* and *Master* of the *Rolls* were both of an opinion, that it should be sent back to be determined in the *Mayor's Court*; and the *Register* said, it had been often done both ways, sometimes retained and decreed here, but oftner sent back: sometimes after publication, and sometimes after a *Subpœna* served to hear judgment. (2)

In this case the apprentice first obtained that his indentures should be delivered up, and so decreed in the *Mayor's Court*, because not inrolled; although it was at the instance of his mother they were not inrolled; yet *that* would not excuse the master, who had covenanted to inroll the indentures, and although the apprentice was bound for *seven* years: yet covenanted to make him free at the end of *five* years.

*Secondly*, Whereas the apprentice had married without the privity of his Master; yet *that* would not justify his turning him off, but must sue his covenant.

If an apprentice in London marries without his master's consent,

the master cannot turn him away for that reason, but must sue his covenant,

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(1) Vide *Bacon's Tracts*, p. 283.

(2) Vide on this head, *Newton v. Rowse*, ante 1 vol. p. 460.

DE  
TERMINO PASCHÆ, 1705.

IN CURIA CANCELLARIÆ.

CASE 444.  
Eq. Ca. Ab. 67.  
pl. 6.  
Pre. Ch. 239.  
(nomine Lord  
Rockingham  
and Arabella  
Oxenden v. Sir  
James Oxen-  
den.) S. C.

DOMINA OXENDEN per prochein amie *versus* Sir JAMES  
OXENDEN & Al'. & è contra.

By articles be-  
fore marriage  
6000*l.* part of  
the portion, is  
agreed to be  
invested in  
land, and set-  
tled to the hus-  
band for life,  
then to his  
wife for life,  
remainder as a  
provision for  
younger chil-  
dren remain-  
der to the hus-  
band in fee.  
The husband  
having by his  
cruelty forced  
his wife to se-  
parate from  
him; the Court  
decreed the in-  
terest of the  
6000*l.* to be paid  
her for her se-  
parate main-  
tenance till co-  
habitation.  
Post Case 598,  
657.

[\*494]

When a hus-  
band comes  
into a Court of  
Equity for his  
wife's portion,  
the Court will  
oblige him to  
make a settle-  
ment upon her,  
or secure her a  
maintenance in  
case she survives  
him.

UPON the marriage of the defendant Sir *James* with the plaintiff, the sister of the Lord *Rockingham*, 6000*l.* part of the portion was paid to Sir *James*, and a settlement made of 1000*l.* per ann. for jointure, &c. The other 6000*l.* was by the articles to be invested in lands, and settled on Sir *James* for life; then to the plaintiff for increase of her jointure, remainder as a provision for younger children; remainder to Sir *James* and his heirs and assigns; and until a purchase made to be placed at interest, with the consent of the plaintiff and defendant, and her trustees. The marriage being had, and there being no issue, and the money lying dead, and some leasehold estates, which by the marriage articles were to be kept up, not being \*renewed, as they ought to have been; and Sir *James* by his cruel usage having forced the plaintiff, his wife, to separate from him,

The Lady *Oxenden's* bill was to have the marriage agreement performed, the leases filled up and renewed; and in regard of ill usage, to have an allowance for maintenance.

Sir *James's* cross bill was to have the 6000*l.* which, by the default or obstinacy of the trustees, lay dead, invested in a purchase, and until a purchase found, to be placed at interest, on security, or on some of the public funds.

The ill treatment of the lady being fully proved, the Court decreed, that the 6000*l.* should be placed out at interest, and the plaintiff to receive it for her separate maintenance, until there should be a cohabitation; and it was said by the *Lord*

*Keeper*, that as a Court of Equity will oblige a husband, who comes into equity for his wife's portion, to make a settlement upon the wife by way of jointure, or to secure a maintenance

upon the wife by way of jointure, or to secure a maintenance in case she survives him.

to her, in case she out lives the husband ; (1) the Court ought much rather to do it, where the wife is at present reduced to a starving condition ; and especially, when, as in this case, the execution of a trust is to be directed by the Court. (2)

OXENDEN v.  
OXENDEN.

(1) *Ball v. Montgomery*, 2 Ves. jun. 191, 194. *Brown & ux. v. Elton*, 3 P. Wms. 202. Et vide cases cited in not. (2) *Micoe v. Powell*, ante 1 vol. 40. (2) Vide *Mildmay v. Mildmay*, ante 1 vol. 54, and cases cited in not. there.

### TOLLER *versus* CARTERET.

CASE 445.

May 14.

Eq. Ca. Ab.  
134. pl. 5. S. C.  
Bill that de-  
fendant might  
redeem a

SIR PHILIP CARTERET, owner of the island of *Sarke*, made a mortgage thereof to one *Willowe* the plaintiff's intestate, for five hundred years for 500*l.* mortgage of the island of *Sarke*, or be foreclosed. Defendant pleaded to the jurisdiction of the Court, that the island was part of the *Dutchy* of *Normandy*, and had laws of their own, and were under the jurisdiction of the Courts of *Guernsey*. Plea over-ruled, because the mortgage was of the whole island, and for that the defendant was served here, for *equitas agit in personam*.

The bill was that the defendant might redeem, or be fore-  
closed.

[ 495 ]

The defendant pleaded to the jurisdiction of the Court, that the island of *Sarke* was part of the *Dutchy* of *Normandy*, and had laws of their own, and were under the jurisdiction of the Courts of *Guernsey*, and not within the jurisdiction of the Court of Chancery ; and cited 4 *Inst.* 284. *Anderson's 2 Rep.* 115. *Kelloway* 202.

*Lord Keeper* over-ruled the plea, because the grant was of the whole island ; and *secondly*, that the Court of Chancery had also a jurisdiction, the defendant being served with the process here, *et æquitas agit in personam*, which is another answer to the objection. (3)

(3) 16th *May*, there is merely an entry of plea over-ruled. Reg. Lib. 1704. B. fol. 316. Vide as to the jurisdiction of this Court over lands, &c. in the plantations, colonies, and other foreign dependencies, *Arglasse v. Muschamp*, ante 1 vol. p. 75.

### LAMB, Widow, *versus* PARKER.

CASE 446.

A. by will de-  
vises to his son  
a messuage  
for 99 years, if  
three lives

EDWARD PARKER by his will devised to his younger son, *Wyke Parker*, a messuage, with appurtenances, in *Zeale* lived so long paying his sister 40*l.* per ann. for her life, and afterwards makes a lease to B. of the same messuage for 99 years, if three lives lived so long, paying 50*l.* per ann. to the lessor and his heirs. Decreed at the Rolls, that the lease was a revocation of the devise ; but upon an appeal to the Lord Keeper, decreed to be no revocation, and that the daughter should be paid her annuity.

LAMB v.  
PARKER.

*monachorum* for *ninety-nine* years, if *three* lives lived so long; yielding and paying unto the plaintiff, his sister, 20*l.* per ann. until *twelve* years old, and thence 40*l.* per ann. for life. The said *Edward Parker*, afterwards, in *November*, 1682, for 300*l.* fine, demised the said messuage to one *Levett*, for *ninety-nine* years, if *three* lives lived so long; yielding and paying 50*l.* per ann. to the testator, his heirs and assigns. (1)

The question was, whether this demise to *Levett* was a revocation of the devise to *Wyke Parker*, and consequently of the annuity payable to the plaintiff.

[ 496 ]

The cause was heard at the *Rolls*, and there held to be a revocation. (2) Now upon an appeal to the *Lord Keeper*, adjudged to be no revocation; for that by the lease to *Levett*, the term for *ninety-nine* years commenced immediately in the life time of the testator: the term to *Wyke Parker* was for *ninety-nine* years from the testator's death, and although both determinable on *three* lives, and possibly *Levett's three* lives might live longest; yet a reversionary interest passes, and will carry the rent reserved on *Levett's* lease; and the rule where a subsequent act shall amount to a revocation by implication, is, that such implication must be necessary, and wholly inconsistent; and for that purpose cited *Cr. Jac. Cook* and *Bullock*, 49, 1 *Roll. Abr.* 616. A devise for *forty* years, afterwards the testator grants a lease for *twenty* years of the same premises; that is no revocation, only *pro tanto*. *Cro. Car.* 23 and 24. A devise in fee; a lease subsequent revokes not the devise. *Gardner* and *Sheldon's* case in *Vaughan's Reports*, 259. A revocation by implication must be a necessary implication. *Hull* and *Dunch*, a mortgage subsequent to a devise no revocation, but *pro tanto* only.

Vol. 1. Case  
325.

Decreed for the plaintiff. (3)

(1) In the case which was stated to the *Master* of the *Rolls* the annuity is first devised to the daughter, and then the estate charged with the annuity, is devised to *Wyke Parker*, and the estate out of which the annuity was made payable is mentioned to be of the annual value of 90*l.*; and the *Master* certified that the devise of the annuity was crossed in the original will in the manner in the case stated (but how does not appear) and evidence was admitted to prove, that after the making of the lease the testator declared he had left the plaintiff 40*l.* per ann. charged on the

premises in *Zeale monachorum*, R. L.

(2) 5th *May*, 1702.

(3) 16th *June*, 1705, but permitted the defendant to take the opinion of the Judges of the Court of *Queen's Bench*, on the case above mentioned, and the Judges afterwards, 20th *July*, delivered in a certificate, by which it appeared that the opinion of all the judges was, "that the devise is revoked quoad the term demised, but not as to the reversion expectant thereupon, which is vested in *Wyke Parker* by the death of the said testator, during his term of 99 years, determinable upon the



“lives mentioned in the will. But as  
 “to the annual payment of 40*l.* the  
 “same is not revoked, but is consistent  
 “with the demise and ought to be  
 “paid.” Reg. Lib. 1704. B. fol. 263.

On this subject vide *Perkins & Al. v. Walker & Al.* ante 1 vol. 97. *Hall v. Dench*, ibid. p. 329, and cases cited in not. there respectively.

ATTORNEY GENERAL, ad relationem COSSART and  
 DUTRIE *versus* SOTHON et Ux' et è contra.

CASE 447.

May 18.

ONE *Costell* having made several wills, and therein devised 600*l.* to a *French*, and the like sum to a *Dutch* church; but after his decease there being no will to be found, defendant *Sothon*, his nephew and next of kin, applied to the *prerogative* for administration; but being opposed there by the relations, who were named executors, in one or more wills made by *Costell*, the cause, whether the defendant should have administration or not, depended *eighteen* months in the *Prerogative*. At last the defendant was told, he should have administration; but that it was expected, he should give bond to pay 300*l.* to each of the said churches. The bond is read in open Court, and then sentence is pronounced. After this the relators applied to the *delegates*, and there the sentence was confirmed.

*A.* having made several wills, and thereby given 600*l.* to a Dutch church, and the like sum to a French church; but no will being to be found after his death, the brother endeavours to get administration in the prerogative court, but was opposed; and after the cause there had depended

*eighteen* months, the brother was told he should have administration; but it was expected he should give bond to pay each of the churches 300*l.* Bond is given and read in Court, and then sentence is pronounced, and afterwards confirmed by the delegates. Upon an information by the Attorney General, that the churches might have the benefit of the bond, and a cross bill to set it aside, as being unduly obtained; Court declared, if the bond was not given freely, but by compulsion, it ought to be set aside, or at least not carried into execution. At length both bills dismissed.

The original bill was to have the benefit of the bond, or note, given for the payment of the 300*l.* to each church; and the cross bill was to have the bond or note delivered up to be cancelled, as being unduly gained.

*Lord Keeper.* The question is, whether the bond was given freely and voluntarily, or by compulsion; if by force or terror, though not so as to make it *per dures*, it ought to be set aside, or at least not carried into an execution. A judge may fairly mediate an accommodation; but not put terms upon pronouncing sentence, or giving judgment. *Nulli vendemus, nulli differemus, justitiam*, says *magna charta*.

[ 498 ]

There being proofs in the cause, that there were such wills once made; and likewise it appearing by the proofs, that the testator had afterwards changed his mind, thereupon the *Lord Keeper* declared, he was not satisfied to decree a performance or execution of the bond, nor to set it aside; and dismissed both bills. (1)

(1) Leaving the relators to their remedy at law. Reg. Lib. 1704. A. fol. 342.

## CASE 448.

BROWN *versus* DAWSON, et è contra.

May 23.

Eq. Ca. Ab.

203. pl. 1.

Pre. Ch. 240.

S. C.

*A.* on his wife's joining in sale of part of her jointure gives her a note to pay her 7*l.* 10*s.* per ann. for her life, and afterwards on sale of a farther part, gives her a bond to pay her 6*l.* 10*s.* per ann. for her life; and by will, without taking notice of the note or bond, gives her 14*l.* a year for life. The devise shall be a satisfaction of the bond and note. Ant. Case 433. Post Case 454.

MR. *DAWSON*, on his wife's joining in sale of part of her jointure, gave her a note to pay her 7*l.* 10*s.* per ann. for her life; and upon a second sale of a farther part of her jointure, gave her a bond to pay her 6*l.* 10*s.* per ann. for her life; and afterwards by will, without taking notice either of bond or note, devised unto her 14*l.* per ann. for her life.

*Per. Cur.* The devise shall be taken to be in lieu and satisfaction of the bond and note (2).

(2) Reg. Lib. 1704. *A.* fol. 374. Vide *Tunbridge v. Teather*, ante 1 vol. 345. *Atkinson v. Webb*, ante p. 478. *Eastwood v. Vinke*, 2 P. Wms. 615. [and notes (1) and (y) 616. 6th Edition.] *Devese v. Pontet*, stated by Mr. *Finch*,

in not. to *Brown v. Dawson*, Pre. Ch. 240. [1 *Cox*, 188.] *Haynes v. Mico*, 1 Bro. Ch. Rep. 129. *Cantle & Al. v. Morris & Al.* stated in note to *Haynes v. Mico*, *ibid.* p. 133.

## CASE 449.

BURKITT, Widow, *versus* BURKITT.

May 24.

Eq. Ca. Ab.

402. pl. 4. S. C.

*A.* by will duly executed devises a copyhold estate to his wife, and on the day of his death, orders his nephew to obliterate some devises, but nothing as to the copyhold, and then caused a memorandum to be wrote, that he approved of the will as obliterated, but does not republish it; and orders his nephew to carry it to one to write it fair, and before it is done, he becomes delirious. Held to be a good will, and that the copyhold passed.

*WILLIAM BURKITT*, rector of *Dedham*, in *Essex*, by will in writing, attested by three witnesses, devised to his wife a copyhold estate in *Ealing*; afterwards the testator, on the day of his death, directed his nephew to obliterate some devises, but nothing as to the copyhold devised to \* his wife, and then caused a memorandum to be wrote that he had examined, perused, and approved of the will as so obliterated and altered by his nephew in his presence, but did not republish it in the presence of three witnesses; (3) but directed his nephew to

caused a memorandum to be wrote, that he approved of the will as obliterated, but does not republish it; and orders his nephew to carry it to one to write it fair, and before it is done, he becomes delirious. Held to be a good will, and that the copyhold passed.

[ \*499 ]

(3) Vide on the head of revocation of a will by an instrument, insufficient to constitute a will, *ex parte* the *Earl of Ilchester*, 7 Ves. 348, in which the cases on the subject and the doctrine in its analogy to the rules of the civil law are stated and investigated, and from which it appears to be the law, that where nothing in the instrument of revocation appears beyond the mere and direct purpose of revocation, there an instrument insufficient for a will or an

appointment, *e. g.* of a guardian, shall, nevertheless, be held sufficient for revocation; but where the intention to revoke appearing in such instrument is only to be discovered through the medium of another devise or appointment, or where the revocation is express, but is only subservient to another purpose, for which such instrument is incompetent, there that instrument shall not operate as a revocation.

carry it to Mr. *Eldred*, to have it wrote out fair, but before it was brought back became delirious. BURKITT v.  
BURKITT.

Held to be a good will, and the trustees decreed to surrender accordingly (4).

(4) So *Onions v. Tyrer*, post 741. 1 P. Wms 343. S. C. Mr. Cox's note (2) p. 344. there. *Limbery v. Mason & Al.* Comyn. 451. The words of the decree as to the above point are—  
 "Whereupon, &c. this Court declared  
 "that the obliterations and alterations  
 "in the said will do not revoke or make  
 "void such clauses or parts of the will  
 "which remain unaltered or not obliterated, and that it appears to be the  
 "intention of the testator that the will  
 "with such alterations should stand,  
 "and therefore conceived the devise of  
 "the copyhold estate to be a good  
 "devise." And then decreed the trustees to surrender, &c. Reg. Lib. 1704. A. fol. 354. vide Stat. 29 Car. 2. cap. 3. And it is clear that the Stat. of Frauds does not affect devise of copyholds, but they pass by the surrender and not by the will, *Attorney General v. Barnes & Ux.* post 597. *Wagstaff v. Wagstaff*, 2 P. Wms. 258, 260. *Attorney General v. Andrews*, 1 Vez. 225. *Attorney General v. Sawtell*, 2 Atk. 497. *Carey v. Askew*, 2 Bro. Ch. Rep. 58. *Haberg-ham v. Vincent*, 4 Bro. Ch. Rep. 353. 2 Ves. jun. 204, 209. S. C. But it was formerly held, that though the copyhold itself was not subject to the statute, yet that the trust or equity of redemption of the copyhold was subject, *Wagstaff v. Wagstaff*, 2 P. Wms. 261. But the contrary was afterwards decided by

*Hardwicke*, Lord Chancellor, in *Tuffnell v. Page*, 2 Atk. 37. better reported 2 Barnard. Ch. Rep. 12. where said the clause in the Statute of Frauds, which requires the testator's signing in the presence of three witnesses, and their attestation in his presence is confined only to such estates as pass by the Statute of Wills, 34 and 35 Henry VIII. cap. 5. which is an act made to explain one made in the 31st of the same king, and at the close of the third section enacts the words *estate of inheritance*, in the former statute shall be declared, expounded, taken, and adjudged of estates of fee simple only, which shews plainly that it does not extend to customary estates. Yet where no custom to surrender to the use of a will, a customary freehold can only pass by a will attested according to the Statute of Frauds, *Hussey v. Grills*, Amb. 299. And even with respect to copyholds that have been duly surrendered, where the testator himself pointed out the mode of the surrender to be to uses to be declared in and by his last will and testament in writing, signed and published in the presence of three or more credible witnesses, and the testator made a will not attested by any witness, and thereby gave his copyholds; held the statute operated, and they did not pass, *Godwin v. Kilsha*, Amb. 684.

### LAMLEE versus HANMAN et Ux'.

*LAMLEE*, the mother, having a jointure in part, and 10*l.* per ann. devised to her by her husband, and charged on the other part of the premises in question, on the marriage of *Lamlee* the son, the mother joined in the settlement, and accepted 15*l.* per ann. in lieu; and the day before the settlement, had taken a security from her son for 10*l.* per annum out of the leasehold estate, which was not comprised in the marriage settlement; and the son covenants to pay it. The son died;

CASE 450.  
 Rolls, May 24.  
 Under-hand  
 agreements on  
 marriage, set  
 aside as fraudulent.  
 Ant. Ca. 426.

LAMLEE v.  
HANMAN.

the plaintiff, his widow, took administration.—The defendant brought an action of covenant against her for non-payment of the 10*l. per ann.*

The bill was to be relieved against that action, insisting that the defendant was guilty of a fraud in making this private agreement with her son to have 10*l. per ann.* over and above the 15*l. per ann.* mentioned in the marriage-settlement.

[ 500 ]  
Vol. 1. Case  
233.

And decreed for the plaintiff, 1 *Roll. Abr. Tit. Marriage*, the daughter promised to repay 10*l.* part of the marriage-portion of 90*l.* adjudged at law to be a fraudulent and void promise; and in the case of *Peyton and Blaidwell, Pasch. 9 May, 1684*, where Sir *John Blaidwell* having a kindness for *Yelverton Peyton*, treated a marriage for him with *John Roberts* for his niece, and a settlement agreed for 2,500*l.* portion; he obtained a re-demise of part of the estate settled for present maintenance, and a release of what *Blaidwell* had covenanted to settle after his death, and both set aside in equity. And also cited the case of *Redman versus Redman, 9 Dec. 1685*, (1) the widow of *Redman* relieved, although privy and consenting to the fraud, and giving of the bond. *Gale and Lindo, 1687*, (2) where the brother gave a bond to make up his sister's portion the sum, that was insisted on, but took a bond from her before marriage to repay. The husband died, the wife survived, and was relieved against the bond; from which precedents it may be collected, that that which is the open and public treaty and agreement upon marriage, shall not be lessened, or any ways infringed by any private treaty or agreement.

That which is the open and public treaty and agreement on marriage shall not be lessened or infringed by any private agreement.

And decreed a perpetual injunction of the action.

(1) Ante 1 vol. p. 348.

(2) Ante 1 vol. p. 475. Et vide those cases, and *Powell* on contracts, 2 vol.

163, 177, where most of the cases on this subject are stated.

**THE END OF THE FIRST PART OF THE SECOND VOLUME.**





DE  
TERM. S. TRINITATIS, 1705.

IN CURIA CANCELLARIÆ.

BLOIS and MARTIN Executors of the Viscount HEREFORD  
versus DOMINAM Viscountess HEREFORD & A<sup>r</sup>.

CASE 451.  
June 13.  
Eq. Ca. Ab. 68.  
pl. 4. S. C.

ON the marriage of the late Lord Viscount *Hereford* with the defendant, one of the daughters and co-heirs of Mr. *Narbone*, on the treaty of marriage, they being both infants, there was an act of parliament procured for settling a jointure in bar of dower; provided if she, when of age, did not settle her lands, part of the jointure to cease; but nothing said, as to the personal estate; but upon the treaty of marriage inquiry was made, what was the portion of fortune of Mr. *Narbone*; and a particular given in of what her personal estate amounted unto, and (*inter alia*) mention made of the mortgage for 1300*l.* (1) taken in the Lady *Bacon*'s name. The Lady *Bacon* being dead, and having made her *three* daughters executrixes, their husbands gave a declaration of trust, that half belonged to the Lady *Hare*, and the other half to the Lord Viscount *Hereford*. The marriage being had, and a settlement made by the defendant, after she came of age, of her lands, pursuant to the marriage-agreement;\* the Lord Viscount *Hereford* died, having made the plaintiffs his executors.

*A. marries B. who has an estate in land, and a fortune in money. They being both infants, an act of parliament is obtained for settling a jointure on the wife in bar of dower; provided that the jointure shall cease, if the wife when of age did not settle her land; but nothing said as to the personal estate. Part of the fortune is a mortgage for 1300*l.* taken in a trustee's name. The*

wife when she came of age settled her own land; and afterwards the husband died. Decreed the mortgage to the executors of *A.* and that it should not survive to his wife as a chose in action.

The question was, whether this money should go to the plaintiffs, executors of the Lord Viscount *Hereford*, or as a chose in action, should survive to the wife. [*\*502*]

*Lord Keeper.* I lay no stress upon the declaration of trust; lay that out of the case; the law of this Court will presume a promise; and in all cases, where a settlement equivalent, it shall be intended the husband was to have the portion. The wife shall not have her jointure and fortune both; and the

When a man makes a settlement equivalent to his wife's portion, it shall be intended, that he was to have the portion, though there is no particular agreement for that purpose.

(1) 1000*l.* R. L.

BLOIS v.  
VISCOUNTESS  
HEREFORD.

rather in this case because a trust ; and the husband could not come at it, so as to alter the property without the assistance of this Court ; and the defendant was condemned in costs. (1)

Now the counsel cited the precedents of *Cleland* and *Cleland*, (2) where a jointure settled in consideration of 100*l.* portion ; whereas the wife had 150*l.* more in her brother's hands. The husband died, the wife survived. Decreed at the *Rolls*, and confirmed upon an appeal, that the 150*l.* should survive to the wife.

*Burnet* and *Kinaston*. (3) A mortgage in fee to the wife. The husband by articles agrees to settle it on his wife for life ; and the wife died ; the husband afterwards died. Mr. *Kinaston* the brother got administration *de bonis non* to his sister, and decreed for him ; although the husband had done what lay in his power to alter the property of it.

[ 503 ]

*Ruddiard* versus *Nearn*, 1702. a jointure made in consideration of 500*l.* paid down, and of 500*l.* which the wife had in the chamber of *London*. The husband died, and the wife survived ; decreed to the wife. (4)

(1) No costs given on either side, *Reg. Lib.* 1704. *A.* fol. 444. vide *Lister v. Lister*, ante p. 68. *Howman v. Corie*, ante p. 190, and cases in not. there respectively.

(2) *Pre. Ch.* 63.

(3) Ante p. 401.

(4) The husband having done nothing to reduce it into possession, *Pre. Ch.* 209. 2 *Freem.* 262. *S. C.* nomine *Rudyard v. Neirin & Ux.* Note, the editor in note (D) to *Lord Carteret v. Paschal*, 3 *P. Wms.* 199. says, " it is to be observed, that in all cases where a husband makes a settlement of his own estate on his wife in consideration of her fortune, the wife's portion, though consisting of choses *en action*, and though there be no particular agreement for that purpose, is looked on as purchased by him, and will go to his executors," and cites on that point *Cleland v. Cleland*, *Pre. Ch.* 63. the principal case, ub. sup. and *Packer v. Windham*, *Pre. Ch.* 412. but it is apprehended, that the doctrine is laid down much too generally in that note ; and that choses

*en action*, though there be a settlement, shall not pass to the husband as purchaser, unless there be a special agreement, except so far as the settlement be equivalent to the portion ; and this was the case in *Cleland v. Cleland* ; for though so decreed at the *Rolls*, the *Lord Chancellor* was of opinion, that though there was a settlement, as it was not in consideration of the whole portion and equivalent to it, that such an agreement ought to be proved, and directed accordingly ; in the principal case, ub. sup. the words of the *Lord Keeper* expressly are, " that in all cases where a settlement is equivalent it shall be intended the husband was to have the portion." And in *Packer v. Windham*, there was an assignment by the husband : and the rule is established, that to make the husband a purchaser of the whole, the settlement must either express, or clearly import to be so. Per *Grant Master of the Rolls* in judgment, *Carr v. Taylor*, 10 *Ves.* 579. Et vide *Mitford v. Mitford*, 9 *Ves.* 87.

GILBERT *versus* EMERTON.

CASE 452.

THE plaintiff by his bill surmised, that he and the defendant having been partners in buying and selling of cattle, and in returning money; they paid 1460*l.* into the Exchequer, upon the account of Mr. *Woodcock*, the receiver of *Leicestershire*; and that 600*l.* part thereof was the proper monies of the plaintiff; but the defendant had been paid by *Woodcock* the whole 1460*l.* and refused to pay the plaintiff the 600*l.* The defendant by answer denied that 600*l.* of the 1460*l.* was the plaintiff's money; but swore it was all his own money.

An issue at law was directed in a matter, where the plaintiff had a proper action at law, and was under no impediment in respect of bringing such action.

The plaintiff had *three* witnesses, who swore the defendant confessed that 600*l.* of the 1460*l.* was the plaintiff's money.

And although it was insisted, that little regard ought to be given to witnesses, who only swore a confession, when the defendant had denied it upon his oath; but besides, if there was any doubt in it, the plaintiff might bring his action at law: there being no impediment, nor reason for a court of equity to meddle in it.

Yet the *Lord Keeper* directed, that the plaintiff should bring his action, and the defendant not to insist on the statute of *limitations*: and the plaintiff's counsel insisting rather to have an issue directed; he did accordingly direct it to be tried, whether 600*l.* part of the 1460*l.* was the proper money of *Gilbert*, or not. (1)

Note in the case of *Peeres* and *Bellamy*, although the assignees under the statute of bankruptcy were disabled from recovering the effects belonging to the bankrupt's estate by a fraud in the defendants, *viz.* their having altered the bills of lading and invoices, and even the ship's name, that the assignees might not know or discover the goods, that were assigned to *Bellamy* the bankrupt; yet there the *Lord Keeper* refused to direct an issue, saying it was a matter triable at law, and refused to direct that the statute of *limitations* should not be given in evidence. (2)

[ 504 ]

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(1) 15th *June*, and both parties to attend the trial of such issue, Reg. Lib. be at liberty to make use of the depositions of such witnesses in the cause 1704. A. fol. 435.  
 in equity as were dead, or not able to (2) Vide *Anon*, ante 1 vol. 73. and cases cited in not. there.

## CASE 453.

FELLOWES *versus* OWEN.

Two trustees for sale of an estate join in a conveyance of it to a purchaser, and in a receipt for the consideration-money; but each of them received only a moiety thereof. One of them afterwards becomes insolvent; the other shall not be answerable for what the insolvent trustee received. Post Case, 464. 516.

Two trustees, each received 1000*l.* upon the sale of the trust estate, and both joined in the sale, and executed conveyances; one of them afterwards became insolvent.

Otherwise it is where executors join in sales.

One of them afterwards becomes insolvent; the other shall not be answerable for what the insolvent trustee received. Post Case, 464. 516.

The question was, whether the solvent trustee should be charged with what his co-trustee received, or should only be answerable for what he received himself. In the case of *Heaton* and *Marryott*, trustees for sale of lands, each answerable for his own receipts only; but in the case of executors, where they join in sales, it is otherwise; and the *Lord Keeper* doubted in this case, and would consider of it. (1)

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(1) Vide post, p. 515. S. C.

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[ 505 ]

PERRY *versus* PERRY.

CASE 454.  
Eq. Ca. Ab.  
203. pl. 4. S.C.  
A. on his marriage covenants to purchase and settle 20*l.* a year on his wife for her life, and if he died before it was done, to leave her 300*l.* out of his personal estate for her better livelihood and maintenance. He died without making any settlement, and by will gives his wife the interest of 330*l.* for her life, with a power to dispose of 30*l.* at her death. Decreed first, that she was intitled to the 300*l.* by the articles, and that the executors were not at liberty to settle 20*l.* a year on her for her life. Secondly, That the legacy was not a satisfaction of the articles; but she should have the 300*l.* by the articles, and the legacy too.

ON the plaintiff's marriage, *Edward Perry* her husband covenanted to purchase and settle upon her for her jointure 20*l.* *per ann.* and if he died before such purchase or settlement made, she should have 300*l.* out of his estate for her own use. The marriage was had, and before any purchase or settlement, *Edward Perry* the husband died without issue, having made his will and the defendant executor; and thereby devised to the plaintiff his wife 330*l.* for her life, with power to dispose of 30*l.* part thereof at her death, and the residue of the 330*l.* upon her death he devised over to other relations.

He died without making any settlement, and by will gives his wife the interest of 330*l.* for her life, with a power to dispose of 30*l.* at her death. Decreed first, that she was intitled to the 300*l.* by the articles, and that the executors were not at liberty to settle 20*l.* a year on her for her life. Secondly, That the legacy was not a satisfaction of the articles; but she should have the 300*l.* by the articles, and the legacy too.

The bill was to have 300*l.* absolutely by the articles, and also the use of 330*l.* for her life by the will, with power to dispose of 30*l.* part thereof.

And the questions were, *first*, whether the plaintiff was intitled to have the 300*l.* and interest by the articles, or only 20*l.* *per ann.* for her life; and it was decreed at the *Rolls*, that she had a right to the 300*l.* and interest, (2) and that the executor

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(2) From the death of her husband the testator, R. L.

could not now be at liberty to settle 20*l.* *per ann.* for life ; as the testator might have done.

PERRY v.  
PERRY.

The *second* question was, whether the 330*l.* devised as afore- said, should be in lieu of the articles, or be looked upon as an additional bounty and provision for the wife : the words of the articles being, that if the husband did not purchase and settle 20*l.* *per ann.* on her for life, he would leave her out of his personal estate 300*l.* for her better livelihood and maintenance : and decreed she should have as well the 300*l.* by the articles, (1) as also the legacy by the will.

Ant. Ca. 448.

[ 506 ]

And this decree now affirmed upon an *appeal*. (2)

(1) With interest at 4 *per cent.* from the death of the testator, with costs to be paid out of the surplus of the testator's estate after debts and legacies paid, R. L.

(2) 20th *June*, subject to abatement as to the legacy, in common with the other legatees in case of deficiency, Reg. Lib. 1704. B. fol. 486. vide *Brown v. Dawson*, ante 498.

### OLDHAM *versus* LITCHFIELD.

**JOHN LITCHFIELD** made his will, and the defendant *Abel Litchfield* his brother executor, and devised to him his real estate ; and thereby willed, that his executor out of his rents in arrear and other his personal estate, and out of half a year's rents and profits of his real estate, after his death, should pay his debts and legacies therein after mentioned ; and by his will, amongst other legacies, devised 40*l.* *per ann.* to the plaintiff his wife's nephew, to maintain him at *Cambridge*, to be paid by his brother and executor. The testator dying, the defendant his executor alledged, he had fully administered the personal estate ; as also the half year's profit of the real estate, which incurred after the testator's death ; and therefore refused to pay the *forty pounds per ann.* to the plaintiff.

CASE 455.  
Eq. Ca. Ab. 231.  
pl. 4. Freem.  
2 vol. 284. S.C.  
more fully re-  
ported.  
3 Ves. 39.  
*A.* devises land  
to his brother,  
and makes  
him executor;  
and wills that  
out of his per-  
sonal estate,  
and half a  
year's rent of  
his real estate,  
he should pay  
his legacies ;  
and gives an  
annuity to his  
nephew, to  
maintain him  
at College. It

being proved that the brother promised the testator to pay the annuity, otherwise he would have charged his real estate therewith ; decreed the real estate to be charged with the annuity.

The question was, whether the real estate was chargeable therewith or not ; it being charged by the bill, and proved by Mr. *Bagshaw*, that the defendant promised the testator, he would pay the annuity to the plaintiff ; otherwise the testator would have charged his real estate with the payment of it. (3)

(3) For the rule of evidence on this head, vide *Thurlow*, Lord Chancellor's, judgment in *Pember v. Matthers*, 1 Bro. Ch. Rep. 54. et vide *Elliott v. Hancock*, ante p. 143. *Alcock v. Sparhawk*, ante p. 228. *Whitting v. Russell*, 1 Atk. 448. and cases cited in not. there respectively. As to the case of *Whitting v. Russell*, according to a MS. note of it, Lord *Hurdwicke* is stated

OLDHAM v.  
LITCHFIELD.

It was admitted, that the will had made only the half year's rents and profits of the real estate liable; but upon the evidence of Mr. *Bagshaw*, it was decreed at the *Rolls* for the plaintiff, (1) and affirmed upon an appeal by the *Lord Keeper*.

to say, "as to *Oldham v. Litchfield*, "Mr. *Vernon* does not give the reasons the Court went upon, but perhaps the Court looked upon the promise of the executor as a confession of assets." [And see *Reech v. Kenne-gal*, 1 Vez. 123. Amb. 67. and *Barrow v. Greenough*, 3 Ves. 152.]

(1) The first decree, 9th Feb. was by the *Lord Keeper*, and appeared to charge the real estate with the legacy of 40*l.* per ann. for five years by quarterly payments from the testator's death, and in case *Elizabeth Litchfield* therein named should not be living at the end of the said five years, then the said defendant was to pay the said 40*l.*

per ann. by quarterly payments for two years after the said five years according to the said testator's will; together with a quarter's bill due from the plaintiff's tutor at the University at the time of the testator's death. On the rehearing, 20th June, so much of the decree as charged the real estate with the payment of the annuity of 40*l.* per ann. was discharged, but it ordered the defendant to pay the testator's bill, and also, the said legacy of 40*l.* per ann. according to the said decree, without taking any account of assets; and also the plaintiff's costs, and the costs of the rehearing, Reg. Lib. 1704. B. fol. 486.

[ 507 ]

CASE 456.

CORPUS CHRISTI COLLEGE in Oxon versus PAROCH' de NAUNTON in Com' Gloucest'.

Issue at law directed upon a rehearing of exceptions taken to a decree made by commissioners of charitable uses, after that decree had been twice confirmed.

IN 1660, a decree was made by Commissioners of charitable uses against Mrs. *Oldys* for four acres of land in her possession, belonging to the parish of *Naunton* for repairs of the church, whereby she was decreed to deliver possession, and account for arrears.

Mrs. *Oldys* in 1681, took exceptions to the decree, and upon arguing thereof the same were over-ruled, and the decree confirmed.

Afterwards in 1690, the *College* came, and alleged that Mrs. *Oldys* was only their tenant, and prayed that they might be admitted to take exceptions to the decree; and they admitted so to do; and their exceptions were over-ruled, and the decree confirmed again. (2)

Upon a rehearing, before the *Lord Chancellor Sommers*, he directed a trial at law, whether four acres in the possession of Mrs. *Oldys* belonged to the parish of *Naunton* for repairs of their church.

Upon a rehearing, the *Lord Keeper Wright* confirmed the last order.

(2) On the subject of exceptions to a decree made by commissioners of charitable uses, vide *Mallet v. Trigg*, ante 1 vol. 42. *Man v. Ballet*, ibid.



CAVE DOMINA *versus* CAVE BART.

SIR *Roger Cave* by his will devised *four thousand pounds* to his son *Charles*, to be paid him at his age of *twenty-five*, and interest in the mean time, (1) and he thereout to have a maintenance. (2) *Charles* died under age, and the *four thousand pounds* being to be raised out of trust-estate the question was, whether the *four thousand pounds* should be raised and paid to his representative, or merge in the land for the benefit of the defendant, the heir. (3)

thereout; and directs the 4000*l.* to be raised out of a trust-estate. The son dies under twenty-five. This is a vested legacy, and shall go to his executors. Vol. 1. Case 201.

CASE 457.  
June 26.  
Eq. Ca. Ab. 268.  
pl. 6.  
A. devises  
4000*l.* to his  
son, to be paid  
at his age of  
twenty-five,  
and interest in  
the mean time,  
and he to have  
a maintenance

Decreed it should be raised, it being an interest vested in *Charles*; for although it was not payable until his age of *twenty-five*, yet it was to carry interest immediately.

And a question arising whether some pictures and glasses belonged to the heir or to the executor: the *Lord Keeper* was of opinion, that although pictures and glasses generally speaking would otherwise have been put, shall go to the heir, and not the executor.

Pictures and  
glasses put up  
instead of  
wainscot, or  
where wains-  
cot 4 Co. 64. a.

(1) At 5 *per Cent. per ann.* from his the testator's death, R. L.

(2) Not diminishing the 4000*l.*—*And if his son Charles should die before his said portion became due, his the said testator's will was, that the said 4000*l.* should be equally distributed amongst the rest of the testator's younger children by both marriages as therein mentioned, R. L.*

(3) The defendant the heir admitted that the 4000*l.* ought to be raised and paid, but the question was, whether the 4000*l.* should be paid with interest from the death of *Charles* or not; and whether it should be raised before the time when *Charles*, had he lived, would have attained *twenty-five*. The testator had married twice; by his first wife he had the defendant *Sir Thomas Cave* the heir, the said *Charles* and *Elizabeth* and *Penelope Cave*; and by the second wife, *Roger, Mary* and *Eleanor Cave*, and the decree as to the said 4000*l.* was, "that the sum of 800*l.* the share of *Elizabeth* (the wife of one *Ches-shyre*,) be paid together with interest, at 5 *per cent. per ann.* from the end of six months after the death of the said testator, the interest of her ori-

ginal portion them commencing;  
800*l.* the share of *Penelope Cave* an  
infant, to be paid together with in-  
terest from the time her original por-  
tion was to be paid, (which is *twenty-*  
*one* or marriage, but no mention of  
interest;) and that the sum of 2400*l.*  
being the amount of the respective  
shares of *Roger, Mary* and *Eleanor*  
*Cave*, (the children of the second  
marriage,) of *Charles's* said 4000*l.* be  
raised and placed out on security as  
the Court shall direct, and the interest  
thereof to be paid to the said *Sir*  
*Thomas Cave* the heir, for his own  
use and benefit until the said *Roger,*  
*Mary* and *Eleanor*, shall respectively  
attain the age of *twenty-one* years,  
or be married," (being the times  
mentioned in the will for the payment  
of their original portions respectively)  
and then their "respective proportions  
of the said 4000*l.* being 800*l.* a-piece  
to be paid to them respectively,"  
Reg. Lib. 1704, A. fol. 535. vide *Jackson v. Farrand*, ante 424. and cases  
cited in not. there. [*Poulet v. Poulet*,  
ante 1 vol. 204. and *Knight v. Knight*,  
2 S. & S. 490.] Also not. (1) *Duke of*  
*Chandos v. Talbot*, 2 P. Wms. 612.

**CAVE v. CAVE.** are part of the personal estate; yet if put up instead of wainscot, or where otherwise wainscot would have been put, they shall go to the heir. The house ought not to come to the heir maimed and disfigured. *Herlackenden's* case, wainscot put up with screws, shall remain with the freehold. (1)

(1) As to this the decree was "and as to the pictures and glass fixed in the wainscot of the late dwelling-house of the said *Sir Roger Cave* in *Stanford* aforesaid, and the coppers and furnaces there, the Court were of opinion that they were not to be taken as part of the personal estate of the said *Sir Roger Cave*, but were to go along with the said house, and be taken as part thereof, and do decree the same accordingly," Reg. Lib. ub. sup. vide on this head, *Beck*

*v. Rebow*, 1 P. Wms. 94. et vide further on the subject of fixtures, and the exception to the general rule of law held in the cases of landlord and tenant, and tenant for life or in tail, and the reversioner or remainder-man, *ex parte Quincy*, 1 Atk. 477. *Lawton v. Lawton*, 3 Atk. 13. and not. there p. 16. [*Penton v. Robart*, 2 East, 88. *Elwes v. Maw*, 3 East. 38. *Buckland v. Butterfield*, 2 Brod. & Bing. 54. and 4 Bayl. Moore, 440.]

[ 509 ]

CASE 458.

July 12.

A man has judgment for the penalty of a bond.

Though the principal and interest exceed the penalty; yet he shall recover no more than the penalty.

*Quære.*

### STEWART *versus* RUMBALL.

BRIGADIER *Villars* borrowed five hundred pounds of Sir *Walter Plunkett* on bond and judgment, in which the defendant was bound as surety, and forced to pay the debt. The Brigadier died, and the Lady *Grandison* his wife took administration, and afterwards married Lieutenant General *Stewart*. The defendant had received several sums in part, and got judgment against the plaintiff by default, and *Devastavit* returned for six hundred and seventy pounds, and the money levied in the Sheriff's hands.

The bill was to be relieved, paying what was due, discounting what had been paid by assignment of the brigadier's pay or otherwise; and the bond being of one thousand pounds penalty, and the debt and interest much exceeding that sum; a question arose, whether the first payments formerly made should be applied in the first place to pay the interest then in arrear, and afterwards to sink the principal; and so the plaintiff to have now the benefit of the penalty, to recover what remained due.

The Lord Keeper was of opinion, that including what had been paid, though at several payments, and many years since, that the defendant should have in the whole no more than the penalty of the bond, saying a man can have no more than his debt; and the penalty is the utmost of the debt. (1) *Tamen quære.*

(1) So decreed 7th Feb. preceding, Reg. Lib. 1704, B. fol. 220. and con-

firmed on a rehearing as above, Reg. Lib. *ibid.* fol. 458. Note the rehearing was on the part of the defendant, but the 10*l.* deposited with the Register

nevertheless ordered to be paid to him. Vide *Hall v. Thomas*, ante 1 vol. 350. and cases cited in not. there.

TARBACK & Al'. *versus* MARBURY & Al'.

[ 510 ]

*WILLIAM MARBURY* in 1672, made a conveyance to *Brook* and others of his estate, to the use of himself for life, with power to mortgage such part of the estate as he should think fit, (1) remainder to the trustees and their heirs in trust, to sell and pay all his debts. After this he becomes indebted by several judgments and statutes as likewise on bond and simple contract. The estate was all covered with mortgages, and the inheritance in *Brook & Al'*, the trustees, when the judgments were obtained, and statutes acknowledged; so that the creditors by judgment and statute, could not recover their debts by law.

CASE 459.  
Eq. Ca. Ab.  
148. pl. 3. S. C.  
nomine Far-  
back and  
Murbury.  
A. conveys  
lands to the  
use of himself  
for life, with  
power to mort-  
gage such part  
as he shall  
think fit, re-  
mainder to  
trustees to sell  
to pay all his  
debts, and  
afterwards be-

comes indebted by judgments, bonds and simple contract. This is fraudulent, as against the judgment creditors, and they shall not be compelled to take a satisfaction in average with the other creditors, having no notice of the settlement.

The question was, whether the creditors by judgment and statute should be preferred in point of payment, to creditors by bond and simple contract, or must submit to come in under the deed of trust, and content themselves to be paid in an average with the other creditors. (2)

The deed of trust is fraudulent as against creditors by statute and judgment.

*First*, Because *William Marbury* continued in possession, and kept the deed in his custody, and might produce it or not, as he pleased; and the creditors had no notice of it.

*Secondly*, Having reserved to himself a power to mortgage, and charge the estate with what sums he thought fit, he might have charged it to the full value, which amounts in effect to a power of revocation; and therefore fraudulent, as against creditors by statute and judgment. (3)

he pleased. This amounts in effect to a power of revocation, and therefore against creditors by judgment.

[ 511 ]  
A. makes a  
voluntary set-  
tlement, re-  
serving to  
himself a  
power to mort-  
gage what part  
fraudulent as

(1) The power was during his life to grant, alien, or otherwise dispose at his will and pleasure of all and every the premises comprized in the deed, or any part thereof, R. L.

(2) Vide *Child v. Stephens*, ante 1 vol. 101.

(3) Yet where a deed contains a

power to revoke, and to appoint new uses, in the deed appointing the new uses express revocation must be reserved, or it will be executed and irrevocable, and cannot be executed again, *Hele v. Bond*, Pre. Ch. 474. *Duke of Marlborough v. Godolphin*, 2 Vez. 77. *Lord Teynham v. Webb*, *ibid.* 211.

## DE TERM. S. TRIN. 1705.

*Zouch v. Woolston*, Burr. 1136, 1148. The cause in the principal case came on the 22d *June*, 1695. And the order was (*int. al.*) "That the deed of "trust of the 25th and 26th days of "Feb. 1672, should be brought in before the Master, and that he should "state the demands of the several creditors, and the nature of their several "debts, and the consideration thereof, "and the funds or estates on which "they are secured or charged, and the "dates of the securities, and in what "order of time they stand, and are "payable," Reg. Lib. 1694. B. fol. 597. There are many intermediate orders in the cause for commissions to prove bond debts, &c. Reg. Lib. 1697. B. fol. 11, 390. 1698. B. fol. 518. 1699. B. fol. 332, 426, 472, 563. 1700. B. fol. 324, 451, 548, 561. but afterwards 13th *Aug.* 1701, the cause came on again on exceptions to the Master's report of several of the bond debts taken by the co-heiresses of *Marbury*, and others, when it was ordered that the estates of *William Marbury* therein mentioned should be sold and the money to arise by such sale be applied in the first place in the payment of certain debts, other than statute and judgment debts, in the manner and order therein mentioned, and the consideration how and in what proportion the judgments, statutes, and bonds en-

tered into by *Wm. Marbury* should be paid, was reserved till after the Master should have reviewed and made his report, Reg. Lib. 1700. B. fol. 548. There are many entries afterwards, some in the name of *Tarback v. Hill*, but the editor has not been able to find any further entry relating to the claims of the statute, judgment, and bond creditors, except one, Reg. Lib. 1705. B. fol. 405. which does not however decide the proportions in which they were to be paid; but the inference seems clear, that in whatever proportions, or however to be paid, their respective claims were allowed as against the deed of trust. But where a creditor obtains judgment after the debtor has made a conveyance of his estate for payment of his debts, he shall be paid only in average, *Stephenson v. Hayward*, Pre. Ch. 310. So a bill of sale shall be preferred to a judgment, where the trust of the goods appears on the face of the bill of sale, and the particular purpose of the possession is also manifest, *Bucknall v. Royston*, Pre. Ch. 285. A voluntary conveyance is bad in equity against bond debts contracted afterwards, *St. Amand v. Lady Jersey*, A. 1717. 1 Com. 255. sed vide on the effect of voluntary conveyances in general as fraudulent, cases cited in not. (1) to *Fletcher v. Sedley*, ante p. 491.

[ 512 ]

DE

## TERM. S. MICHAELIS, 1705.

IN CURIA CANCELLARIÆ.

CASE 460. FRANKLYN & Al. versus COUNTESS of BURLINGTON.  
 October 31.  
 Eq. Ca. Ab. *RICHARD*, Earl of *Burlington*, by will devised, that the  
 200. pl. 7. furniture and pictures of his three houses at *Lanesborough*,  
 Pre. Ch. 251. S. C. *Burlington* and *Chiswick*, should go along with the three  
*A.* devises that the furniture and pictures of his three houses in *B. C.* and *D.* should go along with the three  
 houses. Adjudged the plate then at the three houses, passed by this devise.

houses; and wills, that his gilt plate belonging to his *chapel*, should be solely appropriated to that use.

FRANKLYN v.  
COUNTS OF  
BURLINGTON.

*Question.* Whether the plate then at the *three* houses should pass by the devise of his furniture and pictures; and adjudged that it should pass. (1)

(1) By the report of the above case in Pre. Ch. ub. sup. it appears that the plate was held not to pass, under circumstances and intention. *Note.* It appears also by that report to be a case of creditors. As to the general question, whether plate will pass by a bequest of household furniture, household goods, &c. it seems to be held that it will, vide the principal case, *dub. sed* vide *Lillcott v. Compton*, post 638. *Masters v. Masters*, 1 P. Wms. 420, 424, and cases cited in not. there, where said "if commonly made use of by the family;" and on that ground, *Nicholls v. Osborn*, 2 P. Wms. 419, and *Snelson v. Corbett*, 3 Atk. 369, appears to be decided; but that distinction done away

in *Kelly v. Pawlett*, Amb. 605. where the cases and principle of the doctrine stated and investigated, and the question must depend upon the particular circumstances, *ibid.* 610. *Porter v. Tournay*, 3 Ves. 311. where the doctrine on this head, in *Kelley v. Pawlett*, is fully recognized, and indeed it seems now to be so clearly settled, that if there are no rebutting circumstances, the words above mentioned will pass the plate, whether in ordinary use or not, that it is hardly necessary to mention the contrary cases; it appears however, to be determined *é contra* in *Jesson v. Essington*, Pre. Ch. 207, and the principal case as reported, Pre. Ch. ub. sup.

### THOMAS *versus* THOMAS.

[ 513 ]

CASE 461.

Nov. 6.

Eq. Ca. Ab,  
344. pl. 10.

S. C.

A man gives legacies to his children to be paid at 21 or marriage, and if any of them die before 21 or marriage, the legacy of such child to be disposed of to one or more of the children then living, in

*ALEXANDER THOMAS*, by will in 1691, devised *one thousand pounds a-piece* to his *six* younger children, payable at *twenty-one* or marriage, to be raised by trustees, by sale of lands appointed for that purpose; and his mind and will was, that if any of his children died before *twenty-one* or marriage, the *one thousand pounds* of the child so dying, should be disposed of to one or more of his children then living, in such manner as his executrix should think fit; and made his wife executrix. *Martha* one of the younger children dying unmarried and under age, the mother, the executrix, appointed *one thousand pounds* to be paid to her daughter *Mary*.

such manner as his wife, whom he made executrix, should think fit. One of the children died under age and unmarried; the mother appoints the whole legacy of such child to one of the other children. A good appointment.

*Question.* Whether such appointment should stand, and *Mary* have the *one thousand pounds*; or the other younger children come in for any share or proportion thereof.

*Lord Keeper.* The power special and particular, that the wife might dispose to one or more; and not like the cases of a general trust in the executrix to distribute amongst the amongst children at discretion; an unreasonable or indiscreet disposition may be controlled by a Court of Equity.

Where an executrix has a general power to distribute a sum of money

THOMAS v.  
THOMAS.

younger children at discretion; there an unreasonable and indiscreet disposition may be controlled by a Court of Equity: but this is *casus provisus*, it is expressly provided, that she might give all to one.

Decreed the appointment to stand. (1)

(1) And the 1000*l.* to be paid with interest from the time *Martha*, the deceased child, would have attained her age of twenty-one years, had she lived.

Reg. Lib. 1705. *B.* fol. 35. Vide *Gibson v. Kinven*, ante 1 vol. p. 66. and cases cited in not. p. 67, there.

[ 514 ]

CASE 462.

Nov. 6.

Eq. Ca. Ab.

249. pl. 2 S. C.

Administra-  
tion granted

to two, one dies, it survives to the other. But if a letter of attorney is made to two, and one dies, the authority ceases.

### ADAMS *versus* BUCKLAND.

AN administration granted unto *two*; the *one* dying, the question was, whether the administration ceases; like a letter of attorney unto *two*, *one* dies, the authority ceases.

*Lord Keeper.* It is not a bare authority; but rather an office. Administrators are enabled to bring actions in their own names, come in the place of executors, and the office survives. (2)

(2) There is merely an entry in a cause of this name of a dumurrer over-ruled, 7th and 16th November, Reg. Lib. 1705. *A.* fol. 28. And so settled, vide *Eyre v. Countess of Shaftsbury*,

2 P. Wms. 121. *Hudson v. Hudson*, Forr. 127. though decided contra in the Ecclesiastical Court. *Bowden v. Bowden*, cited per Talbot, Lord Chancellor, in *Hudson v. Hudson*, ub. sup.

CASE 463.

Nov. 8.

Eq. Ca. Ab.

50. pl. 6. S. C.

Award set  
aside for par-  
tiality in the  
arbitrators.

### BURTON *versus* KNIGHT.

THE submission was to *three* arbitrators, or any *two* of them. They all *three* had several meetings, and heard the parties and witnesses. *Hudson*, one of the arbitrators, not agreeing with the other *two*, they have meetings by themselves, at some of which *Knight* was admitted to be present; and whilst *Burton* was held in hand, that the time should be enlarged, or at least should have been further heard, the *two* arbitrators privately and without notice, either to *Burton* or to *Hudson* the other arbitrator, draw up and publish their award, and employed *Knight's* attorney to draw it up.

Decreed at the *Rolls* to be set aside, and the decree confirmed by the *Lord Keeper*, because the proceedings of the arbitrators were partial and unfair.

If a submission is to three or any two of them; and two by fraud or force exclude the other; that alone is sufficient to vitiate the award.

*First.* Where a submission is unto *three* or any *two* of them,



if *two* by fraud or force will exclude the other ; *that* alone is sufficient to vitiate the award.

BURTON v.  
KNIGHT.

*Secondly.* Nothing could be more partial than to let *Knight* be present at their private meetings, and admit him to be heard to induce alterations in their intended award, and at the same time industriously to conceal their meetings from *Burton* ; and although they met him, and had debates with him *three* days after they had determined to make their award ; yet mentioned nothing of it, and at last left it to *Knight's* attorney to draw up the award. (1)

Private meetings of the arbitrators with one of the parties, and admitting him to be heard to induce an alteration in the award, is partiality.

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(1) The ground expressly taken by the *Lord Keeper*, for confirming the decree at the *Rolls* is—"For that there appeared a designed and fraudulent exclusion of *Roger Hudson*, the third arbitrator, and that thereby the other two arbitrators, *Shallet* and

*Nash*, had assumed to themselves that power which was entrusted to all three." Reg. Lib. 1705. A. fol. 60. Vide on the head of awards, *Brown v. Brown*, ante 1 vol. 158. and cases cited in not. there.

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### FELLOWS *versus* MITCHELL and OWEN.

CASE 464.  
Ant. Ca. 453.

THE plaintiff *Fellows*, and the defendant *Owen*, were made trustees on the marriage of *Charles Mitchell* and his wife, and had a term for years lodged in them of the manor of *Long Braddy*, in trust to raise *two thousand pounds* to be placed out at interest, or invested in lands with the approbation of *Charles Mitchell*, and interest and profits to *Charles Mitchell* for life, and to the wife for life, and then to the children, as the wife should appoint ; and in default of an appointment, to them equally. Mr. *Pollixfen* advanced the *two thousand pounds*, with other monies, upon a mortgage of the estate ; the trustees both joined in an assignment of the estate, and in a receipt or an acquittance for the *two thousand pounds* : but it was paid, *one thousand pounds* thereof to the plaintiff, and the other *one thousand pounds* to his co-trustee, the defendant *Owen*, who is since become insolvent ; *Charles Mitchell* present and consenting to the payment.

The question was, Whether the plaintiff *Mitchell* should be liable to the *one thousand pounds* received by *Owen* ; and decreed he should not, and upon payment of the *one thousand pounds* received by him into court, to be indemnified. (2)

[ 516 ]

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(2) Reg. Lib. 1705. A. fol. 71. The insolvency of *Owen* is not stated ; but he did not appear, vide 1 P. Wms. 181. S. C. *Spalding v. Shalmer*, ante 1 vol. p. 301. and cases cited in not. p. 303. and in addition, *French v. Hobson*, 9 Ves. 103.

FELLOWS v.  
MITCHELL and  
OWEN.

It was admitted, that the precedents, that had been produced, as *Foster* and *Townly*, Cro. Car. 312. *Murrell* and *Pitt*, and *Widmore* and *Bond*, &c. were for making joint trustees, if they had joined in receipts and acquittances, to be answerable for each other; but *that* seemed to be against natural justice, unless they had so joined in receipt, as not to be distinguished, what had been received by one, and what by the other; there indeed of necessity they must both be charged with the whole; and that is from their own neglect or default: as if another man should blend his money with mine, by rendering my property uncertain, he loses his own. And there was a difference between joint-trustees and executors: executors may act separately, if they think fit; but if a trust estate is to be sold, the trustees must both join in conveying, and also in receipts; otherwise no one will purchase; and since one trustee has equal power, authority, and interest with the other, the one cannot in reason insist or desire to receive more of the consideration-money, than the other, or to be more trustee than his partner or co-trustee.

CASE 465.

Nov. 9.

Eq. Ca. Ab.  
306. pl. 8.

Lord of the manor of *A.* brings a bill for a rent of 8s. payable out of a copyhold, held of the manor of *B.* and though it appeared by the Rolls of the manor of *B.* from H. 8. to Car. 1. that

the copyhold was held of the manor of *B.* at the rent of 8s.; and though it was admitted by the plaintiff that the copyhold was held of the manor of *B.* and he had no other evidence of his title to the rent, but that it had been paid him near twenty years; yet the Court decreed him the arrears and growing rent, and denied the defendant a trial at law. By the rules of law, in cases of incroachment of rent, if the tenant makes but one payment of more than is due, he shall never go back from it.

[ \*517 ]

### STEWART *versus* BRIDGER.

THE defendant held a copyhold of the manor of *Ipeing*, at the rent of 8s. *per ann.* and it so\* appeared by the court-rolls of *Hen. 8.* of *Phil. & Mary*, and down to *Car. 1.* and in the 12 *Car. 1.* Mrs. *Heather*, the defendant's mother, was admitted, as of the manor of *Ipeing*. The plaintiff owner of the manor of *Dean*, which he purchased from Sir *Peter Bettesworth*, who formerly was owner of both manors, now brought his bill to compel payment of the 8s. *per ann.* and although he admitted, that the copyhold was held of the manor of *Ipeing*, (1) and not of the manor of *Dean*; yet the rent having

(1) The parties went into evidence, but this admission does not appear from the statement in the Register's Book, and the bill charges that the copyhold in question was held of the manor of *Dean*, and the words of the decree are—"Whereupon, &c. This

" Court declared that it appears that  
" there was an annual rent of 8s. paid  
" for the copyhold lands in question  
" to the plaintiff and his ancestors for  
" twenty-four years together and up-  
" wards, and no demand had in all that  
" time been made, of any annual rent

been paid to him for near *twenty* years, which was the only evidence he had to shew for it, the arrears and growing rent were decreed to him ; and a trial at law denied, though prayed by the defendant. The *Lord Keeper* saying, it was agreeable to the rules of law ; where in case of *incroachment* of rent ; if the tenant makes but one payment of more than was due, he shall never go back from it : and after a payment of *twenty* years, a grant of the freehold of the copyhold from the lord of the manor of *Ipeing* shall be presumed. (2)

STEWART v.  
BRIDGER.

“ out of the said premises, to be due or  
“ payable to the manor of *Ipeing*,  
“ which is a strong evidence of a se-  
“ verence of the said annual quit rent  
“ from the said manor of *Ipeing*, by  
“ some grant or conveyance ; and that  
“ the same is due and payable to the  
“ plaintiff and his heirs.” And then  
proceeds to order payment of six years  
arrears and payment for the future.  
Reg. Lib. 1705. B. fol. 89. Vide *Cocks*

v. *Foley*, ante 1 vol. 359.

(2) It is considered as a general principle that every fair presumption shall be made against a stale demand, and that as well at law as in equity, per *Master of the Rolls, Pickering v. Lord Stamford*, 2 Ves. jun. 583 ; and further as to the doctrine of presumption in general, vide *Parker v. Ash*, ante 1 vol. 256. *Fotherby v. Hart-ridge*, ante p. 21.

### PENDLETON *versus* GRANT.

IN a will the bequest was, *I give my household stuff, as brass, pewter, linen and woollen whatsoever, except a trunk under the chamber window.* The person, who made the will, was examined as a witness ; and swore the testator directed him to insert all his goods, except the trunk.

brass, pewter, linen, and woollen, except a trunk ; the person who drew the will was examined, to prove that the testator directed him to insert all his goods except the trunk, and was allowed to be read.

Case 466.  
Eq. Ca. Ab.  
230. pl. 2. S.C.  
better reported.

There being a devise in a will of all the testator's household stuff, as

*Question.* Whether he should be admitted to be read. Ordered to be read, as in case of a devise to son *John*, when he had *two* of the same name ; or if the devise had been of his trunk, when the testator had *three* trunks. (3)

(3) Vide on the head of admitting vol. p. 30. *Foster v. Munt*, ibid. 473, parol evidence, *Fane v. Fane*, ante 1 and cases cited in not. there respectively.

*Case* **WILLIAM DRAPER**, Esquire of **ST. JAMES**,  
*vs.* **DRAPER**, the Executors of **EDWARD**  
**DRAPER**, **GEORGE NATLER**, and **FRAN-**  
**CIS HARE**, Executors of **FRANCIS NAT-**  
**LER**, and **SIR ROBERT EDINGTON**,  
 Knight,

**HENRY** Earl of **CLARENDON**, **EDWARD**  
**LORD CORNBURY**, and **EDWARD HYDE**  
 an Infant, by his Guardian, **JAMES JEN-**  
**NINGS**, and **DANIEL SHORT**,

*A. has a first mortgage, and B. a second, and subject to these mortgages the estate is settled on C. for life, remainder on D. an infant. A. brings a bill to foreclose, though B. has not the like remedy over against D. who because of his infancy cannot be foreclosed; yet B. must redeem A. in six months, or be foreclosed.*

THE plaintiff had a mortgage on the manor of **Swallowfield**, for a term of five hundred years; the defendant a subsequent mortgage. The estate, subject to these mortgages, was settled on the Earl of **Clarendon** for life, remainder to the Lord **Cornbury**, now an infant of fourteen years of age.

*Per Cur.* Although the defendant cannot have the like remedy over against the Lord **Cornbury**, who, because an infant, cannot be foreclosed; (1) yet the defendant must redeem within six months or be foreclosed.

*Objected.* Some intervening incumbrancers not made parties. It was answered, the plaintiff might notwithstanding foreclose such defendants as he had brought before the court. (2)

*Objected.* The infant had a right to redeem all, and therefore he to have the first election, and to be first foreclosed. Not allowed. (3)

(1) The contrary is clearly held, *Booth v. Rich*, ante 1 vol. 295. and particularly *Bishop of Winchester v. Beavor*, 3 Ves. 314, 317.

(2) As to the practice of making all incumbrancers parties to bills for foreclosure, *Bishop of Winchester v. Beavor*, ubi sup. [And *Bishop of Winchester v. Paine*, 11 Ves. 194.]

(3) The bill stated, that by settlement, 11th Oct. 1670, between the defendant the Earl of **Clarendon**, of the first part, Lady **Flower**, his wife, of the second part, the Bishops of **Worcester** and **Ely**, and **Arthur Haughton** of the third part, and **Thomas Hen-**

**shaw** of the fourth part, the manor of **Swallowfield**, &c. were conveyed to the trustees of the third part for Lady **Flower**, till the marriage, then to Lord **Clarendon** and the Lady, and their heirs for her life, for her benefit, and after her decease to such persons and for such term and estate as she should by will or writing appoint, and in default to her right heirs; with a proviso for the Earl and his wife during their joint lives, to sell or lease to any persons for any term of years, or for such rents as they should think fit, and the trustees to stand seised to the use of every such person to whom such

sales or leases should be made. That by indenture, 1st *March*, 1672, the Earl and Countess mortgaged the premises to the Bishop of *Salisbury*, for 500 years, for securing 2500*l.* and interest. That by indenture, 30th *May*, 1685, this mortgage was transferred to *Robert Jennings*, and by indenture, 1st *June*, 1689, transferred to *Edmund Draper* and *Francis Nayler*, deceased, (each paying 1250*l.*) The plaintiff *Bedingfield* was a trustee for *Nayler*; it then stated, that Lady *Clarendon* and the Bishop of *Ely*, were dead, and that the Bishop of *St. Asaph* had become the surviving trustee: the bill was filed upon this mortgage to foreclose the defendants; all the defendants appeared and answered the bill, but the defendants the Earl of *Clarendon*, Lord *Cornbury*, and *Edward Hyde* did not appear at the hearing: the answer of the defendant *Short*, stated, that one *John Williams*, a scrivener, having money of the defendants to put out, said he was to put out money on mortgage of the defendant's the Earl's estate, and if the defendant would make up his money 1000*l.* it should be put out on such mortgage; that he paid *Williams* so much as would make up 1000*l.* and *Williams*, soon afterwards, gave him a deed (date not stated) between *Robert Bellamy* of the first part, *Williams* of the second part, and defendant of the third part, reciting a mortgage from the Earl and Countess to *Robert Jennings*, for 1500*l.* and to *Bellamy* for 2500*l.* and by which *Williams* and *Bellamy* declared that 1000*l.* part of *Bellamy's* 2500*l.* was the defendant's money, and that *Bellamy* should, as to 1000*l.* and interest, be possessed in trust for defendant; that *Williams* also gave defendant his bond as a further security: that 1295*l.* being due to him, by indenture, 15th *May*, 1699, between the Earl and Countess of the first part, *Thomas Apprice*, Esq. and *Williams* of the second part, *Bellamy* of the third part, *Robert Jennings* of the fourth part, and defendant of the fifth part, reciting that 3885*l.* was due to *Jennings*, and 1295*l.* to defendant. *Apprice* and *Williams*, by the direction of the Earl and Countess, for

better securing the money, and 165*l.* more advanced by *Jennings*, released the premises to *Jennings* and *Bellamy* for 2000 years, *sans waste*: and was willing to accept his money: *Jennings* by his answer said, he believed the premises were vested in the plaintiff for 500 years for securing 2500*l.* and interest; that by indenture, 15th *Jan.* 1694, between the Earl and Countess of the first part, *Robert Jennings*, defendant's father, and *Robert Bellamy* of the second part, *Apprice* and *John Williams* of the third part, *Susan Draper* and plaintiff *Bedingfield* of the fourth part; and by a fine, the Earl and Countess, in consideration of 4000*l.* paid by *Jennings* and *Bellamy*, conveyed to them the mortgaged premises, and the equity of redemption for 2000 years, subject to redemption on payment of the 4000*l.* and interest as therein mentioned; that 1000*l.* of this money was the defendant *Short's*; that there was such an indenture executed, dated 15th *May*, 11 *William*, as stated in *Short's* answer; that 9th *May* 1700, *Robert Jennings* assigned over to the defendant *Jennings* his eldest son, the mortgaged premises, and all his estate and interest therein for the remainder of the term of 2000 years; that the plaintiffs have a mortgage for other monies lent the Earl, of some shares in the New River, and some tenements at *Islington*, which are of much greater value than the plaintiff's debt, and prayed that the plaintiff might not be permitted to foreclose his equity of redemption, till the defendant *Hyde* should come of age, and that the mortgaged premises might be sold to the best advantage; under these circumstances, the decree (which is by default against the defendants the Earl of *Clarendon*, Lord *Cornbury*, and *Edward Hyde* on affidavit of service of subpoena on the Earl and *Hyde*, and on Lord *Cornbury's* clerk in court, in pursuance of an order) directs the account of what is due on the plaintiff's mortgage, and gives the first redemption to the defendants *Jennings* and *Short*, then to Lord *Clarendon*, then to Lord *Cornbury*, and then to *Edward Hyde*, (foreclosing each defendant in that order) and a day is given to *Edward Hyde* to

shew cause on coming of age. Lord *Cornbury* being abroad, the service of the subpoena to shew cause against the decree, on his clerk in court, is ordered to be good service. Reg. Lib. 1705. A. fol. 97. *Note*. It does not ap-

pear by the decree what estate Lord *Clarendon*, Lord *Cornbury*, and *Edward Hyde*, or any of them had in the premises; and *Bellamy* was not a party, though interested in the mortgage of 1695, and perhaps in that of 1699.

CASE 468.  
Eq. Ca. Ab.  
308. pl. 6. S. C.

*A.* puts his son apprentice to *B.* and gives bond for his fidelity, and takes a covenant from *B.* that he would, at least once a month, see his apprentice make up his cash. The apprentice embezzles the cash; and *B.* brings an action on the bond. On a bill by *A.* to be relieved, decreed that *A.* should be answerable for no more than *B.* could prove his servant had embezzled in the first month after the embezzlement began.

[ \*519 ]

### MOUNTAGUE & AL. EXECUTORS of EWER *versus* TIDCOMBE and HASKINS.

MR. *Ewer* gave the defendant, a *Spanish* merchant, six hundred pounds to take his son apprentice, and entered into a bond of one thousand pounds for his \* fidelity; and at the same time took a covenant from his master, that he should at least once a month, see his apprentice make up his cash. The defendant brought an action on the bond, alleging the apprentice had run out eight hundred and fifty pounds. Bill to be relieved against it.

On a bill by *A.* to be relieved, decreed that *A.* should be answerable for no more than *B.* could prove his servant had embezzled in the first month after the embezzlement began.

*Lord Keeper*. The meaning of the covenant is, that the defendant should not only see to the casting up of his cash, that it was right in figures, but to see the cash effectually made up; and therefore the defendant's pretence that his apprentice had inserted in his accounts goldsmiths or bankers notes, as remaining, when he had disposed of them, is no excuse; that the bond and the covenant ought to be taken as one agreement: that the plaintiff would be answerable, provided accounts were taken monthly; would be liable but for one month's embezzlement: and decreed the plaintiff should be answerable for no more than the master could prove the apprentice embezzled in the first month, when the embezzlement began. (1)

(1) With interest for what was so embezzled from three months after the said month in which such embezzlement was made. Reg. Lib. 1705. B. fol. 519. And *Note*, from the answer of the apprentice, who was made a

party, it appears that his master and his partner, *Haskins*, had been guilty of great negligence in trusting him and leaving his accounts unsettled, vide *Shepherd v. Beecher*, 2 P. Wms. 288.



TILLEY & Ux'. *versus* BRIDGE & Al'.

ON an appeal from the *Rolls* the question was, whether the plaintiff was entitled to relief for mesne profits received by the defendant, whilst a cause was pending in this court; and the defendants had an injunction.

CASE 469.  
November 29.  
Eq. Ca. Ab.  
285. pl. 2.  
Pre. Ch. 252.  
S. C.

A person is  
entitled to  
mesne profits,  
but from the time of his entry.

*Lord Keeper.* Not entitled to profits, but from the time of entry. If the plaintiff entered, he may recover at law, the injunction did not prevent an entry; (2) and dismissed the bill. (3)

An injunction  
does not pre-  
vent an entry.

(2) "What is said in *Vernon* as to the injunction not preventing the entry, certainly cannot be right." dict. per *Master of the Rolls*, *Curtis v. Curtis*, 2 Bro. Ch. Rep. 631.

(3) So (unless in the cause of a trust or an infant) the principal case, Pre. Ch. ub. sup. *Hutton v. Simpson*, post 724. Et vide *Bennet v. Whitehead*, 2 P. Wms. 645. [*Reynolds v. Jones*, 2 S. & S. 206.] It appears that in the principal case an order had been obtained by the plaintiffs, 17th October,

1703, in a former cause for a receiver, and that defendants had received the rents contrary to that order, but it was urged that if so, the plaintiffs might have prosecuted for the breach of that order on the foot of the old cause, and not have brought an original bill touching the same; and the decree on rehearing as above, but without costs, unless the plaintiffs troubled the defendants, then to pay costs. Reg. Lib. 1705. B. fol. 44. Et vide Reg. Lib. 1704. B. fol. 252. Entered *Tilly v. Lady Lee*.

BEST *versus* STAMPFORD.

[ 520 ]

JANE HARRIS having an estate of inheritance given to her by her first husband, on the marriage of *Brown*, her second husband, demised the premises to *Binks* for one thousand years; in trust to permit *Brown & Ux'*, to receive the profits during their lives, and the life of the survivor, then in trust for their children; but if *Brown* died in her life time without issue, then in trust for her, and her executors, administrators and assigns. *Brown* died, *Jane* married the defendant her third husband, and died. The plaintiff claimed the term as heir; the defendant, as husband and administrator to his wife.

CASE 470.  
Eq. Ca. Ab.  
274. pl. 10.  
Pre. Ch. 252.  
Salk. 154.  
2 Freem. 288.  
S. C. better  
reported.  
A woman who  
is *cestui que*  
*trust* of a term,  
having the in-  
heritance in  
her, marries  
and dies. The  
term shall at-  
tend on the in-  
heritance, and not go to the husband as administrator of the wife.

The question singly, whether a woman, who is *cestui que trust* of a term, and having the inheritance in her, and marrying a third husband, who survived her, the term should attend the inheritance, or go to the husband as administrator. Decreed for the plaintiff the heir. (1)

(1) The trusts were as follows:— "*Brown and Jane Harris*, after such "*In trust to permit the said Henry* "intermarriage, to receive the rents

BEST v.  
STAMPFORD.

*Holt* versus *Holt*, (2) *Percivall* and *Dowse*, *Pawlett* versus *Pawlett*.

“ and profits thereof for their lives,  
“ and the life of the longer liver of  
“ them, and after both their deaths  
“ then to permit the child or children  
“ of such marriage to receive the pro-  
“ fits, and in case they should have  
“ more than one child, then to permit  
“ them to receive the same in such pro-  
“ portions as the said *Jane* by her last  
“ will should direct; but in case there  
“ should be but one child, then to the  
“ use of such child, his executors or  
“ administrators, till the end of the said  
“ term; and in case the said *Henry*  
“ *Brown* should leave the said *Jane* a  
“ widow and without issue, then to the  
“ use of the said *Jane*, her executors,  
“ administrators, and assigns, during  
“ the remainder of the said term; but  
“ in case the said *Jane* should die with-  
“ out issue, leaving the said *Henry*  
“ *Brown* her surviving, then to the use  
“ of such person or persons, their ex-  
“ ecutors, administrators, or assigns, to

“ whom the said *Jane* should by will  
“ devise the same, after the death of  
“ the said *Henry Brown*, and for want  
“ of such devise to the use of the said  
“ *Henry Brown*, his executors, admi-  
“ nistrators and assigns for the re-  
“ mainder of the said term.” The wife  
of the plaintiff *Best*, was the heir at  
law of *Jane*; but the plaintiffs claimed  
in her right as devisee of the inheri-  
tance, she having survived *Brown* and  
made a will, and the decree was:—  
“ Whereupon, &c. this Court is satis-  
“ fied that the intent of the term of  
“ 1000 years, created by the said tri-  
“ partite indenture was to attend the  
“ inheritance of the said freehold mes-  
“ suage and premises devised to the  
“ plaintiff *Susannah*; and doth there-  
“ fore order and decree, &c.” Reg.  
Lib. 1705. A. fol. 97. Vide on this  
head *Tiffin v. Tiffin*, ante 1 vol. p. 1.  
and cases cited in not. there.

(2) [Stated, 1 P. Wms. 374.]

CASE 471.

JENNINGS & A<sup>r</sup> versus WARD & A<sup>r</sup>.

Dec. 3.

MASTER of the  
ROLLS.

*A.* lends money to *B.* on a mortgage, and takes a covenant from *B.* by another deed, that if *A.* should think fit, *B.* should convey to *A.* so much of the mortgaged estate, as should be of the value of the money lent at twenty years purchase. Covenant decreed to be set aside as unconscionable. A man shall not have interest for his money on a mortgage, and a collateral advantage besides for the loan of it; or clog the redemption with any by-agreement.

[\*521]

THE defendant *Ward* lends money to *Neale*, the *Groom Porter*, to carry on his buildings in *Cock* and *Pye* fields, and took a mortgage from him to secure sixteen thousand pounds with interest at 6l. per cent. and in \* another deed executed at the same time, took a covenant from *Neale*, that he should convey to the defendant, if he thought fit, ground rents to the value of sixteen thousand pounds, at the rate of twenty years purchase. The bill being to redeem, the defendant insisted on that agreement; but the *Master* of the *Rolls* decreed a redemption, on payment of principal, interest and costs, without regard to that agreement; but set aside the same as unconscionable. A man shall not have interest for his money, and a collateral advantage besides for the loan of it, or clog the redemption with any by-agreement. (2)

A man shall not have interest for his money on a mortgage, and a collateral advantage besides for the loan of it; or clog the redemption with any by-agreement.

(2) Vide *Willett v. Winnell*, ante 1 vol. 488. et vide *Powell*, Law Mort. 152, 158.

ELLIOTT *versus* DAVENPORT.

CASE 472.

Dec. 5.

THE testatrix by will reciting, that Sir *William Elliott* owed her *four hundred pounds*, gave and bequeathed that *four hundred pounds* to him, provided he out of the *four hundred pounds* paid several sums therein mentioned, to his wife and children; and the rest and residue she freely and absolutely gave to Sir *William Elliott*; and willed and required the executor to deliver up the security immediately upon her death, and not to claim or meddle with the debt or any part thereof; but to give such release or discharge, as Sir *William*, his executors, or administrators should require or think fit. Sir *William* died in the life-time of Mrs. *Davenport* the testatrix. security, and not to claim any part of the debt, but to give such release as *B.* his executors, &c. should require. *B.* dies in the life-time of the testatrix. Decreed the legacies given out of the 400*l.* to be paid, and the residue of the debt to be paid to the executor.

MASTER of the  
ROLLS.

Eq. Ca. Ab.

296. pl. 1. S. C.

*A.* devises to*B.* 400*l.* which

he owed her,

provided that

thereout he

paid several

sums to his

wife and chil-

dren; and the

rest she freely

gave to him

and directs her

executor to de-

liver up the

*B.* his executors,

legacies given

Whether the *four hundred pounds* was released, or was a lapsed legacy was the question.

It was admitted, if she had only said, *I forgive such a debt, or that my executor shall not demand it, or shall release it, that* would have been a good discharge of the debt, although Sir *William* died in the life-time of the testatrix.

not demand it, or shall release it, this is a discharge of the debt, though the debtor dies in the life-time of the testator.

[ 522 ]

If a person

says in his will

I forgive such

a debt, or my

executor shall

And it was also admitted, that the money directed to be paid by Sir *William* to his wife and children, out of the debt of *four hundred pounds*. will stand good, as well devised, although Sir *William* died before the testatrix.

And it was likewise admitted, that if a debt is mentioned to be devised to the debtor, without words of release or discharge of the debt; if the debtor died before the testator, *that* will be a lapsed legacy, and the debt will subsist.

charge of the debt, and the debtor dies in the life of the testator; the legacy is lapsed, and the debt subsists.

But if a debt

is devised by

will to the

debtor, with-

out words of

release or dis-

charge of the debt,

Now in this case, the *first* clause in the will imports a devise only; and the latter clause amounts to a release and discharge of the debt; and the executor is enjoined from receiving it. The only question is, whether the latter clause is not to be so coupled to the former, as to be *ancillary* and dependant upon it; viz. if the legacy took effect, then the executor to release, and not to claim the debt as a consequence of it; and the Court was the rather induced to be of that opinion, because it appears by the devise over of part of the debt to the wife and

ELLIOTT v.  
DAVENPORT.

children, it was not the intent of the testatrix, that the will should work by way of release or extinguishment of the debt.

Decreed the plaintiff to be allowed what was devised over, and to pay the residue of the debt to the executors. (1)

(1) Vide 1 P. Wms. 83, S. C. and note there. [*Toplis v. Baker*, 2 Cox. 118. *Maitland v. Adair*, 3 Ves. 231.] And in addition, where legacy given, legatee paying an annuity, legatee dies in the lifetime of testator, the annuity nevertheless subsists, and shall be a charge upon the residue, all lapsed legacies, whether pecuniary or specific

falling into the residue, *Oke v. Heath*, 1 Vez. 141. *Jackson v. Kelly*, 4 Vez. 286. sed vide, as to the application of the rule to real estates, *Goodright v. Opey*, 8 Mod. 123. *Wright v. Horn*, ibid. 221. and to prevent a lapse the intention ought to be specially penned, the principal case, 1 P. Wms. 86.

[ 523 ]

CASE 473.

Dec. 11.

MASTER of the  
ROLLS.

Eq. Ca. Ab. 8.  
pl. 4. S. C.

Lands are limited by marriage settlement, upon failure of issue male, to the daughters of the marriage and their heirs, until the next remainder-man should pay them 3000*l.* there being four daughters only, they entered. Decreed at the Rolls they should account for the profits; and that the

BLAGRAVE *versus* CLUNN & Ux', & Al'.

*EDWARD LOYD* on his marriage settled several lands to the use of himself for life, as to part to his wife for jointure, remainder to first and other sons of that marriage; and in default of issue male, to the daughter and daughters of that marriage, and their heirs; until the remainder-man, to whom the estate was to go, according to the limitations of that settlement, should pay and satisfy unto the daughter *three thousand pounds*, remainder to the heirs of his body, &c. He had issue a son by that marriage, and *four* daughters. The son died in the life-time of *Edward Loyd*, leaving a daughter: he (1) afterwards suffered a common recovery, and made a settlement upon that marriage, and thereby charged the premises with other lands with the raising *three thousand pounds* more. The plaintiffs were creditors by judgment, and their bill was to be let into a satisfaction, subject to those charges of *three thousand pounds*, and *three thousand pounds*; and in exoneration thereof, to have an account of the rents and profits.

rents should be applied first to pay the interest, and then sink the principal; as in case of a common mortgage. Decree affirmed by the Lord Chancellor, with this variation, that the principal should not be sunk, till a *third* part was raised above the interest; and so again, when another *third* part was raised.

For the defendants, the daughters, it was to be considered, that they were as purchasers under the marriage settlement; and as such were entitled to retain the possession, and to receive the rents and profits to their own use without account, until the remainder-man, or those who had the next estate or in-

(1) i. e. *Edward Loyd*, the father.

terest, should think fit to determine their estate by the payment of the *three thousand pounds*, at one entire payment. BLAGRAVE v.  
CLUNN.

But the *Master* of the *Rolls* decreed the defendants to account for the rents and profits, to be applied in the first place to pay the interest of the *three thousand pounds*, and then to sink the principal, as in the case of a common mortgage. [ 524 ]

Upon an appeal to the *Lord Chancellor*, the decree was affirmed with this alteration, that the principal should not be sunk by small payments; but when a *third* part was raised beyond all interest then due, it should go to sink the principal; and so again, when any other *third* part was raised, &c. (1) Post Ca. 521.

(1) The settlement in this case, appears by the statement in the Register's book, which however is rather confused, to have been made 5th June, 1656, by a Sir *Edward Loyd*, the father of the *Edward Loyd*, who appears to be the settlor, according to the printed report, on the marriage of the said *Edward* his son, and was made between the said Sir *Edward* and Dame *Ursula* his wife, *Edward* the son and *Dorothy* his wife, the mother of the daughter, defendant of the 1st part; *Thomas Broker* and *Dorothy* his wife, of the 2d part; *John Jones* and others of the 3d part; and *Thomas Davies* of the 4th part; whereby it was agreed, that the lands therein mentioned should be settled as to the 3000*l.* as in the printed report: and after payment thereof, or in case of failure of daughters, then to the issue male of the said *Edward Loyd* the son by any other wife, and in default of such issue, to the younger sons of the said *Edward Loyd* the son in tail male, and for default of such issue, to the right heirs of the said Sir *Edward*. Sir *Edward Loyd* and *Ursula* his wife, and *Dorothy* the wife of *Edward* the son, all died in the lifetime of the said *Edward* the son, who had issue by the abovementioned marriage, one son *Edward* and four daughters, viz. *Mary*, the wife of the defendant *Price Clunn*, *Dorothy*, the wife of the defendant *John Loyd*, *Jane*, the wife of the defendant *Humphry Loyd*, and *Ursula*, the wife of the defendant *Richard Wilson*: then *Edward*, the son of that marriage and grandson of the original settlor died, leaving issue

a daughter *Catherine*, the wife of the defendant *Thomas Clunn*, who claimed as heir at law by the said settlement in 1656, as also by a subsequent fine levied in 1684, by *Edward Loyd* his grandfather, the son of the original settlor.—Then the said *Edward* the son of the original settlor married a second wife, by whom he had issue the defendant *Edward* the infant; the second wife then died, and the said *Edward* the son of the said original settlor married a third wife *Catherine*, the eldest daughter of Sir *John Wittwrong*, Bart. and by indentures of lease and release, dated 30th and 31st days of *March*, 1687, and in consideration of 3000*l.* paid to the said *Edward Loyd* the son of the original settlor, the intended husband, for the portion of the said *Catherine*, he the said *Edward Loyd*, did grant and convey to the said Sir *John Wittwrong*, and his heirs, (after the determination of a term of 99 years therein mentioned,) certain manors, &c. to the use of the said *Edward*, the son of the said original settlor, the intended husband for life; remainder to *Catherine*, the intended wife for life, for her jointure; remainder to their sons in tail male successively; remainder to the defendants, *James Wittwrong*, and *Sam. Gibbs*, and their executors, &c. for 500 years upon trust, to raise portions for the daughters of that marriage out of the rents and profits, or by sale of any part thereof, (certain parts thereof excepted,) and for default of issue by the said *Edward* and *Catherine*, then to raise out of the premises (except as before excepted,) by



sale or otherwise 3000*l.*; 2000*l.* whereof to be paid to the said Sir *John Wittwrong*, his executors, administrators, and assigns; and 1000*l.* residue thereof, as the said *Catherine* should appoint. And as for a certain farm called *Deleven Farm*, and other lands therein mentioned, to the use of the said *Edward* the son, the intended husband, for life, remainder to trustees and their heirs, upon trust, to sell the same, and out of the monies to arise by such sale, to pay all such sums of money as should be then due to all and every the daughter and daughters of the said *Edward Loyd* the son, the intended husband, by *Dorothy* his first wife, pursuant to the said deed of settlement of the 5th *June*, 1656; and after payment thereof, and indemnifying the said *Catherine* as to her jointure, in trust for the heirs of the said *Edward Loyd*.—The marriage took effect, but there was no issue, and the 3000*l.* mentioned in the said settlement 30th and 31st *March*, 1687, was appointed as in the Register's Book mentioned. *Catherine* then died, and afterwards *Edward Loyd*, the son of the original settlor of 1656, having become indebted to the plaintiff, the bill then charged, and it appears that the defendants the daughters, and their husbands were, and had been ever since the death of the said *Edward* the son of the said original settlor, in possession of the premises comprised in the deed of settlement of 5th *June*, 1656, and in the receipt of the rents and profits thereof, and that the defendants *Wittwrong* and *Gibbs*, were and had been ever since the death of the said last mentioned *Edward Loyd*, in possession of the premises appointed to be sold by the said deed of settlement of 30th and 31st *March*, 1687; and the prayer of the bill was, for discovery of the settlements and fines, how long defendants had been in possession, an account of rents and profits, and that the estates agreed to be sold might be sold, and that the money arising thereby, might be applied to pay off all the said incumbrances, and the residue to pay all just debts. The answers of the defendants make no material alteration in the above statement, and set up such defence as stated in the printed report, and insist that the rents and profits re-

ceived, and to be received, should go in lieu of interest of 3000*l.* and the decree was, "whereupon, &c. the Court declared that the clause in the deed of settlement 5th *June*, 1656, for the daughters having of the profits of the premises till the 3000*l.* be paid them, is no penalty, but a security for the payment of the said 3000*l.*" The decree then proceeds to refer it to the Master to take an account of what is due to the plaintiffs *Blaggrave* and *Hamilton* for principal and interest on their judgments, and for their costs; and also, of what was due to the daughters of the said *Edward Loyd*, the son of the original settlor, and their husbands of the 3000*l.* that was settled by the said deed of settlement of 5th *June*, 1656, and to compute interest for the same, from the death of the said *Edward Loyd*, the son of the original settlor, discounting thereout what they or any of them, or any other for them have from time to time received thereout, or otherwise been satisfied in the life-time of the said *Edward Loyd* their father, or since his death, in part of the said 3000*l.* portion; and the defendants the trustees were to account for the rents and profits received by them, and the money remaining in their hands on such account in the first place to be applied to pay what the said Master shall certify to be due for principal and interest to the said defendants the daughters and their husbands, as aforesaid. And then it was ordered and decreed that the said farm called *Deleven Farm*, and other the premises limited by the aforesaid deed of settlement of the 31st *March*, 1687, to be sold and the monies arising by the sale thereof, to be applied to pay off what shall appear to be due of the said 3000*l.* by the said deed of settlement of the 5th *June*, 1656, and the interest thereof; and afterwards of the said 3000*l.* by the said deed of settlement of the 31st *March*, 1687. And in case the said money remaining in the said trustees hands, and the money arising by such sale shall fall short to pay off what shall be due of the said sums of 3000*l.* and 3000*l.* by virtue of the said settlements, and the interest thereof, then it was further ordered and decreed, that the said term of 500 years limited by



the said deed of settlement of the 31st *March*, 1687, or so much thereof as should be necessary, should be sold, and the money raised by such sale to be paid and applied pursuant to the said settlement of the 31st *March*, 1687; and if any overplus, same to be applied to pay plaintiffs *Blagrove's* and *Hamilton's* debts, and the other defendants forthwith, and the heirs, viz. the defendants *Thomas Clunn* and *Catherine* his wife, and *Edward Loyd*, who were then infants, on attaining their age, to join in such sale, or within six months shew cause to the contrary. Reg. Lib. 1705. A. fol. 91.

COMES BRISTOL & Al' Creditors of Sir WILLIAM  
BASSETT versus HUNGERFORD & Al'.

[ 524 ]

CASE 474.

Decemb. 17.

LORD KEEPER.

Eq. Ca. Ab. 142

pl. 5. S. C.

A. in 1687,

lends 1000*l.* to

B. on a judg-

ment, at which

time there was

a term of years

attendant on

the inherit-

ance, which

had been as-

signed to three

trustees. In

1688, B. and

one of the

trustees assign

the term to C,

for securing

1000*l.* A. shall

have the benefit of this assignment, and be paid before C.

SIR *William Bassett* in 1687, borrowed *one thousand pounds* of the Lady *Biddulph* on a judgment; at that time there was a term of *five hundred years* kept on foot, and assigned to *Neville*, Lady *Biddulph*, and *Simon Biddulph* to attend the inheritance. Afterwards in 1688, Sir *William Bassett*, and *Neville*, one of the *three* trustees assigned the term to *Windham* and *Millington*, for securing *one thousand five hundred pounds* borrowed of them by way of mortgage; and afterwards Sir *William Bassett*, together with the *two* other trustees, viz. the Lady *Biddulph* and *Simon Biddulph*, assign the term to *Garrett*, in trust for the better securing the *one thousand pounds* due to the Lady *Biddulph*.

money then borrowed of him. A. having notice of this assignment, gets an assignment of the term from the *two* other trustees to D. in trust for the better securing his

It was now made a question, whether *Windham* and *Millington* should have the benefit of the whole term, or only of a *third* part, there being but *one* of the *three* trustees that joined in the assignment; and it was insisted, that although but *one third* part passed, as to the legal estate; yet the *cestui que trust* could make a good assignment in equity; and the Lady *Biddulph* ought to be bound thereby, because, she lent her money on the credit of the judgment, and before the assignment to *Garrett* had notice of the assignment to *Windham* and *Millington*.

[ 525 ]

*Lord Keeper.* Although there is a term attendant on the inheritance; yet a judgment is an equitable lien on the inheritance, and consequently affects the term; and therefore the Lady *Biddulph* having got the legal estate, as to *two thirds* of the term in *Garrett*, in trust of herself, shall have the benefit thereof, although she had notice of the mortgage and assignment made by the *cestui que trust* with one of the trustees, and the mortgage-term being created in 1679, all mesne incum-

**BRISTOL v. HUNGERFORD** branches were postponed to the debt of the Lady *Biddulph*, and of *Windham* and *Millington*. (1)

Mortgages are not to be preferred to other real incumbrances ; In this case *first* decreed at the *Rolls*, mortgages were to be paid in the first place, and then judgments, and then recognisances, &c. but upon an appeal to the *Lords*, it was adjudged, but mortgages, judgments, statutes and recognisances, shall be paid according to priority.

(1) As to Lady *Biddulph's* claim, the words of the decree are, " His Lordship declared that the judgment confessed by the said Sir *William Bassett* to the said Lady *Biddulph* in *Michaelmas* Term, 1687, for 2000*l.* which is prior to the said *Windham* and *Hill's* (the executor of *Millington*) demand, is a lien on the said lease attendant on the inheritance, and that as far as the penalty of the judgment extends, the executors and assigns of the said Lady *Biddulph* ought to be paid what is due to her precedent to the mortgage, and that what the penalty of the said judgment will not extend to pay, must be paid out of and by the said assigned mortgage, as it stands in priority as to two thirds thereof, and also declared that the right of the said mortgage, and money arising by sale of the said two farms (the premises comprised in the term of 500 years mentioned in the printed report) as to one third of the money is in the said *Windham* and the executors of the said *Hill*, and as to the other two thirds is in the said *John Garrett* trustee for the said Lady *Biddulph*, her executors and assigns ; and if any judgment shall appear prior to the Lady *Biddulph's* judgment in 1687, and subsequent to the term granted on the 10th June, 1699, the Lady *Biddulph* is to have a priority, and take place as to two thirds thereof." As to *Symonds's* security, there appears to have been two demands made by his widow and executrix, " one for the sum of 570*l.* principal money, lent by *William Symonds* her late husband, to the said Sir *William Bassett* in Sept. 1690 ; secured by an indorsement on a mortgage formerly made by the said Sir *William Bassett*, of the Manor or Lordship of *Norton Malereward*, 20th March, 1687, and the other as

" assignee of a judgment from the executors of *James Dobson*, who were the assignees of one *Chs. Broome*, who was administrator of one *Henry Broome*, on the pleadings mentioned for the sum of 1000*l.* debt, and 3*l.* 10*s.* 8*d.* costs, which said assignment of the said judgment, the said Mrs. *Symonds* obtained *pendente lite*." And as to these, the decree declared, that as to what is due to the said Mrs. *Symonds* as assignee of the executors of *Dobson*, she ought to have the benefit of the said judgment of 1003*l.* 10*s.* 8*d.* from the time the said judgment was obtained in Trin. Term. 1678, for securing and satisfying what was due to her for principal and interest as assignee of the executors of the said *Dobson*, of a certain mortgage in the pleadings mentioned to be made to him 25th Dec. 1679 ; but as to what is due to her for principal and interest as executor of her said husband *William Symonds*, she the said Mrs. *Symonds* ought not to have the benefit of the said judgment, but only of the security which her husband had, dated 20th March, 1687, and doth order the same accordingly." Reg. Lib. 1705. A. fol. 513. Note, in this case one *Edward Hoblin* was in Court at the hearing of the cause, and alledged that he together with his brother *Thomas Hoblin* were creditors of the said Sir *William Bassett* by mortgage, and were no parties to the suit, and praying the benefit of the decree. It was thereupon ordered that the said *Edward* and *Thomas Hoblin*, and all other the creditors of the said Sir *William Bassett*, should be at liberty to come in and prove their debts before the Master, and have the benefit of the decree, they contributing their proportions to the expences of the suit, R. L. ub. sup. fol. 513, near the bottom.

that mortgages were not to be preferred to other real incumbrances: but mortgages, judgments, statutes and recognisances, should take place according to priority, and as they stood in order of time. (2)

BRISTOL v.  
HUNGERFORD.

In this case, *Simonds*, a *Puisne* incumbrancer after the bill brought, and after the first decree made, and in truth after the report, gets an assignment of an old judgment and mortgage, hoping thereby to gain a preference to his debt.

*Per Cur.* The assignment obtained by him being after the decree made, he shall not profit by it, or change the order of payment; but must come in according to the time of his own incumbrance, without regard to the old judgment and mortgage, which he got in after the decree and report. (3)

[ 526 ]

(2) The appeal was by the judgment creditors, 26th Feb. 1703, and the judgment in Dom. Proc. thereon was, that the said decree so far as it had been executed, should not be set aside or opened, but as to the money then remaining undivided pursuant to the decree, the appellants should be let into a satisfaction of their debts according to the priority of their several securities, and also that the respondents should be at liberty to contest the appellants or any other of the creditors debts, in the Court below, before the Master if they should think fit, and so far the said decree was opened and reversed, R. L. fol. 514, the middle. Vide also, 1 Bro. P. C. 66. entered *Symmes v. Symonds*.

The principle seems to be, that the first incumbrancer who has fairly acquired the legal estate, shall be preferred to the second, and so on, vide *Turner v. Richmond*, ante p. 81. *Berrisford v. Milward*, Barnard. Rep. 101. 2 Atk. 49. S. C. Powell, Law Mort. 461. et seq. [And see *Brace v. Marlbro*, 2 P. Wms. 491, and notes there.]

(3) So after a decree, *Wortley v. Birkhead*, 2 Vez. 571. But it seems clear, that where three mortgagees, the last may by getting in the first incumbrance, though *pendente lite*, protect himself against the second, *Hawkins v. Taylor*, ante 29. *Turner v. Richmond*, ante 81. *Robinson v. Davison*, 1 Bro. Ch. Rep. 63.

### LEONARD versus Com' SUSSEX.

CASE 475.

THE Countess of *Sheppey* (*inter alia*) devised her real and personal estate to Sir *Charles Cotterell & al'*, and their heirs, (4) for payment of debts and legacies, (5) and afterwards to settle the remainder; and what should remain unsold, a moiety to her son *Henry*, and the heirs of his body by a *second* wife; and in default of such issue, to her son *Francis*, and the heirs of his body; the other moiety to *Francis* and the heirs of his body, with remainders over; taking special care in such settlements over; and directs, that special care should be taken in the settlement, that it should never be in the power of her son to dock the intail. Decreed the son should be only tenant for life, without impeachment of waste, and should not have an estate-tail conveyed to him.

Eq. Ca. Ab.  
12. pl. 8. as to  
the account  
184. pl. 26. S.C.  
*A.* devises lands  
to trustees to  
pay debts and  
legacies, and  
then to settle  
the remainder  
on her son *B.*  
and the heirs  
of his body,  
with remain-

that it should  
never be in the power of her son to dock the intail. Decreed the son should be only tenant for life, without impeachment of waste, and should not have an estate-tail conveyed to him.

(4) To be sold.

(5) So far as her personal estate should fall short, R. L.

LEONARD v.  
SUSSEX.

ment, that it never be in the power of either of my said sons *Francis* or *Henry*, to dock the intail of either of the said moieties, given them as aforesaid, during their, or either of their life or lives.

And whether *Francis* and *Henry* were intitled to have an estate-tail conveyed to them, or only an estate for life, was the question. The defendant the Lord *Sussex*, having purchased from *Henry*, and his younger brother, who was the plaintiff's father.

[ 527 ]

The sons must be made only tenants for life, and shall not have an estate tail conveyed to them, but their estate for life shall be without *impeachment of waste* : (1) and *first*, because here an estate is not executed, but only executory ; (2) and therefore the intent and meaning of the testatrix is to be pursued. She has declared her mind to be, that her sons should not have it in their power to bar their children ; which they would have if an estate-tail was to be conveyed to them : and took it to be as strong in the case of an executory devise for the benefit of the issue, as if the like provision had been contained in marriage-articles (3) ; but had she by her will devised to her sons an estate-tail, the law must have taken place, and they have barred their issue, notwithstanding any subsequent clause or declaration in the will, that they should not have power to dock the intail.

*A* is tenant for life of a trust, remainder to his sons. *A*. before a son born, brings a bill against the trustees, and an account is decreed, and afterwards taken. This account shall bind the sons ; for all persons, that could be made parties, were parties in the suit.

(1) Remainder to their respective sons in-tail general, remainder to their respective daughters in-tail general, with other remainders over, according to the will of the said Lady *Sheppey*, Reg. Lib. 1705. B. fol. 117.

(2) Vide *Papillon v. Voice*, 2 P. Wms. 478, where per *King*, Lord Chancellor, "The diversity is where "the will passes a legal estate, and "where it is only executory, and the "party must come to this Court, in "order to have the benefit of the will, "that in the latter case the intention "shall take place, and not the rules of "law." [*Lincoln v. Newcastle*, 12 Ves. 227. *Stratford v. Powell*, 1 Ba. & Be. 1. *Green v. Stephens*, 17 Ves. 64.

*Blackburn v. Stables*, 2 V. & B. 367. *Synge v. Hales*, 2 Ba. & Be. 499. *Jervoise v. Northumberland*, 1 J. & W. 559. *Deerhurst v. St. Albans*, 5 Mad. 232.] Et vide in confirmation of this doctrine, *Seale v. Seale*, 1 P. Wms. 290. Pre. Ch. 421. S. C. Lord *Glenorchy v. Bosville*, Forr. 4. *Roberts v. Dixwell*, 1 Atk. 607. *Baskerville v. Baskerville*, 2 Atk. 281. *Heneage v. Hunloke*, *ibid.* 456, and cases cited in not. there respectively.

(3) Vide *Bale v. Coleman*, post 670. 1 P. Wms. 142. S. C. and particularly as to the distinction laid down between the construction of marriage articles and wills in such cases, Note (1) *Papillon v. Voice*, 2 P. Wms. 474.

although he was but tenant for life, and the now plaintiff claims not under him, but *paramount* him by the will; yet the plaintiff or any issue of *Henry* not being in *esse* at that time, all persons were parties, that could then be made parties; and therefore decreed *that* account to stand, and not to be ravelled into.

LEONARD v.  
SUSSEX.

DE

TERM. S. HILLARII, 1705.

[ 528 ]

IN CURIA CANCELLARIÆ.

CHADWICK & Ux'. *versus* DOLEMAN Mil'.

CASE 476.  
JAN. 25.

SIR *Thomas Doleman*, the father, on his marriage, settled divers manors and lands to the use of himself for life; and then, as to part thereof, to his wife for her jointure, remainder to trustees in trust, that if there should be both sons and daughters of the marriage, then the trustees were within *six* months after his decease to enter on all, not settled in jointure; and by profits to raise any sum, not exceeding 2000*l.* for payment of debts, as Sir *Thomas* should appoint; (1) and should also raise 4000*l.* for younger childrens portions, (2) in such proportions, as Sir *Thomas* should appoint; and in default of an appointment, to be equally divided amongst them; (3) remainder to first and other sons in tail.

LORD KEEPER.  
Eq. Ca. Ab.  
343. pl. 8. S.C.  
*A.* by marriage-settlement is tenant for life, remainder to trustees, to raise 4000*l.* for younger children's portions, as *A.* should appoint; remainder to his first, &c. sons in tail. *A.* appoints the 4000*l.*

younger children, and particularly 2600*l.* thereof to *B.* his *second* son. The eldest son dies *six* years afterwards, whereby *B.* became eldest son, and intitled to the whole estate after his father's death; and thereupon *A.* makes a new appointment of the 2600*l.* to one of his daughters. Decreed the last appointment to take place; the first being made to *B.* upon a tacit or implied condition, that he should not become the eldest son.

(1) Not for debts, but merely as Sir *Thomas* should appoint.

(2) To be paid to them after the death of Sir *Thomas*. R. L.

(3) And paid to them at their respective ages of twenty-one years; and

if no younger children, then the whole 6000*l.* to be disposed of by Sir *Thomas*, in case his eldest son should not marry and take a wife with his full consent. R. L.



CHADWICK v.  
DOLEMAN.

person. He was a person capable to take at the time of the appointment made, but that was *sub modo*, and upon a tacit or implied condition, that he should not afterwards happen to become the eldest son and heir; so that he had as it were only a defeasable capacity in him, and decreed it for the plaintiff; (1) and added, that although the appointment had been made in consideration of marriage, it would have been the same thing. (2)

(1) This appears somewhat like the case cited from *Fitzherbert*, in *Hills v. Brewer*, ante p. 104. where a man having appointed his trustees after his death to convey to his daughter, and afterwards had a son, the opinion was, that the conveyance should be made to the son.

(2) The decree, as stated in the Register's Book is substantially as above, and is in the following words:—  
“Whereupon, &c. his lordship declared that the said first appointment of the 15th March, 1686, was not in its nature an absolute appointment, and therein differed from the cases now cited, where absolute voluntary deeds of appointment were made neither defeasible by express words nor by implication, but that in this case the said appointment was in its nature, and by implication, defeasible, for that Sir *Thomas Doleman*, the father, had not by the deed of settlement in 1651, power to appoint any part of the 4000*l.* to any child that should have the land immediately upon the decease of Sir *Thomas Doleman*, the father, under the settlement; nor could such child who should, in such manner, take the land, and consequently was not a younger child within the intent of the settlement, be capable of taking, at the same time, any part of the said money charged on the land for the benefit of younger children, and therefore, though the defendant, Sir *Thomas*, to whom the first appointment was made, was a person, at the time, capable of taking under that appointment, yet it was a defeazible capacity only, (*viz*) if he should not become the eldest son and heir of his father in his father's life time, and the real estate should not come to

him immediately upon the death of his father, by virtue of the settlement, and that by his afterwards so becoming the eldest son and heir apparent in the life time of his father within the intent of the settlement, and having the real estate come to him immediately on his father's decease under the settlement; that defeazance happened, and thereby the said first appointment to him became void, and Sir *Thomas*, the father, had power to make the subsequent appointment of the 27th January, 1693, which, therefore, ought to take place, and if the said first appointment had been expressed to be upon consideration of the defendant Sir *Thomas's* marriage, yet it would have been but conditional, (*viz.*) if he should continue to the death of his father such younger son, to whom the land should not then come by virtue of the said settlement, neither is there any dis-appointment thereby of the consideration of such marriage, for that the defendant, Sir *Thomas Doleman*, hath the whole real estate instead of what would have come to him as a younger child by the said appointment, and as to the defendant's pretence of being in the nature of a purchaser, touching the money, the same is of no consideration, the plaintiff, *Dorothy*, being clearly a purchaser with the rest of the younger children of the said 4000*l.* The decree then ordered an account of the rents and profits of the estate in question received by Sir *Thomas Doleman*, the defendant, and payment of the 1800*l.* due to the plaintiffs, *Chadwick* and his wife, under the second deed of appointment of the 27th January, 1693, with interest as therein mentioned. Reg. Lib. 1705. A. fol. 323. Note. The second deed of appointment



confirmed the 1000*l.* before appointed to the daughter, and appointed to her 200*l.* more; 1200*l.* to *Dorothy*, the wife of plaintiff *Chadwick*; 1000*l.* to defendant *Lewis*; 50*l.* to *John*, and 550*l.* the residue, to *Lewis*, conditionally, to pay *John* an annuity; but if *John* died before Sir *Thomas*, the father, (which happened) then the 50*l.* and 550*l.* to *Dorothy*, which made up the claim of *Dorothy* 1800*l.* as above. The decree takes no notice of the 200*l.* additional to *Ann*, nor of the 1000*l.* to *Lewis*, as to which, and also as to the mention of Sir *Thomas* claiming to be considered as a purchaser touching the money in the first deed of appointment, and of the appointment being void, though it had been made on consideration of marriage, it appears, *First*, that *Ann* was no party to the suit. *Secondly*, That defendants, Sir *Thomas* and *Lewis*, by their answers stated, "That he, *Lewis*, had accepted from the defendant, Sir *Thomas*, the 5*l.* under the first deed of appointment, in full satisfaction of his share of the 4000*l.* and had voluntarily given him a discharge for the same." And *thirdly*, that defendant, Sir *Thomas*, by his said answer stated, "That he, the defendant, did with the consent and privity of his said father, to enable his trustees to raise money towards payment of his debts, by deed poll, dated 4th *May*, 1688, assign over the said 2940*l.* and the premises therewith chargeable, upon certain trusts in a quadrupartite deed, dated the said 4th *May*, mentioned; in pursuance whereof of 3000*l.* was soon after raised by the trustees therein mentioned, by mortgage of part of the said trust estate." *Fourthly*, The said defendant *Dorothy*, the wife of defendant Sir *Thomas*, by

her answer stated, "That being a widow, and her former husband not having been long dead, Sir *Thomas Doleman*, the father, did propose his son, the defendant Sir *Thomas*, to be her husband, and to encourage her to accept thereof, offered to settle upon him 2000*l.*; that afterwards, the said Sir *Thomas's* father's attorney, showed her a draft of such intended settlement, being the same in the bill mentioned to bear date the 15th *March*, 1686, wherein (*int. al.*) was contained that it was made in consideration of her marriage with the other defendant, her now husband, but she not being willing such clause should be inserted *because it was so near the death of her former husband*, therefore, at her request, the consideration of marriage was struck out of the said deed." Reg. Lib. ub. sup. As to the principle of the above case, it seems to have been fully recognised and approved by *Talbot*, Lord Chanc. in *Jermyn v. Fellows*, Forr. 93. But is considered as restrained and applying only to the cases of portions by *Hardwicke*, Lord Chancellor, in *Lord Teynham v. Webb*, 2 Vez. 204, 5. Et vide *Trafford v. Ashton*, post 660. *Beale v. Beale*, 1 P. Wms. 344. *Broadmead v. Wood*, 1 Bro. Ch. Rep. 77. the principal case cited, arg. *Boyle v. Bishop of Peterborough*, 1 Ves. jun. 403. Vin. Ab. vol. 3, p. 427. pl. 8. Tit. Authority. *West v. Primate of Ireland*, 3 Bro. C. C. 148. 2 Cox. 258. *Emery v. England*, 3 Ves. 232. *Lincoln v. Pelham*, 10 Ves. 166. *Bowles v. Bowles*, *ibid.* 177. *Matthews v. Paul*, 3 Swan. 328. *Driver v. Frank*, 6 Price, 41. *Savage v. Carrall*, 1 Ba. & Be. 265. *Windham v. Graham*, 1 Russell, 331.

CASE 477.  
Eq. Ca. Ab.  
343. pl. 5.  
Pre. Ch. 257.  
Gilb. Eq. Rep.  
545, S. C. and  
more fully re-  
ported there.  
In a settle-  
ment a power  
is reserved to  
tenant for life  
to make leases  
of all lands  
anciently de-  
mised, reserv-  
ing the an-  
cient rents,  
and of the  
other lands,  
reserving the  
best improved  
rents. Tenant  
for life being  
ill, and not  
having the  
counter-parts  
of the old  
leases, makes  
a general lease  
to his sister of  
all the lands,  
*reddend'* for  
the lands that  
had been let,  
the ancient  
and accus-  
tomed rents,  
and for the lands not usually let, the full and improved rents and value thereof.—Lease ad-  
judged void by the Lord Keeper and Lord Chief Justice Trevor, *contra* the opinion of Lord  
Chief Justice Holt.

[ \*532 ]

Lady CHARLOTTE ORBY & Al'. *versus* Lady MOHUN.

THE late Earl of *Macclesfield* settled his *Cheshire* estate on the Lord *Brandon*, his eldest son, for life, and to his first and other sons in tail, remainder to his second son *Fitton Gerrard*, and his first and other sons in tail, with a power to the tenant for life in possession, to grant leases of all lands anciently demised, reserving the ancient and accustomed rents; (1) and of the other lands, reserving the best improved rents, that could be gotten for the same (2) remainder to his own right heirs. Earl *Brandon*, the elder brother, being dead without issue, and having devised the reversion in fee to the defendant the Lord *Mohun*: and Earl *Fitton* having\* no issue, and being indisposed in health, thought fit to execute his power in favour of the plaintiff, the Lady *Charlotte Orby*, and the Dutchess of *Hamilton*, the heirs at law; but not having the counter parts of leases nor time to make particular contracts, by the advice of counsel, made one general lease of all his lands to the plaintiffs, yielding and paying for the lands, that had been let, the ancient and accustomed rents, and for the demesnes and lands not usually let, the full and improved rents and value thereof, and soon after died without issue; and whether this was a good lease within the power or not, was the principal question in the case. (3)

- (1) "Or more." R. L.  
(2) "For any term of years not exceeding twenty-one years, or for one, two, or three lives, or for any number of years determinable upon the death of one, two, or three persons in possession, and not in reversion, remainder, or expectancy." R. L.

(3) There were two leases; the first dated 21st *December* 1702, and made between Earl *Fitton* of the one part, and the plaintiffs, Sir *Charles Orby* and *Thomas Orby*, the husband of Lady *Charlotte Orby*, of the other part, whereby the said Earl demised to the said plaintiffs, their executors, &c. all the several messuages and lands comprised in the indenture of settlement, which had been usually letten and fines taken for the same, or that were within the compass of the pro-

viso for ninety-nine years, if the plaintiff, *Thomas Orby*, and two others, should so long live, and so as the plaintiffs should, after the sealing thereof, execute a new counterpart, which they did, rendering yearly at the times and days therein mentioned, the several old and accustomed rents for the same, according to the intent of the said proviso. The second lease was dated 22d *December*, 1702, and made between the said Earl *Fitton* of the one part, and the plaintiff said *Thomas Orby*, of the other part, whereby the said Earl did demise to the said *Thomas Orby* all other messuages, lands, and premises, &c. whereof there were no leases for years or lives in being, and for which no fines were formerly taken, for ninety-nine years, if plaintiff and two others should so long live,

ORBY v.  
MOHUN.

And the settlement being by way of a covenant for suffering a common recovery to the uses therein mentioned, which common recovery was never suffered, but the legal estate resting in the trustees, the bill was to have the benefit of the trust, so far as to make good the leases in the same manner as they would have been at law, in case Earl *Fitton* had had the legal estate in him, insisting that the leases ought to be allowed as good in equity.

And for the plaintiffs it was insisted, it was a rule in the execution of powers, that if a man exceeds his power, yet it shall stand good for what was within his power; but indeed if he doth not do what was necessary in the execution of his power, *that* defect is not to be supplied. And this case is not to be compared to the case of a bishop's lease, or cases on the *disabling* statutes; but rather to cases on the *enabling* statutes; and as leases are held strictly to the letter in the one case, so the exposition is always liberal and favourable in the other case; and as authorities, cited the case in *Dyer*, a demise of *three* several things, with *three* several *reddendums*, and held good. *Knight's* case, and *Ayre's* case in *Moor*, 51. *Tanfield* and *Rogers*, *Cr. Eliz.* 340. Demise by tenant in tail of lands usually demised, and of lands not usually demised, *reddend'* for the lands usually demised, the ancient and accustomed rent, and for the lands not usually demised the best improved rent: held to be a good lease. *Cook Litt. fol.* 45. A lease for such number of years as *J. S.* shall name, is a good lease.

Moor. 199.

[ 533 ]

*Lewson* and *Piggott's* case in *B. R.* power to lease for *twenty-one* years, or *three* lives, so as 12s. *per ann.* rent be reserved. Lease of all within his power to let, paying the rent intended to be reserved by the power, and held to be a good lease; though neither the lands, nor the rent specified or mentioned in certain. *Venables's* case, held that the lease good for lands for which rent was reserved, and void only for those, for which no rent was reserved; and there an averment necessary, and allowed how many *Cheshire* acres reserved in the lease. *Audley* versus *Audley*, a lease rendering *two* thirds of the full improved value, held good. 11 *Rep.* Dr. *Grant's* case, a *modus* Fol. 15. b.

at the yearly rent therein mentioned, according to the intent of the said proviso. Lord *Mohun*, by his answer, knew nothing of the leases, but insisted that Earl *Fitton* had no power to lease at all, inasmuch as the recovery, by virtue of which such power was to arise, had never been suffered.

And the decree, as to the leases, merely says, "And as to the two leases made by Earl *Fitton*, dated 21st and 22d *December*, 1702, this Court declared the same were not good as against a remainder-man." And so as to them dismissed the bill. Reg. Lib. 1705. B. fol. 313.

ORBY v.  
MOHUN.

of 2s. in the pound of the full improved value held to be good.

3 *Lev.* 255. Custom for a fine of copyhold at a year's improved value held good; and cited *Plowd. Com.* where many relative clauses are allowed to be good upon the *maxim*, that *certum est quod certum reddi potest*: (1) and in letters patent the usual clause *tot tanta et talia* allowed good, though not appearing in the grant what those franchises and royalties were: and it was not difficult to know what the ancient rent is; for it is but looking into the last lease, according to the resolution in the case of *Morries* and *Antrobus*, in *Hardres's* reports, the rent reserved in the last lease shall be presumed to be the ancient rent.

Fol. 325.

Fol. 94.

1 Mod. 203.

[ 534 ]

5 Co. 3 b.

And as to the case of *Owen* and *Thomas ap Rees*, in *Crook Ch.* p. 94. that report is of no authority, because it puts not the case, but abruptly relates the opinion of the judges: and the case of *Thredneedle* and *Lynham*, Lord Chief Justice *Vaughan* takes notice of that case in *Crook*, and that it went off upon another point, viz. for want of excepting out of general words, lands that had been excepted in former leases; so more lands than usually demised, for the same rent, as when less was demised, and so fell within the rules of Lord *Mountjoy's* case.

On the other hand, for the defendant it was insisted, that in this lease the lessor had not well pursued the power, nor was the lease within the purview or intent of it; which was to give a power of leasing in a reasonable manner, as leases fell in; and for keeping of the estate tenanted, in like manner as an owner of an estate would be supposed to do: but here is no contract or agreement with any tenant, but a general lease made of all, as well what was usually demised, as not, to the plaintiff, to the intent he might have the benefit of granting leases, and of putting the power more particularly in execution; so that in truth, it was rather a delegating the power of leasing to the plaintiffs, than an execution of the power, and *delegatus non potest delegare*. And should such general leasing be allowed, it would put the remainder man, or reversioner under great difficulties, as well to find out what lands had been usually demised, and what had not; as also to know what rent he was to demand, how to distrain or avow; and besides, had the rent been particularly reserved in the lease, the tenant should have been obliged to have paid, whether it had been the

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(1) Vide observation on this rule, post p. 544.

ancient rent or not; and there might have been an action of debt or covenant brought against him: and the intent of the settlement was, that as the tenant in possession should have a power of leasing, so on the other hand, that the revenue should not be lessened; but that the remainder-man or reversioner should be sure of his rent, and have it effectually reserved, and secured to him in the most easy and beneficial manner; and relied on the case of *Owen and Ap Rees in Crook*, and that in *Thredneedle* and *Lynham's* case, the Lord *Vaughan* allowed of *that* authority as reported by *Crook* and the matter of the omission of the exception not material.

ORBY v.  
MOHUN.

[ 535 ]

*Vide infra* lease held not to be good. (1)

Post Ca. 485.

(1) Vide the principal case cited arg. *Evelyn v. Evelyn*, 2 P. Wms. 667, and said to be affirmed in Dom. Proc. but the Editor has not been able to find any entry of it. [3 Bro. Par. C. 248. nom. *Dutchess of Hamilton v. Mordaunt*.]

### GORE *versus* KNIGHT.

CASE 478.

LORD  
KEEPER.

THE Lady Gore, the plaintiff's mother, upon her marriage with Sir *John Knight* having reserved to herself a power by deed or will to dispose of her personal estate, and rents and profits of her real estate, made her will, and devised to the plaintiff several securities for money and her personal estate. Sir *John Knight* objected, she had disposed of several mortgages, &c. that did not appear to be any part of the estate, she had so reserved a power over.

Eq. Ca. Ab.  
66. pl. 4. Pre.  
Ch. 255. S. C.  
Where a woman on her marriage reserves a power to dispose of her personal estate, all that she dies possessed of is to

be taken to be her separate estate, or the produce of it; unless the contrary can be made appear; and as she has power over the principal, she may dispose of the interest.

*Lord Keeper.* It appears not, that any other estate came afterwards to the Lady; and therefore what she died possessed of is to be taken to be the separate estate, or the produce of it, unless the contrary had been made appear; and as she had a power over the principal, she consequently had it over the produce of it; for the *sprout* is to savour of the *root*, and to go the same way. (2)

(2) The statement in the Register's Book, though very long, appears substantially to agree with the above, the fact of the disposal of mortgages does not indeed appear, but it appears that (amongst other things,) Lady Gore had purchased a house and premises on *St. Michael's Hill, Bristol*, which *Knight* by his answer claimed, to-

gether with other things; and stated, that apprehending he was intitled thereto, he had laid out 300*l.* of his own money in building and repairing, and had taken a lease in his own name of some closes adjoining; he also stated, that he had given Lady Gore some jewels, or a jewel: the case went upon the circumstances as

established by the evidence, but the decree was in substance and principle as above ; and as to the jewels, directed a reference to the master, to see what jewels, if any, had been given by *Knight* to Lady *Gore* ; and that if any such appeared, he should be entitled thereto ; and as to the premises on *St. Michael's Hill*, the Court declared, that the purchase was made with the produce and part of Lady

*Gore's* separate estate, and therefore ordered *Knight*, who was in possession, to deliver it up to the plaintiff. Reg. Lib. 1705. A. fol. 258. Entered *Gore v. Gore*, vide *Bletsow v. Sawyer*, ante 1 vol. 244. and cases cited in not. (2) there. *Willson v. Pack & Al'*, Pre. Ch. 295. *Hearle v. Greenbank*, 3 Atk. 709. [And see *Walter v. Hodge*, 2 Swan. 92. and cases cited 105.]

[ 536 ]

RAMSDEN *versus* LANGLEY, & è contra.

CASE 479.

Feb. 5.

LORD

KEEPER.

Eq. Ca. Ab.

328. pl. 5. S.C.

Mortgagee

having been

at great charges to defend a suit at law, brought by the heir of the mortgagor, who endeavoured to defeat the mortgage by an intail, but could not prevail ; upon a bill afterwards brought by the heir to redeem, the mortgagee allowed his full costs expended in that suit, and not tied down to the costs taxed.

THE plaintiff by his guardian having endeavoured to overthrow the mortgage by a supposed intail ; and after a special verdict, and great agitation at law, the mortgagee having prevailed, the plaintiff now brought his bill to redeem.

Allowed also costs in taking out administration to the mortgagor, as principal creditor.

And the mortgagee having sworn he paid and expended above 120*l.* in defending his mortgage at law, although he had but 60*l.* costs allowed him there ; *Per Cur.* shall not be held down to the taxation at law, but shall upon the account be allowed all he laid out, or expended. And the mortgagee fearing his mortgage would have been defeated at law, got administration as principal creditor in the Spiritual Court ; *Per Cur.* shall be allowed the costs expended there also. (1)

(1) So *Lomax v. Hide*, ante p. 185. but where mortgagee made an unjust defence, he was made to pay costs, *Mocatta v. Murgatroyd*, 1 P. Wms. 393. sed vide note (1), p. 394 there.

So deprived of costs for gross misconduct, *Detillin v. Gale*, 7 Ves. 583. [And see *Morony v. O'Dea*, 1 Ba. & Be. 121.]

CASE 480.

Feb. 9.

LORD

KEEPER.

Eq. Ca. Ab.

394. pl. 6. S.C.

A. devised

300*l.* to be laid

out in land,

and settled to

the use of her

daughter and

her children,

and if she

died without issue, to go over. She married *B.* and had a child by him, and she and the child being dead, and the money not laid out ; on a bill brought by *B.* decreed the money to be considered as land, and the plaintiff to be tenant by the courtesy.

*W. B.* devised 300*l.* to her daughter *Mary*, to be laid out by her executrix in lands, and settled to the only use of her daughter *Mary* and her children ; and if she died without issue, the lands to be equally divided between her brothers and sisters then living. The plaintiff married *Mary* the legatee, and had issue by her ; but she and her child being both dead, and the money not laid out in land, the bill was, that the plain-

SWEETAPPLE *versus* BINDON.



tiff might either have the money laid out in lands, and settled on him for life, as being tenant by the *courtesy*, or in lieu of the profits of the lands, might have the interest of the money during his life. (1)

SWEETAPPLE  
v. BINDON.

*Per Cur.* If it had been an immediate devise of land *Mary* the daughter would have been, by the words in the will, tenant in tail, (2) and consequently the husband would have been tenant by the *courtesy*; and in the case of a voluntary devise, the Court must take it as they found it, and not lessen the estate or benefit of the legatee; although upon the like words in marriage articles it might be otherwise, where it appeared the estate was intended to be preserved for the benefit of the issue; and therefore decreed the money to be considered as lands, and the plaintiff to have the interest, or proceed thereof, for his life, as tenant by the *courtesy*. (3)

(1) For the cases on money being considered as land, vide *Kettleby v. Atwood*, ante 1 vol. 298, and cases cited in not. there.

(2) For the cases on limitations of this nature, vide note (2) to *Bale v. Coleman*, 1 P. Wms. 142.

(3) It is clearly settled, that there shall be a tenancy by the *courtesy* of a trust as well as of a legal estate; vide the principal case, ub. sup. *Otway v. Hudson*, post 585. *Williams v. Wray*, post 680. and cases cited there, *Chaplin v. Chaplin*, 3 P. Wms. 234. *Casborne v. Scarfe*, 1 Atk. 660. [*Burgess v. Wheate*, 1 Eden. 196.] So of money agreed or directed to be laid out in land, though not laid out, the principal case, ub. sup. *Cunningham v. Moody*, 1 Vez. 174, 176. *Dodson v. Hay*, 3 Bro. Ch. Rep. 404. So of an equity of redemption, and of the wife's equitable estate; but not of a mortgage in fee, unless foreclosure or the mortgage so circumstanced that the Court will not grant redemption; nor of a condition, *Casborne v. Scarfe*, 1 Atk. 606. 2 Eq. Ca. Ab. 728. pl. 6. [2 J. & W. 194.] So held in the case of a trust estate for payment of debts, *Watts v.*

*Ball*, 1 P. Wms. 108. and cases cited in not. there. *Roberts v. Dixwell*, 1 Atk. 609. But though it be true, as a general doctrine, that the husband may be tenant by the *courtesy* as well of a trust as of a legal estate, yet it must be such a trust estate as that the husband may have an equitable seisin thereof; otherwise, though the wife have the equitable estate of inheritance, yet the husband shall not be tenant by the *courtesy*, *Hearle v. Greenbank*, 1 Vez. 299. 3 Atk. 716. S. C. and this may depend upon the intent of the trust, 1 Vez. 302. S. C. et vide the principal case cited in decree of *Master of the Rolls*, in *Fletcher v. Ashburner*, 1 Bro. Ch. Rep. 499. Note, in the Register's Book, 1705, B. fol. 144. Mich. Term. an entry of an order, that the *two* causes should be set down to be heard on the 4th day of causes in the then next Term, entered *Sweetapple v. Feast*, and in the same Book, fol. 425. an entry of an order on petition reciting an order made in the cause for taxing the bills of *Arthur Loyd* the solicitor, but the Editor has not been able to find any entry of the decree.

CASE 483.

Feb. 26.

LORD  
KEEPER.

Eq. Ca. Ab.

146. pl. 5. S.C.

*A. and B.*

being trustees  
of money for  
the separate  
use of a feme  
covert, lend it  
to *C.* who  
gives bond to  
the trustees,  
and the trust  
is declared in  
the condition.  
The bond is  
kept by the

feme, and *B.* having received money for *C.* they settle an account, and *B.* gives *C.* a receipt for 100*l.* as received for the use of the feme. *B.* becomes insolvent. Whether *C.* is well discharged of this 100*l.*

BALDWIN *versus* BILLINGSLEY.

Mrs. *Sharpe* by her will devised 200*l.* to Sir *Ambrose Phillips* and *Thomas Parker*, in trust for the separate use of a daughter *Billingsley* and her children. In 1691, the 200*l.* was lent to *Charles Baldwin*, who became bound for the same to Sir *Ambrose Phillips* and *Thomas Parker*. In 1695, *Charles Baldwin* trusts *Parker* to receive 100*l.* for him from *Singleton*, and afterwards states an account with him, and takes a receipt from *Thomas Parker*, as for so much received by him upon the account of Mrs. *Billingsley*; but gave no notice thereof to Mrs. *Billingsley* until 1699, when *Thomas Parker* became insolvent and absconded.

The question was, whether the plaintiff should be allowed that 100*l.* as well paid to *Parker* for the use of Mrs. *Billingsley*, who always kept and had the bond in her hands.

Mr. *Baldwin* by letters owned that he had intrusted *Parker* to receive and pay monies for him, and complained that he had been drawn in by *Parker*; and seemed to admit that he should be obliged to make Mrs. *Billingsley* satisfaction.

[ 540 ]

Payment to  
the obligee,  
after notice of  
an assignment  
of the bond is  
not good.

*Lord Keeper.* This is a case of unusual circumstances, as here is a power in *Parker* a trustee to receive and pay, to call in, and to put out: but the trust being particularly taken notice of in the condition of the bond, Mr. *Baldwin* ought to have been cautious how he paid the money; it being in equity the money of *Billingsley*, as much as if the bond had been assigned to her; and payment to the obligee after notice of an assignment is not good: In the case of an assignment of a bond the assignee alone becomes intitled to receive the money; but here in this case *Parker* remains a trustee still, and might have received, in case he had had the bond; but having delivered over the bond to Mrs. *Billingsley*, *Parker* had dismissed himself of the trust, and put it altogether in her power to receive, &c. and therefore the payment afterwards to *Parker*, without seeing the bond, was not a good payment; and it is plain Mr. *Baldwin* was conscious to himself, that the payment would not be allowed him; and therefore never mentioned nor took notice of it until 1699, when *Parker* had failed. (1)

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(1) And so decreed *Baldwin* to pay the Master, to see what was due to the same over again, and referred it to *Billingsleys* for principal and interest

on the bond in question. Reg. Lib. ante 1 vol. p. 150, and cases cited in 1705. A. fol. 237. vide on this head not. there.  
*Roberts and Al'. v. Matthews and Al'*,

### DUPLEIX *versus* DE ROVEN.

CASE 484.  
 Eq. Ca. Ab.  
 144. pl. 17.  
 S. P.  
 If a man recovers a judgment or sentence in France, for money due to him, the debt must be considered here only as a debt on simple contract, and the statute of limitations will run upon it.

PLAINTIFF and defendants intestate were merchants at *Lyons* in *France*. The plaintiff recovered a judgment, or sentence there, against the intestate; and afterwards the intestate failing, compounded for a lesser sum, for which in 1676, he gave a note, as for so much due upon an account stated; but before any payment or satisfaction, the intestate fled out of *France*, and at the *Indies* acquired a considerable estate; and about four years before the bill exhibited died intestate. The defendant took administration to him, and lately had considerable effects come to his hands. The bill was for a discovery of assets, and satisfaction of the plaintiff's debt.

The defendant pleaded the statute of limitations.

*Per Lord Keeper.* Although the plaintiff obtained a judgment or sentence in *France*, yet here the debt must be considered as a debt by simple contract. The plaintiff can maintain no action here, but an *indebitatus assumpsit*, or an *in simul computasset*, &c. so that the statute of limitations is pleadable in this case; and although both parties were foreigners, and resided beyond sea, *that* will not help the plaintiff. The statute provides where the party plaintiff, he who carries the action about him, goes beyond sea; his right shall be saved; (1) but when the debtor or party defendant goes beyond sea; there is no saving in that case. (2) It is plausible and reasonable, that the statute of limitations should not take place, nor the six years be running, until the parties come within the cognisance of the laws of *England*; but that must be left to the legislature. (3)

[ 541 ]

The statute of limitations provides, where the party to whom a debt is owing, goes beyond sea, but not where the debtor is beyond the seas.

(1) Statute 21 Jac. 1. cap. 16. sect. 7.

(2) Sed vide 4 Anne, cap. 16. sec. 19. by which the right is saved in that case also, et vide as to the general force of judgments in foreign courts, *New-*

*land v. Horseman*, ante 1 vol. p. 21. and cases cited in not. there.

(3) The plea allowed, and again on a rehearing, Reg. Lib. 1705. A. fol. 222.

DE  
 TERMINO PASCHÆ, 1706.  
 IN CURIA CANCELLARIÆ.

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CASE 485.

April 15.

LORD KEEPER.  
 Lord Chief  
 Justice HOLT,  
 Lord Chief  
 Justice  
 TREVOR.

ORBY *versus* LORD MOHUN, & è contra.

8 Co. 69. b.

9 Co. 30. a.

Fol. 6. a.

[ 543 ]

Fol. 395.

5 Co. 55. b.  
 Dyer 308. b.

LORD Chief justice *Holt* differed in opinion from the Lord Chief Justice *Trevor*, and from the *Lord Keeper*, and held that the lease was good, and the rent certain enough. It must be admitted that a power to lease, reserving the ancient rent, is a certain power, and well enough to be understood, what it is, and what it means; and why shall the same words that create and reduce the power to a sufficient certainty, when turned into a lease, render it uncertain? The same certainty that is in the power, is carried over into the lease, which is the execution of it; but neither in the one or the other, is it mentioned what the old rent is; but that lies in an averment, as it is held in *Whitlock's* case. And that is certain, which may be made certain. In the case of *Abbot of Strata Marcella*, reference to a former grant the same, as if former letters patent had been recited. A lease reserving the rents and services *inde prius debita et de jure consueta*, is a good reservation. Sir *John Mollyn's* case, 6 *Rep.* That shall be deemed the ancient rent, which was the rent at the time the power was reserved, or when the last lease before was made, if the estate was not then under lease. *Hardress's* reports, *Morris* and *Antrobus*. The word ancient is not used in respect to the time past, but in respect of the leases to be after made.

If a Dean and Chapter have once increased their rent, they can never go back, because the statute restrains it. But tenant in fee has an absolute power to diminish, so that the last rent before the creation of the power, is to be deemed the ancient rent; and although all is comprised in one lease, it is the same as if it had been in several, *Knight's* case, and *Winter's* case; there may be several reservations in one lease. If the demise be joint; yet if several reservations, they shall be taken to be several, 5 *Rep. fol. 7.* Justice *Windham's* case.

A lease for *forty* years, to commence after the expiration of *two* former leases, which end at different times. When the *first* lease expires, it shall commence as to that part; but here in the granting part, it is said severally and distinctly, and not jointly, 6 Rep. Sir *Edward Clere's* case, and the case of *Kibbet and Lee*, Hob. 312. What is void as a deed or will, may be a good appointment, or execution of a power; and therefore in his opinion the lease, as to the lands anciently demised, was a good lease; although not as to the demesnes, and lands not usually demised; nothing being more uncertain than what is the best improved rent.

ORBY v.  
MORUN.

6 Co. 17. b.

[ 544 ]

But the *Lord Keeper*, and Lord Chief Justice *Trevor* were of opinion, that the lease was void. As to the lands not usually demised, *that* was given up; the remainder-man could not tell what rent to demand; and it is in great measure in the same uncertainty as to the lands usually demised, and of the rent payable for them. As the intent of the settlement was, that the tenant for life in possession might lease; so it was on the other hand, that the revenue should not be diminished; but the ancient rent at least reserved, and in such beneficial manner, as might with certainty, and without any difficulty be recovered; and for that reason it is provided, that there should be a counter-part of the lease, that it might the better be known what the rent was, and how to recover it. If the rent had been mentioned in the lease, there if the tenant had refused to pay it, the proof would have been turned upon the tenant, to show the rent in his lease was not the ancient rent, and if he should do so, it would make his lease void. But as this lease is contrived, the remainder-man might be baffled and nonsuited *twenty* times, before he could declare or avow in certain, for the rent payable in the lease; and yet the tenant still holds the land, and doth not prove his own lease void, as must have been done in the other case. All beneficial clauses and reservations ought to be observed. In the Lord *Mountjoy's* case, if the rent was anciently reserved quarterly, and now is reserved half-yearly, the lease is void; if silver instead of gold; if *two* farms, formerly let at 10*l.* each, are both demised at 20*l.* per ann. not good.

The question here is not, whether the lease is void for uncertainty, as between the lessor and lessee; but whether all requisites are observed, and such beneficial clauses and reservations, as ought to have been for the benefit of a third person, the remainder man. Where there is a power of leasing in general words, as reserving the ancient rent; in the execution of

ORBY v.  
MOHUN.

the power which is to be explained and made certain, the rule, *certum est quod certum reddi potest* is to be understood of a reference to that which is absolutely certain, as to former letters patent or the like; but this is rather a delegating the power of leasing to the plaintiff, than an execution of the power, and is the first attempt of the kind; and it is a good rule, that what never has been ought never to be; and therefore adjudged the lease to be void. (1)

(1) Vide ante, p. 531. S. C.

[ 545 ]

CASE 484.

April 17.

LORD  
KEEPER.

### COOK versus COOK.

A DEVISE to the issue of *J. S.* who then had a daughter living, and afterwards had a son born. The question was who shall take, and what estate.

A devise to *J. S.* who had a daughter living, and afterwards a son born. All the children shall take, and even grandchildren, if there are any. But they shall only take an estate for their lives.

*Lord Keeper.* All the children shall take, and even grandchildren, if there had been any; (1) but they shall take only an estate for life: and although the devise is to the issue begotten, *that makes* no difference; (2) the words *begotten and to be begotten*, are the same, as well upon construction of wills, as settlements, and take in all the issue after begotten. And although upon the death of the testator, there was then only a daughter born; yet upon the birth of another child, the estate

The words begotten and to be begotten, are the same as well on construction of wills as settlements.

A devise to *J. S.* and his children: if he has children, they take with their father; but if he has none, it is an estate-tail. A devise to a man and his children of his personal estate. A child born after the death of the testator shall not take. A devise to *two*, and the heirs of their bodies. It is a joint estate for life, and several inheritances; and so it is, if there is a devise over: but if there is a devise over, and one of them dies without issue, a moiety shall go over to the remainderman. A devise to the issue of *A.* and for want of such issue to *B.*, *A.* has a son and a daughter. They shall take as persons described; but shall take only an estate for their lives.

(1) Vide on this head *Crooke v. Brookeing*, ante 106. and cases cited in not. p. 108. there; and in addition, *Taylor v. Sayer*, Cro. Eliz. 742. *Bate v. Amhurst*, Sir Thomas Raymond, 82. where *Bridgeman*, Ch. Just. says, "the case of *Taylor v. Sayer*, Cro. Eliz. is "not law." So *Luddington v. Kime*, 1 Lord Raym. 206. [3 Lev. 431. Salk. 224.] *Elliot v. Jekyl*, 2 Vez. 681. *Sibley v. Perry*, 7 Ves. 522. And it is clear the Court will not extend the meaning of the word children to grandchildren, except from necessity, as if the will would otherwise be inoperative, or where by other words, as "issue," it clearly appears, that the word children, was used not in the proper but more

extensive sense; nor would the Court alter the construction upon inference from the testator's knowledge of the circumstances of the family, *Radcliffe v. Buckley*, 10 Ves. 195. Et vide *Stead v. Berrier*, Sir Thomas Raymond, 408. where *per* Sir Thomas Raymond, neither the word *son* or *child* is ever taken for grandchild. As to the word *parent*, it seems *that* has been construed grandfather, *Sibley v. Perry*, ub. sup. p. 528, 530.

(2) Vide Co. Litt. 20. b. not. (2) *Wild's* case, 6 Rep. 17. b. *Darbison v. Beaumont*, 1 P. Wms. 231. *Hewitt v. Ireland*, Pre. Ch. 490. 1 P. Wms. 426. S. C.

(3) *B.* having divers sons and daugh-



and his children: if he hath children, they take with their father; but if he hath no child, it is an estate tail. (4) A devise to a man and his children of a personal estate. A child born after the death of the testator, shall not take; for it vested upon the death of the testator, and shall not be divested. A devise to the testator's *two* daughters, and the heirs of their bodies: the rule of law is, it is a joint-estate for life, and several inheritances; (5) but the testator never meant that the surviving daughter should turn out the issue of her deceased sister, and that was the point upon the appeal in *Wilkinson* and *Spearman*, where the Lords inclined for the appellant; yet the judges all agreeing that the law was so settled, the Lords would not alter it. (6) A devise to the testator's *two* daughters and their issue, and in default of such issue to *J. S.*, they have a joint estate for life, and several inheritances; if one of the daughters dies without issue, there shall not be cross remainders; (7) but her moiety shall go over to the remainderman upon the death of the daughter, for want of such issue, *i. e.* such respective issue. A devise to the issue of *B.* and for want of such issue to *C.* *B.* having a son and a daughter, they shall take only as persons described, and have only an estate for life; although the subsequent words, for want of such issue, seem to imply an estate-tail: but then there must be a double use made of the word issue, *viz.* *First*, it is a word of implication, who were the persons to take. *Secondly*, as words of limitation to make an entail, which is not to be admitted. (8)

[ 546 ]

ters, *A.* giveth lands to *B. et liberis suis, et a lour heires*, the father and all his children do take a fee simple jointly by force of these words, their heirs; but if he had no child at the time of the feoffment, the child born afterward shall not take. Co. Litt. 9. a. Sed vide the qualifications to this rule of law, in notes (2) and (3) there. Et vide *Davie and Al' v. Stevens and Al'*, 1 Doug. 321. *Hodges v. Middleton*, 2 Doug. 431.

[(4) *Wild's* case, 6 Co. Rep. 17. *Ex parte Williams*, 1 J. & W. 91. cases in not. (1) there.]

(5) Vide Co. Litt. 183. a. 184. a. So of the trust of a term, *Aston v. Smallman*, post 556.

(6) *Fletcher's* case, Ley. 47. et vide *Cray v. Willis*, 2 P. Wms. 530. for observations on the case of *Wilkinson v. Spearman*. As to joint tenancy of a

trust, *Aston v. Smallman*, post 556. *Cray v. Willis*, ub. sup.

(7) Vide *Trevivan v. Tooker*, 1 Lord Raym. 495. *Comber v. Hill*, 2 Str. 969. *Davenport v. Oldis*, 1 Atk. 579, 80. and cases cited in not. (1) there.

(8) But where the devise was to the first son of the testator's son *Caleb*, and the heirs male of his body, with remainder to the use of the second, third, fourth, and fifth sons of *Caleb* successively, without saying for what estate; the words of inheritance being by mistake omitted, and there was a son of *Caleb* born before, but such first son died very young, after which, another son, the plaintiff, was born, held, the plaintiff being the first son at his father's death, took an estate tail. *Lomax v. Holmedon*, 3 P. Wms. 176. and not. p. 178. there.

**COOK v. COOK.** In the case of *Chute* and *Parker*, or *Tilt* and *Parker*. A devise to the son for life, and to his first and other sons in tail; and for want of such issue, to his daughter *Parker*. It was made a question whether those last words, *for want of such issue*, gave the son an estate-tail by implication.—The matter ended by compromise; but the same question came afterwards in judgment, in the case of *Popham* and *Bampfild*, (9) and adjudged that the devisee having an express estate for life, it could not be enlarged, nor he take an estate-tail by implication.

1 Salk. 236.

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(9) Ante p. 427, 449. S. C. [1 P. Wms. 54.]

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**CASE 495. TOWNSHEND & AL' versus WINDHAM and ROBINSON.**  
 Eq. Ca. Ab. 203. pl. 26. S. C. **THE Duke of Bolton** by his will devised in these words, viz.  
*A. devises a year's wages to such of his servants, as shall be living with him at his death. Stewards of Courts, or such as are not obliged to spend their whole time with their master, are not within the words of this devise.*  
*Item, I give and bequeath unto such of my servants as shall be living with' me at the time of my death, one year's wages.*

[ 547 ] **Lord Keeper.** Stewards of Courts, and such who are not obliged to spend their whole time with their master, but may also serve any other master, are not servants within the intention of the will: but I will not narrow it to such servants only that lived in the testator's house, or had diet from him. (1)

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(1) Reg. Lib. 1705, B. fol. 485. [A not entitled under a bequest to servants. servant provided by a job-master *Chilcott v. Bromley*, 12 Ves. 114.] with the carriage and horses, was held

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**CASE 496. HILL & ux' versus WIGGETT.**  
 April 20.  
**LORD KEEPER.** AN entry in the Steward's book, and a parol proof by the foreman of the jury, admitted as good evidence, that a feme covert surrendered her whole estate; although the surrender upon the roll, and the admission thereon, was but of a moiety. (1)  
 Eq. Ca. Ab. 232. pl. 8. S. C. An entry in the book of the steward of a manor, and a parol proof by the foreman of the jury, allowed as good evidence against an entry on the Roll, and an admission thereon.

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(1) This may be the inference from Reg. Lib. 1705. A. fol. 311. In such the statement in the Register's book, case averment of mistake admitted, but the point does not distinctly appear, *Towers v. Moor*, ante 98.

COLWALL *versus* BONYTHON, LONGEVILLE & Al'.

'CASE 497.

Eodem die.

LORD

KEEPER.

**COLWALL** the testator on his marriage with *Lucy Ramsey*, was entitled to her portion of 8000*l.* in the Chamber of *London*; but a stop being put to payment there, and the credit of the Chamber failed; he by will declared, that when his executors should have received his wife's portion, he gave 2000*l.* to the *three* Hospitals, *viz.* *Christ's Hospital* *St. Bartholomew's* and *St. Thomas's*; it fell out that 8000*l.* in the Chamber of *London* was worth but 6300*l.* to be sold. (1) *A. is entitled to 8000*l.* in the Chamber of London, and whilst a stop was put to payment there, he made his will, and declares that when his executors should receive the 8000*l.* he gives 2000*l.* to three hospitals. Afterwards an act passed for settling a fund for paying a perpetual interest for the orphans' debt, and the 8000*l.* is then worth to be sold but 6300*l.* yet decreed the whole 2000*l.* to be paid.*

The question was, whether the 2000*l.* should be all paid, or there should be an abatement in proportion. It was insisted upon for the hospitals, that from the passing of the act of parliament in 1693, (2) which settles the orphans' fund, and gives a perpetual interest, the portion ought to be looked upon as recovered, and the 2000*l.* ought to be paid.

[ 548 ]

**Lord Keeper.** This is not called a composition by the act of parliament, but intended a satisfaction; and the devise is not of 2000*l.* part of the debt of 8000*l.* but a charge upon the whole; and if the debt had increased, and been 10000*l.* yet the legacy was not to increase; neither now when it is of less value is the legacy to be reduced; and decreed the payment of the 2000*l.* (3)

(1) It appears that at *Midsummer*, 1694, by the Books of the Chamber of *London*, there were 10664*l.* 7*s.* 7*d.* due to the estate of *Colwall* the testator, in right of his wife, from the Chamber, at which time *Bonython* his executor, (since deceased,) transferred the debt into his own name and acknowledged satisfaction for 8000*l.* part thereof, and the plaintiff acknowledged satisfaction for

1710*l.* 5*s.* 5*d.* other part, and one *Robert Waller*, was assignee of 954*l.* 2*s.* 2*d.* the remainder: the 8000*l.* then remaining in *Bonython's* name was ordered to be sold. R. L.

(2) 5 *Will. & Mary*, Cap. 10.

(3) With interest at 4*l.* 10*s.* from *Midsummer*, 1694. Reg. Lib. 1705. *A.* fol. 302.

LEE *versus* LEE.

CASE 498.

April 22.

Eq. Ca. Ab.

398. pl. 7. S. C.

**LORD KEEPER.** Although a trustee, or executor, is not empowered or directed to place out at interest; yet where he makes interest, he shall be accountable for it; and decreed it accordingly. (4)

Although a trustee is not directed to put money out at interest; yet

if he makes interest he shall account for it.

(4) Reg. Lib. 1705. *B.* fol. 429. vide 196, and cases cited in not. (1) p. 197 *Ratcliffe v. Graves & Al'*, ante 1 vol. there.

## CASE 502.

April 30.

*A.* living in Antigua, and having a plantation there devises 50,000lb. weight of sugar to the children of *B.* to be paid by

his executors in ten years after his death. The executors not delivering the sugars within the time, on a bill brought by one of the children; decreed the value of the plaintiff's legacy to be computed according to the medium rate of sugars in Antigua, at the end of the ten years, and paid with interest from the time it became due.

SYMES *versus* VERNON.

*JOHN VERNON*, of *Antigua*, devised to the children of one *Symes*, of whom he had bought a plantation, (2) 50,000lb. weight of sugar, to be paid by his executors in ten years after his decease, which fell out to be in the year 1699. (3) The plaintiff being one of the five children brought her bill for a satisfaction of her part.

*Per Cur.* Although the defendant might have paid the plaintiff in sugar at the time it became payable by the will; yet not having so done, it became a personal duty, and to be paid in money here.

[ 554 ] Decreed that the value of the plaintiff's share of the legacy should be computed, according to what was the medium rate of sugars in *Antigua*, in 1699, (4) and paid with interest from the time it became payable. (5)

(2) It was charged in the bill that the plantation was obtained by *Vernon*, who married the grandmother of the plaintiff, from the plaintiff's mother, *Dorothy Symes*, whilst an infant, without consideration, but that after she came of age, she and her husband, *George Symes*, made a new assignment thereof for no consideration, or at least

a very small and inadequate consideration, and the answer denied that, but did not state what was the consideration paid. R. L.

(3) The plaintiff's legacy was 50,000lb. weight of sugar. R. L.

(4) To Christmas, 1700. R. L.

(5) At 6*l.* per cent. per ann. Reg. Lib. 1705. B. fol. 464.

## CASE 503.

May 3.

LORD  
KEEPER.

Eq. Ca. Ab.  
229. pl. 13.  
321. pl. 6. S. C.

*A.* lends money to *B.* on mortgage, but before he does so, sends *C.* to enquire of *D.* who had a prior mortgage, whether he had any

IBBOTTSON *versus* RHODES.

ON an appeal from the *Rolls*, the case was, that the defendant *Rhodes* having lent money to *Shipley*, upon a mortgage of his estate, and *Ibbottson* being likewise about to lend *Shipley* money, one *Gargrave*, examined as a witness in the cause, deposed, that the plaintiff being about to lend money to *Shipley*, he, by the plaintiff's direction, enquired of the defendant, whether he had any incumbrance or mortgage on the estate, who denied he had any; and that he enquired a second time, and had the same answer.

incumbrance on *B.*'s estate, who denied he had any. This was proved by *C.* *D.* by answer confessed *C.* enquired of him what money *B.* owed him; but denied *C.* told him, that *A.* was about to lend *B.* any money. Decreed at the *Rolls* the estate should stand charged in the first place with *A.*'s debt. But upon an appeal, issue directed to try, whether *C.* told *D.* that *A.* was about to lend money on *B.*'s estate.

The defendant by answer confest that *Gargrave* met him in a public market, and enquired of him what money *Shiple*y owed him; but denied that *Gargrave* told him, the plaintiff was about to lend *Shiple*y money; nor did *Gargrave* upon his cross examination take upon him to swear it; but slides it in, that the plaintiff being about to lend money to *Shiple*y, he enquired of the defendant, if he had any mortgage, &c. And although it was insisted upon for the defendant, that to take away the defendant's mortgage, or to make him lose or forfeit his money, it ought to be a very plain and positive proof, that the defendant industriously concealed his mortgage, as designing or contriving to induce the plaintiff to lend his money upon a bad security; yet upon the evidence, the Master of the *Rolls* decreed, that the estate should in the first place stand charged with the plaintiff's debt, and that the defendant, although the first mortgagee, should be postponed for having concealed his incumbrance. (1)

IBBOTTSON  
v. RHODES.

[ 555 ]

*Lord Keeper* directed it to be tried at law, whether *Gargrave* told the defendant, that the plaintiff was about to lend money on *Shiple*y's estate, when he enquired what the defendant's debt was; and also directed that upon such trial, the answer should be admitted to be read as evidence. (2)

Defendant's  
answer directed  
to be read  
as evidence at  
a trial.

(1) Vide *Mocatta v. Murgatroyd*, 1 P. Wms. 393. *Draper & Al. v. Borlace & Al.* ante p. 370.

this point of the answer being read as evidence; contra 1 Eq. Ca. Ab. 229, pl. 13.

(2) Reg. Lib. 1705. A. fol. 401. but

## HERNE DOMINA & Al'. versus FREDERICK HERNE.

CASE 504.  
May 3.

SIR *Joseph Herne*, on the marriage of the plaintiff, agreed by articles, that his wife, over and above one-third part of his personal estate, should, if she survived him, have 800*l.* in money, and the furniture of a chamber and her jewels, &c. and it was thereby further declared, that notwithstanding any thing in the articles, she should not be debarred of any thing Sir *Joseph* should give her by will or writing, or other lawful declaration of his mind or intention: and Sir *Joseph* having by his will devised to the plaintiff the sum of 1000*l.* the plaintiff therefore claimed the 800*l.* &c. by the articles, and also the 1000*l.* devised by the will, and reheard the cause as to that matter.

LORD  
KEEPER.  
Eq. Ca. Ab.  
203. pl. 2. S.C.  
A. by marriage articles  
agrees to leave  
his wife 800*l.*  
and her jewels,  
&c. but it is  
declared that  
notwithstanding  
the articles  
she should not  
be debarred of  
any thing he  
should give  
her by will.  
A. by will  
makes a dis-

position of his whole estate, and gives his wife 1000*l.* The wife must either wave the articles or the will; she cannot claim the benefit of both.

HERNE v.  
HERNE.

[ 556 ]

*Lord Chancellor.* It is true the articles do provide, that the plaintiff shall have what her husband shall think fit to give her more than the provision there made, and give her a capacity to take of her husband; yet I am of opinion, that she must either abide by the will and renounce the articles, or abide by the articles and renounce the will; and she cannot take by them both; for although the 1000*l.* devised by the will is not mentioned to be in lieu of what is given by the articles; yet the will imports a disposition of his whole estate, and allows what was intended for the wife, and what for the children; and therefore implies a condition, that she must accept what is there given her, in satisfaction of her demands: if she will take the benefit of the will, she must suffer the will to be performed throughout.

A child entitled by his father's marriage articles to a share of his father's personal estate, has a legacy given him by the will of his father. If he will have the legacy, he must wave the benefit of the articles.

And as to the defendant *Frederick Herne*, the eldest son, who by the articles was intitled to an equal share of one-third of the personal estate, he having 7000*l.* devised to him by the will; and one-third of the estate is devised to the younger children: if he will have the benefit of the will, he must renounce the articles, and accept of what is given by the will in lieu and satisfaction of what he might claim by the articles. (1)

(1) The bill in this case was to have the benefit of the articles, and also of the will; and also to have an account of several sums of money which were charged by the bill to be in the hands of Sir *Joseph Herne*, at the time of his death, in trust for the plaintiffs Lady *Herne* and her children. The provision by the articles as stated in the Register's Book is as follows:—"By the said articles, the plaintiff the Lady *Herne*, was to have one full third part of all Sir *Joseph's* real estate (in case she survived him) and one full third part of all his household goods, stock, and personal estate, over and besides her wearing apparel and jewels, and 300*l.* for the furniture of her chamber; and should be likewise capable of taking any legacy or gift by the will of her said husband, or by any writing or declaration of his mind." It is then stated, that Sir *Joseph*, in his life-time, put out several sums of money in trust for the plaintiffs, who were the said Lady *Herne*, and the younger children

of the said marriage, amounting to 2887*l.* 11*s.* 6*d.* besides a bond for 1030*l.* entered into by one *William Gosfright*, to the said Sir *Joseph*; and which bond he the said Sir *Joseph*, indorsed to belong to the plaintiff Lady *Herne*; and that the said Sir *Joseph* did, in his books of account, keep a particular account of the said money under his own hand, and how much belonged to, and was the proper monies of, or in trust for the said plaintiffs respectively; which account he signed, and it was solemnly attested; and he declared that 1242*l.* 14*s.* 3*d.* part of the said 2887*l.* 11*s.* 6*d.* did belong to the plaintiff the Lady *Herne*, or was in trust for her, and promised payment of the same with interest at 6 per cent. and did, by the said account, declare the same to be no part of his estate, but a debt on it: that the said Sir *Joseph Herne*, made his will 25th *February*, 1698, and thereby (*inter alia*) gave to the plaintiff the Lady *Herne*, his house in *Coleman Street*, wherein he dwelt, as long as she continued a widow; and



likewise gave to her all such jewels as she had then in her own possession, and likewise 1000*l.* in money, and gave 7000*l.* to the defendant *Frederick Herne*; and devised that all the residue of his plate, jewels, household goods, and personal estate whatsoever should be converted into money, and that one-third part thereof should be paid to the plaintiff Lady *Herne*, in satisfaction of her share of the personal estate provided for her by the said articles, the other two-thirds to the younger children; and of his said will made the plaintiff Lady *Herne*, and the defendant *Frederick Herne*, and another defendant executors; which will was afterwards confirmed by an act of parliament, with a saving to the plaintiff Lady *Herne*, of the benefit of her marriage articles, which were not to be prejudiced thereby: there was a cross bill for an account of Sir *Joseph's* real and personal estate; and the decree, on the first hearing, was—"That the said articles and will should be performed; and that what by the said will was specifically devised to the plaintiff the Lady *Herne*, should be by her held and enjoyed accordingly; and that she should hold and enjoy the house in *Coleman-street*, according to the said will; and that she should be paid the 1000*l.* legacy with interest from the time of the bill exhibited; but the said 1000*l.* and interest was to be in full of the 300*l.*

"provided for her by the articles, for her chamber; and the plaintiff Lady *Herne's* jewels were thereby decreed to her, and a third part of the goods, stock, and personal estate; and also that one-third part of the rents and profits of the said testator's real estate, since the time of his death, should be paid to the plaintiff Lady *Herne*, and that she should likewise hold one-third part of the testator's real estate, pursuant to the said articles, or should be paid one-third part of the rents and profits of the said real estate for the future, during her life, at her election; but as to the money due on Mr. *Gosfright's* bond, and the money due to the plaintiff Lady *Herne*, on the account aforesaid, 1st Aug. 1698, the bill was dismissed." The petition of re-hearing was on the grounds (*int. al.*) of the directions touching the 300*l.* for the chamber, *Gosfright's* bond, the account, and the 7000*l.* legacy to the defendant *Frederick Herne*; and re-heard 3d May, where decree as above, Reg. Lib. 1705. A. fol. 412. On the point of double satisfactions, vide *Goodfellow v. Burchett*, ante p. 298. and cases cited in not. at p. 299, there. Et vide also *Annand v. Honeywood*, ante 1 vol. 345. *Tunbridge v. Teather*, *ibid.* and cases cited in not. there respectively; and further, *Streatfield v. Streatfield*, Forr. 176.

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ASTON & Al'. *versus* SMALLMAN & Al'.

CASE 505.  
May 4.

*JOHN SMITH* being possessed of a lease for years which he held of the Lord *Kilmurry*, died intestate, leaving two daughters, *Eleanor* and *Mary*: *Tonna*, their grandfather, and *Dodd*, the administrator of *John Smith*, surrender the old lease, and take a new one from the Lady *Kilmurry* to *Tonna* the grandfather, and *Dodd* the administrator, for ninety-nine years, if the two daughters, and one *John Leach*, any or either of them should so long live; but in trust, nevertheless for the two daughters. *Eleanor* married *Bradburne* and died, and left three children. The defendant *Smallman* claimed under *Eleanor* in a course of administration, and had also got an assignment of the lease from the executor of *Tonna*, the surviving trustee.

*A.* and *B.* are joint tenants of the trust of a term. *A.* dies, *B.* shall have the whole by survivorship.

ASTON v.  
SMALLMAN.

[ 557 ]

The plaintiffs claimed under *Mary* as administrators *de bonis non* to her, who survived her sister *Eleanor*, and brought their bill to compel the defendant *Smallman* to account for profits, and to assign the term to them.

The question was, Whether *Mary*, as joint-tenant with her sister *Eleanor*, and surviving her, became entitled to the whole term by survivorship.

For the defendant it was insisted, that in this case, there ought not to be any survivorship allowed in equity; and as authorities cited the cases of *Cox* and *Quaintock*, and of *Billingsley* and *Shore* (1) and *Draper's* case, 2 *Par. Chanc. Rep.* 64.

*Lord Keeper.* A trust of a term must go as the term at law would have done by the like limitations; and as survivorship would have taken place at law, it must do so in equity; and decreed the defendant to account for profits from the death of *Eleanor*, and to assign the term to the plaintiffs, or as they should appoint. (2)

(1) Ante 1 vol. p. 492. So where three persons were jointly interested in the trust of a term for years, and one of them mortgaged his third part, it was held to be a severance of the jointure, *York v. Stone*, 1 *Salk.* 158.

(2) 23d April. There is an entry of an order, by which the cause is ordered to be set down, May 4th, for hearing. Reg. Lib. 1705. A. fol. 278. Afterwards, 3d May, entry of another order for production of a lease at the hearing, Reg. Lib. *ibid.* fol. 353, but no further entry appears, *Webb v. Webb*, post 668.

So in equity you cannot come nearer to a perpetuity than at law. *Sic. dict.*, per *Lord Keeper, Duke of Norfolk v. Howard*, ante 1 vol. p. 164. So where deed casually lost, the evidence is the same in equity as at law, *Cookes v. Hellier*, 1 *Vez.* 235. *Clavering v. Clavering*, 2 *Vez.* 233. So in general as to the rules by which estates are held and settled, *equitas sequitur legem.* *Cook v. Cook*, ante p. 545. *Thomas v. Freeman*, post 563. *Tuffnell v. Page*, 2 *Atk.* 37.

## TERM. S. TRINITATIS, 1706.

## IN CURIA CANCELLARIÆ.

WILCOCKS *versus* WILCOCKS.

THE plaintiff's father upon his marriage covenanted to purchase lands of 200*l. per ann.* and to settle the same upon himself for life, and on his wife for her jointure, and to the first and other sons in tail, remainder to the daughters. The father, who was a freeman of the city of *London*, died intestate, having purchased lands of the value of 200*l. per ann.* but made no settlement thereof, but permitted them to descend upon the plaintiff his eldest son; who now brought a bill founded on his father's marriage-articles, to have 200*l. per ann.* purchased out of the personal estate, and settled to the uses in the marriage-articles.

on his death the lands descend on the eldest son. On a bill by the son for a specific performance, decreed the lands descended to be a satisfaction of the covenant.

**Lord Keeper.** The lands descended, being of 200*l. per ann.* and upwards, ought to be deemed a satisfaction of the covenant, and decreed it accordingly; (1) and that the personal estate should be divided and distributed amongst the *three* children, according to the custom of the city of *London*, and the statute for settling intestates estates.

One of the daughters having attained the age of *seventeen* years, made her will, and devised her personal estate.

personal estate, dying under twenty-one, and unmarried, cannot devise it by his will; for by the custom it survives to the other children; but he may devise his share under the statute of distributions.

**Per Cur.** The will is good as to the share that belonged to her by the statute; but as to her orphanage share, (2) she

(1) Vide on this head, *Herne v. Herne*, ante p. 555, and cases cited in note, p. 556. there.

(2) Both her own original share, and her share of her brother *John's* orphan-

age-share, he having died under age, Reg. Lib. 1706. B. fol. 508. entered *Wilcocks v. De Lanoy*, and *Wilcocks v. Mayne*.

CASE 506.  
Eq. Ca. Ab. 26.  
pl. 5. S. C.  
A. covenants on his marriage to purchase lands of 200*l. a year*, and settle them for the jointure of his wife, and to the first, &c. sons of the marriage: he purchases lands of that value, but makes no settlement; and

Post. Ca. 631.

**WILCOCKS v. WILCOCKS.** dying unmarried before *twenty-one*, it survives to the other orphans by the custom, and her will could not take place upon her orphanage part. (3)

(3) Vide on this point, the cases, cited in not. to *Fouke v. Lewen*, ante 1 vol. p. 89. by which case it also appears that if she had been married, her part would have gone to the husband, and would not have survived to the other children.—But Note, that if a man marries a city orphan, and her portion is in the Chamber of *London*, and

he die before the wife attain her age of 21, this shall not be looked upon as a *depositum* for the husband, but as a *chose en action*, which, he not having taken it out and reduced into possession, must survive to the wife. *Ann Pheasant's case*, 2 Vent. 340. 1 Ch. Ca. 181. S. C.

## CASE 507.

4 June.

*A.* disinherits his son, and by will gives the greatest part of his estate to *B.* and tells *B.* if his son behaved well, he might pay him 20*l.* a quarter, and if he used that well, he might make it up 40*l.* a quarter.

KINGSMAN *versus* KINGSMAN.

THE plaintiff having displeased his father, who was also jealous that he was not really his son, made his will, and devised both his real and personal estate to the defendant *Jasper Kingsman*, a *Bargeman*, the real estate being upwards of 2000*l.* *per ann.* the plaintiff's bill was to have a discovery of the deeds and writings, and the circumstances of obtaining the will; and whether it was not upon a secret or private trust for the benefit of the plaintiff.

Decreed the 40*l.* a quarter to the son.

[ 560 ] It appeared by proof in the cause, and in some measure confessed by the defendant's answer, that the defendant had confessed to several persons, that when the testator delivered his will to the defendant, he said to him, if his son gave him no disturbance, he might do *so or so*; and being afterwards pressed to discover, what the testator meant by that expression, *so and so*; he owned before several witnesses, that the testator directed him, that if his son behaved himself well, he might allow him 20*l.* *per* quarter; and if he used that well, he might make it 40*l.* *per* quarter. (1)

(1) The statement on this point in the answer is as follows; "That the testator before his death *did advise* the defendant that, if the plaintiff should be quiet and give no disturbance about the said will, the said defendant might, if he thought fit, allow him 20*l.* a quarter; and if he continued quiet and respectful to him, the defendant, he might allow him 40*l.* a quarter, according as the de-

fendant should think the plaintiff deserved it; but that the said testator never *directed* the said defendant to give the plaintiff any thing." The decree, as in the printed report, except that the question as to the reversion does not appear, Reg. Lib. 1705. *A.* fol. 482. And in Vin. Ab. Tit. Devise, p. 276. pl. 12. it is doubted whether this paragraph belongs to the case.

Upon this case the Court decreed the payment of 40*l.* per quarter to the plaintiff during his life. KINGSMAN v. KINGSMAN.

The testator having by his will devised a farm to the plaintiff for life ; and after other legacies, devised all other his personal estate, lands, tenements and hereditaments not before devised, to the defendant ; it was made a question, whether the reversion of that farm passed to the defendant by that general devise. A. devised a farm to B. for life, and after some legacies, devises all other his personal estate, lands, tenements and hereditaments

not before devised, to C. The reversion of the farm passed by the general devise to C.

*Per Cur.* The reversion well passed. (2)

(2) As to the words by which a reversion will pass, vide *Rooke v. Rooke*, ante p. 461. and cases cited in not. there, and the words "all my interest," shall pass a reversion, Co. Litt. 345, b. Et vide the principal case cited in *Nab v. Nab*, 10 Mod. 404. *Cope v. Sir Robert Wilmot, & Al'*. Amb. 706.

### SCOT & ux' versus HAUGHTON and Dr. FULLER.

ONE Mr. *Cornewallis* having set up a lottery called the *Wheel of Fortune*, (3) or a thousand pounds for a penny ; Mrs. *Fuller* the wife of Dr. *Fuller*, sent for twenty-four of those tickets, and gave them amongst the servants, upon condition if 20*s.* or more should come up, her daughter should have a moiety of the lot ; and one of them thus given to the defendant *Haughton*, her foot-boy, happened to produce the 1000*l.* lot. (4)

daughter. The ticket given to the foot-boy came up a prize of 1000*l.* On a bill by the daughter, a moiety of the 1000*l.* decreed to her.

CASE 508.  
Eq. Ca. Ab. 282.  
pl. 8. S. C.  
A. gives lottery tickets amongst her servants, on condition if any of them came up a prize of 20*s.* or more, they should give one half to her

The 1000*l.* being paid to Dr. *Fuller*, *Scot* and his wife, daughter of Mrs. *Fuller*, brought their bill for a moiety of the 1000*l.* lot. And it being undeniably proved by the rest of the servants and others, that the ticket, which cost but one penny, was given the foot-boy on that condition.

[ 561 ]

*Per. Cur.* *Cujus est dare, ejus est disponere*, and an infant is to be bound by it as well as one of full age, and may be a trustee ; and decreed it for the plaintiff accordingly. (5)

A Gift to an infant on condition. The infant is bound by the condition.

(3) 1,680,000 Penny tickets.

(4) No. 992, 231.

(5) Reg. Lib. 1705. B. fol. 261. Note, the tickets were purchased by Mrs. *Fuller* out of her own separate fortune. As to where an infant shall be

bound, vide *Jevon v. Bush*, ante 1 vol. p. 343. and cases cited in not. there, *Cary v. Bertie*, ante p. 343. and cases there cited, *Fry v. Porter*, 1 Mod. 310, 311.

CASE 509.  
Eq. Ca. Ab. 169.  
pl. 2. S. C.

*A.* by answer confessed he had in a passion burnt his marriage articles; but it being proved that he had produced them after the time he said they were burnt, he was committed; and though he made oath he had them not, and could not produce them; yet the Court would

not discharge him, till he consented to admit the articles to be as in the bill.

### SANSON & ux' versus RUMSEY.

THE defendant confessed, that he in a passion had burnt the articles made upon his marriage with the daughter of Mr. *Gamage*; but it being made appear, that he produced and exhibited them at the execution of a commission subsequent in time to the day, on which he pretended to have burnt them, he was committed a prisoner to the Fleet, until he should produce them; and although he afterwards made oath, he had them not, and could not produce them, and that it was insisted for him, that although the burning of the articles was a great misdemeanor; yet a man was not to suffer perpetual imprisonment, because he could not do what was impossible for him to do; yet he could not be discharged until he had consented to admit the articles were to the effect in the bill. (6)

(6) The Editor has not been able to find any entry of the decree in this case; but by an entry of an order, 3d March, 1707, it appears the defendant had been decreed to pay taxed costs. Reg. Lib. 1706, B. fol. 260. vide *Eyton v. Eyton*, ante p. 380, and cases cited in not. there. So where a settlement under which the plaintiffs claimed was lost, but had been proved in Chancery by the plaintiffs themselves 30 years before, when they were not concerned in interest, though they had since become intitled by that deed, it was ordered that a copy (*Qy. attested*) of the deed should be admitted to be read at law; and also that the plaintiffs depositions should be read to prove the deed, although they then claimed under it. *Lady Holcroft v. Smith*, Tr. 1702. 2 Freem. 259. and where a parol agreement confessed in the answer, founded on a written agreement which was lost, it shall be executed, *Hosier v. Read*, 9 Mod. 56. And, as a general principle, where deeds are destroyed by

a party interested, equity will go farther than law, in *odium spoliatoris*, *Cookes v. Hellier*, 1 Vez. 235. *Delany v. Tenison*, 5 Bro. P. C. 300. And, in such case, parol evidence of its contents will be allowed, the destruction being reasonably shewn; being the best proof the thing will then admit, *Cole v. Gibson*, 1 Vez. 505. *Saltern v. Melhuish*, Amb. 247. For the rules of evidence in case of a lost or destroyed deed, vide *Whitfield v. Fausset*, 1 Vez. 389. *Saltern v. Melhuish*, ub. sup. Note, on a bill to supply the loss of a deed charged to be in the defendant's hands, though a strong case for making an immediate decree, yet a trial at law must be directed, if defendant insists on it: but Courts of law will always admit the depositions of witnesses in equity to be read, so no order necessary, *Clavering v. Clavering*, 2 Vez. 233. and deeds are presumed to be lost, *sic dict. per Master of the Rolls, Pickering, v. Lord Stamford*, 2 Ves. jun. 583.

CASE 510.  
June 11.

### HOOK versus TAYLOR, & è contra.

LORDKEEPER.  
A devise of  
two farms to  
the father and

*HUGH PHILLIPS* being seised in fee of two several farms, devised them to *Richard Carill*, the father, and *Richard Carill*, mother for their lives, remainder to trustees till *A.* and *B.* respectively come of age, and then to convey one farm to *A.* and the other to *B.* *A.* died before the time came for the conveyance. *A.* being to have had an estate in fee, the conveyance shall be made to his heir.



HOOK v.  
TAYLOR.

the son, and their heirs, in trust to permit his father and mother to receive the profits for their lives; and after their decease to permit his *two* nephews to receive the profits until placed out apprentices, and when his nephews respectively attained their full ages of *twenty-one*, then to convey one farm to one of the nephews, and the other to the other nephew. (1) *Richard Hook*, one of the nephews, died in the life-time of the testator's father, and before he attained the age of *twenty-one*. The now plaintiff's bill was, as brother and heir of *Richard Hook*, to have the farm, intended for *Richard Hook*, conveyed to him.

*Per. Cur.* The case is no more than a devise to the father and mother for their lives, remainder to trustees till *A.* and *B.* came of age, and then to convey to them respectively; although one of the devisees died before the time came for the conveyance; yet as he was to have had an estate in fee, he being dead, the conveyance shall be to his heir: and decreed for the plaintiff accordingly. (2) *Vide Boraston's case*, 3. Co. 19. a.

(1) The devise was, "In trust that the said *Richard Carill* and *John Carill* should apply the rents and profits thereof towards the maintenance of the testator's father and mother during their lives, and after their deceases to apply the profits towards the maintenance and bringing up of his nephews *Richard Hook*, the plaintiff's late brother, and the defendant *Samuel Mountford*, until they could be put apprentices, and after they should have attained their several ages of 21 years, then that the farm in the possession of *James Russell*, and all lands thereto belonging, should be by the said trustees or the survivor of them settled upon the said *Richard Hook* and his heirs, in such manner as the said *Abraham Hook*, by the advice of his friends, should direct; and as to the farm in the possession of one *Edward Wyld*, that the said trustees or the survivor of them should stand seized thereof to the use of the said defendant *Sam. Mountford*, to be settled on him as his friends should direct." The circumstances and decree as in the printed report. Reg. Lib. 1705. A. fol. 474.

(2) As to what words will pass a fee; it seems that a fee has been held

to pass by the force of circumstances coupled with words, that otherwise or alone, would only pass an estate for life; as where *A.* being seised of lands of 10*l.* per ann. in possession, and 34*l.* per ann. in reversion, gave certain legacies to be paid at certain different times, and then devised all his lands to his youngest son *R.* who did not pay the legacies within the times mentioned: held that a fee passed to *R.* because it appeared that the sums to be paid, were more than the profit of the lands in possession would amount to in the time prescribed for payment, *Reake v. Ley*, 1 Freem. 479. So *Spicer v. Spicer*, Cro. Jac. 527. *Hawker v. Buckland*, ante p. 106. *Reeves v. Gower* 11. Mod. 208, *Cliffe v. Gibbons*, 2 Lord Raym. 1324. So where a devise of "all my lands, tenements, and hereditaments, to my wife and her assigns, reserving an annual sum to be distributed among the poor of the parish for ever;" this will pass a fee by reason of the perpetual charge, *Smith v. Tyndall*, 11 Mod. 90, 102. 2 Salk. 685. *Holt*, 235. S.C. So any word that describes or signifies the interest the devisor had in the land devised, will, without more (such word describing or signifying real estate) pass a

fee, e. g. the word *estate*, which is *genus generalissimum*, *Hyley v. Hyley*, 3 Mod. 228. *Johnson v. Kirman*, Style, 281. *Countess of Bridgewater v. Duke of Bolton*, 6 Mod. 106. 1 Salk. 236. Holt 281, S. C. which last case has never been doubted, per *Hardwicke*, Lord Chancellor, *Ridout v. Pain*, 3 Atk. 492. *Barry v. Edgeworth*, 2 P. Wms. 523. *Hogan v. Jackson*, Cowp. 299, 306. So “tenant-right estate,” *Wilson v. Robinson*, 2 Lev. 91. So the words *temporal estate*, *Tanner v. Wise*, 3 P. Wms. 295. “*worldly estate*,” *Beachcroft v. Beachcroft*, post 690. So the words “*whole remainder*,” *Norton & Lad’s case*, 1 Lutw. Ent. 755. So a devise of all testator’s lands, tenements, and hereditaments, and whatsoever else he had in the world, to his brother, desiring him to pay his debts and legacies, *Ackland v. Ackland*, post 687. So no difference where words describing real estate are joined with words describing personal estate; as where testator bequeaths 50*l.* to his daughter, to be paid within three months after his decease; and then all the rest and residue of his real and personal estate whatsoever, he gives to his dearly beloved wife *Anne Nott*, whom he makes the sole executrix of his will; held a devise in fee, *Murray v. Wise*, post 564. Pre. Ch. 264, S. C. So held and the point a good deal discussed in *Ridout v. Pain*, 3 Atk. 486. 1 Vez. 10, S. C. So where testator made his wife sole heiress and executrix of all his lands, tenements, goods and chattels whatsoever, the same to sell and dispose of as she should think proper; held, the fee passed, *Rogers v. Rogers*, 3 P. Wms. 193. Forr. 268. S. C. sed vide *Piggot v. Penrice*, Pre. Ch. 471. Com. Rep. 250. Gilb. Eq. Rep. 137. S. C. where testator made his niece executrix of all his goods, lands, and chattels, and died, not having any leasehold interest; the lands of inheritance held not to pass; and the reason given by the Court was, “that nothing certain could be inferred from such a devise, and that by testator making his niece executrix of all his lands, the rents of the lands would pass,” et vide *Hogan v. Jackson*, Cowp. 299, 306. So the words “all his right” will carry a fee; as

where *A.* seized in fee, had had issue two sons, *A.* and *B.* and by his will devised several lands to *B.* and that *B.* should renounce all his right in *Blackacre* (of which devisor was then seized,) to *C.*; held that *C.* should take an estate in fee in *Blackacre*, *Hodgkinson v. Star*, cited in *Baker v. Wall*, 1 Lord Raym. 187. So the words “all I am worth,” *Huxtep v. Brooman*, 1 Bro. Ch. Rep. 437. “what I may die possessed of,” per Master of the Rolls, *Barnes v. Patch*, 8 Ves. 604. So “all my effects,” *Hogan v. Jackson*, Cowp. 299. cited in *Wilson v. Major*, 11 Ves. 207. arg. So money given in trust to be laid out in land, *Young v. Combe*, 4 Ves. 101. for the principle of which, vide *Kettleby v. Atwood*, ante 1 vol. 298, 471. and cases cited in not. there. So an estate given to such uses as *A.* shall appoint, *Langham v. Nenny*, 3 Ves. 470. So devise of an estate in a will, that mentioned the same estate as fee simple lands before, the inheritance will pass, *Cliffe v. Gibbons*, 2 Raym. 1324. and as to the effect of the words *estate, interest, right*, at law, vide Co. Litt. 345. a. b. but it seems clear, the effect of those words, as to passing a fee, may be restrained and controuled; as where the word *estate*, which might carry the fee, in one part of the will, evidently and clearly refers to the same word as descriptive of a *life estate* only in another part of the will; *Ibbetson v. Beckwith*, Forr. 157. not so decided, but seems to be allowed. So by the clear intention of the testator, which indeed, when it can be discovered, is the foundation of the whole, *Bailis v. Gale*, 2 Vez. 48. *Ibbetson v. Beckwith*, ub. sup. *Macaree v. Tall*, Amb. 181. *Stiles v. Watford*, 2 Blacks. 938. *Doe v. Chapman*, 1 H. Blackst. 223.—*Barnes v. Patch*, 8 Ves. 604. *Woollam v. Kenworthy*, 9 Ves. 137, and cases there respectively referred to: whether this intention may be inferred from the use, by the testator, of such words as describe particular rights, e. g. when the devise was of all my estate in the occupation of particular tenants, seems to have been a matter of some doubt with *Hardwicke*, Lord Chancellor, in *Goodwyn v. Goodwyn*, 1 Vez. 226. but from the reasoning used by the Lord Chancellor in that case, as applied to

the doctrine delivered by Lord *Mansfield* in *Hogan v. Jackson*, Cowp. 299, 306. it should seem, at the first glance, that the use of such words would restrain the general construction; for though it appears to be considered in *Goodwyn v. Goodwyn*, ub. sup. as the result of the later cases on this head, that a local description of the subject would make no difference, and that, therefore, words describing the particular occupation of tenants would not; yet in *Hogan v. Jackson*, ub. sup. and cited by the *Master of the Rolls* in *Barnes v. Patch*, 8 Ves. 608. without comment, Lord *Mansfield* is stated to say, "it is now clearly settled, that the words '*all my estate*,' will pass every thing a man has; but if the word *all* is coupled with the word *personal*, or with a *local description*, there the gift will pass only personalty, or the specific estate particularly described." He however further says "if the words of the testator denote only a description of the specific estate or lands devised; in that case, if no words of limitation added, the devisee has only an estate for life; but if the words denote the *quantum of interest*, or *property* of the testator in the lands devised, then the whole extent of such his interest passes to the devisee; the whole is matter of construction." It is evident that from this position of Lord *Mansfield's*, as laid down in the book, it does not necessarily follow as the conclusion of his mind, that the conjunction of the word "*personal*," or of words of local description alone, would give an estate for life only in the lands devised; for in the first place, no cases are cited by him in support of that notion; in the next place, the classes of cases above mentioned are against it; and thirdly, the words "*will pass only the specific estate particularly described*," are inconclusive, inasmuch as they still leave the precise meaning of the word "*estate*," as applicable to the words *specific estate*, unascertained and undefined, unless the word *specific* be considered as restraining it to the thing only: it is apprehended, therefore, that the word "*personal*," and words of *local description* will not, of themselves,

restrain the general construction of such words as, without them, would carry a fee, unless from the context it plainly appear that the testator intended they should have that effect: et vide on this point, *Pettiward v. Prescott*, 7 Ves. 541. and as to the word *lands* lying in or at, &c. considered by Lord *Mansfield* not sufficient, *Right v. Sidebotham*, 2 Doug. Rep. 759, 763. As to the word "*estates*" alone in the plural number, which in common parlance seem to be considered as meaning merely a description of the lands, the Court seemed doubtful in *Goodwyn v. Goodwyn*, 1 Vez. 229: but it should seem that if the devise were simply of "*all my estates at, &c.*" there the word "*estates*" would carry the fee; for in the case of *Sayer v. Masterman*, Amb. 344. where the testator devised "*all his estates and farms at, &c.*" per *Wilmot*, Lord Commissioner "The word *estates*, in this case, means only the thing, and not the interest in it. It is coupled with the word *farms*." Et vide *Cowper v. Marten*, & *Al'*. 1 Term Rep. 411. *Fletcher v. Smiton*, 2 Term Rep. 656: but it is said that the word "*hereditaments*" alone will not pass a fee, *Hopewell v. Ackland*, 1 Salk. 239. but the fee passed in that case, by the words "*whatever else the testator had not before disposed of*," *dub.* in *Palmer v. Richards*, 3 Term Rep. 356. but seemed to be taken clear by *Grose*, Just. that it will not. *Moor v. Mellor*, 5 Term Rep. 558. et vide a distinction taken between the word inheritance, and the word hereditaments, per *Powell*, Just. *Smith v. Tyndall*, 11 Mod. 90, 102. 2 Salk. 685. Holt, 235. S. C. Nor will the general introductory words of a will "as to all my worldly estate, &c." alone, be sufficient to explain a testator's intention of enlarging a particular estate or passing a fee, though as connected with other words, or with circumstances, they form a strong circumstance for that purpose, *Loveacre v. Blight*, Cowp. 356. *Denn v. Gaskin*, Cowp. 657, 660, *Right v. Sinebotham*, 2 Doug. 759. *Frogmorton v. Wright*, 3 Wils. 414. *Goodright v. Stocker*, 5 Term Rep. 13. And further on the general question, vide *Lee v. Jones*,

2 Show. 49. 2 Sir *Thomas Jones*, 107. S. C. *Purefoy v. Rogers*, 2 Saund. 388. and not. at the end of that case. *Baddeley v. Leppingwell*, 3 Burr. 1533. *Frogmorton v. Holyday*, *ibid.* 1618. *Markham v. Cooke*, *ibid.* 1684. *Doe v. Richards*, 3 Term Rep. 356. *Andrews v. Southouse*, 5 Term Rep. 292. *Goodright v. Allen*, 2 Blackst. Rep. 1041. 8 Vin. Ab. tit. Devise, (Z. a.) 242. Gilb. law of devises, 19. Fonbl. Tr. Equity, 2 vol. 55. The above cases seem to comprise the material law on this subject; the Editor thought, as the subject had been a good deal canvassed, it might be useful to the student to collect them, else, after all, it appears that very little of general principle can be gathered from them, as the grand go-

verning rule is the intention of the testator: it may however be considered as the result, so far as a general principle does appear, that the Court will, in making its construction on this point, seize on any clauses or expressions to enlarge the estate of a devisee to effectuate the intention: and two rules may be extracted; 1st, that as to a charge on lands devised being considered as indicative of intention to give the fee, it must be such a charge as devisee may lose by, *Frogmorton v. Holyday*, 3 Burr. Rep. 1618; and 2dly, that words which, without more, describe merely *the thing devised* and not *the quantum of interest*, (e. g. *farms*) will not carry a fee.

[ 563 ]

DE

## TERM. S. MICHAELIS, 1706.

IN CURIA CANCELLARIÆ.

THOMAS *versus* FREEMAN.

CASE 511.  
Eq. Ca. Ab.  
46. pl. 12. S. C.  
A possibility  
cannot be as-  
signed, but it  
may be re-  
leased.

*J. S.* the *cestuy que trust* of a term, upon his wife's joining in a sale of part of her jointure, by deed directs and appoints, that his trustees after his and his wife's decease, should assign the residue of the term to his wife's daughter (under whom the plaintiff claimed) when she shall attain the age of *twenty-one*, or be married, after the decease of her father and mother.

The daughter being married, she and her husband in the life-time of her father and mother, assign the term to the plaintiff.

Question if such a possibility could be assigned, and plaintiff well intitled in equity.

*Lord Keeper.* *Equitas sequitur legem*, and that which is the rule of law, must be the rule here. It is a notion that has obtained at law, that a possibility is not assignable; but no

reason for it, if *res integra*; but the law is not so unreasonable, but to allow, that it may be released. (1) The law holds it to be unreasonable that there should be an incumbrance on a man's estate, that can no way be discharged; and therefore doth allow that a possibility may be released; and dismissed the plaintiff's bill, but without costs. (2)

THOMAS v.  
FREEMAN.

(1) Vide *Fulwood's* case, 4 Co. Rep. 66. b. *Lampett's* case, 10 Co. Rep. 47. b.

(2) 24th Oct. There is merely an entry of dismissal without costs, Reg. Lib. 1706. B. fol. 19. It is clear that in equity a possibility may be both released and assigned, *Theobald v. Duffay*, cited in not. to *Wind v. Jekyl*, 1 P. Wms. 574. *Jewson v. Moulson*, 2 Atk. 421. And the question said to be now at rest; even at law, arg. at the bar, *Spragg v. Binkes*, 5 Ves. 588. So by commissioners' assignment, bankrupt's possibility will pass, *Higden v. Williamson*, 3 P. Wms. 132. Stat. 5 Geo. 2d. cap. 30. the words of which are "all such effects of which the party" "was possessed or interested in, or" "whereby he hath or may expect any" "profit, possibility of profit, benefit" "or advantage whatsoever." *Jewson v. Moulson*, ub. sup. *Brown v. Heathcote*, 1 Atk. 160. But it must be such a possibility as the bankrupt can disclose upon his examination, *Moth v. Frome*, Amb. 394. which was the case of a possibility arising under a settlement of lands to settlor for life, remainder to his wife, remainder to the children of the marriage, as settlor and his wife should appoint; and for want of appointment, to the first and every other son in tail male, remainder to daughters, reversion in fee to settlor. Settlor and his wife died without making

any appointment, leaving two children, *Anne* and *Thomas*, who died; *Thomas* having survived *Anne*, leaving the bankrupt his heir, and the Court of opinion this not a possibility within the stat. 5 Geo. 2d. it could not be assigned or released, nor disclosed upon bankrupt's examination. So husband may assign wife's possibility, if for a valuable consideration, *Bates v. Dandy*, 2 Atk. 208. So in general upon consideration, *Robinson v. Bavaser*, 3 Vin. ab. 155. pl. 29. and possibility will go to executor or administrator, *Anon.* 2 Vent. 347. *Pinbury v. Elkin*, post 759. arg. So a possibility, if coupled with an interest is devisable, *Jones & Al' v. Perry*, 3 Term Rep. 93, 96. where the subject is much discussed, and the leading cases stated by *Kenyon*, Chief Justice. *Perry v. Philips*, 1 Ves. jun. 251. As to possibilities and *choses en action*, being put on the same footing, vide *Wind v. Jekyl*, 1 P. Wms. 574. Note, in *Wind v. Jekyl*, ub. sup. and in *Wright v. Wright*, 1 Vez. 411. in not. *Fearne* Cont. Rem. p. 439. is referred to on this point, but the editor has not been able to find any thing on the subject there. In *Moth v. Frome*, Amb. 394. The Master of the Rolls said, that *Higden v. Williamson*, 3 P. Wms. 132. was the occasion of the Stat. 5 Geo. 2d. cap. 30. [And see 6 Geo. 4. c. 16. sec. 63.]

### MURRY versus WYSE & Ux'.

CASE 512.  
Nov. 11.

ROBERT NOTT devised unto his daughter *Mary Wyse*, 50l. to be paid in three months; all the rest and residue of his real and personal estate whatsoever, he gives to his dearly beloved wife, *Anne Nott*, whom he makes the sole executrix of his will.

Eq. Ca. Ab.  
177. pl. 15.  
Pre. Ch. 264.  
S. C.

A. devises all the rest and residue of his real and per-

sonal estate whatsoever. This will pass a fee.



MURRY v.  
WISE.

Question was, whether the inheritance of the real estate or only an estate for life passed to the wife, who had made her will, and devised all her estate to the plaintiff *Murry*.

*Lord Keeper*. Decreed the inheritance of the real estate to the plaintiff. *Vide* the case of *Carter and Horner*, 4 *Modern Reports* 89. *Hanchett and Thelwall*, in 3 *Mod. Reports* 104. and *Hyley and Hyley* 228. (1)

(1) There is an entry of a cause of Reg. Lib. 1706. B. fol. 86. vide *Hook* the above name and date, for an ac- v. *Taylor*, ante 561, and cases cited in count of real and personal estate, but not. there. the above question does not appear,

CASE 513.

Nov. 11.

LORD  
KEEPER.

Eq. Ca. Ab.  
122. pl. 3. 312.  
pl. 8. Salk.  
449. S. C.

[ 565 ]

*A.* mortgages copyhold land to *B.* but the surrender not being presented within the time limited by the custom, became void. Afterwards *A.* becomes bankrupt. On a bill by *B.* against the assignees, this

### TAYLOR *versus* WHEELER.

*RICHARD WHEELER* being seised of a copyhold estate, borrowed 400*l.* of the plaintiff in 1698, and surrendered into the hands of two customary tenants the copyhold estate in question, to be presented at any Court after Sep. 1699, defeasible on paying the 400*l.* and interest. The mortgagor paid the interest for four years together; but no care was taken to get the surrender presented; and in the mean time the mortgagor *Wheeler* became a bankrupt, and died intestate and insolvent. After his death the surrender was tendered, but the homage refused to present it; because by the custom of the manor confirmed by act of parliament, all surrenders were to be void if not presented in twelve months after they were made.

defective surrender was made good. Post, Case 547.

The bill was brought against the assignees and the heir to be relieved, and to supply the defect of the surrenders not being presented in time.

The *Lord Keeper* upon the first hearing of the cause, inclined to dismiss the plaintiff's bill; and thought it more reasonable that he should suffer for his own default, than the other creditors.

But the cause standing in the paper to be farther heard upon the 20th of Feb. and the *Lord Keeper* having been attended with the precedent of *Burgh* and *Francis*, where the Court had supplied the defect of livery against judgment-creditors, he was pleased to declare, that although upon the hearing of the cause, he inclined not to relieve the plaintiff, because through his neglect of getting the surrender presented



TAYLOR v.  
WHEELER.

the creditors might be possibly drawn in to give the greater credit to the bankrupt; and the statute of bankrupts provides, if goods remain in the hands of the bankrupt, that they shall be liable to the creditors, and may be sold as part of the bankrupt's estate, notwithstanding any bill of sale, &c. (1) yet it was too hard to extend a penal law in a Court of equity to the prejudice of the plaintiff, who was in the nature of a purchaser by a defective conveyance, and had contracted and agreed for a security on those lands, which the other creditors had not; but lent to the bankrupt upon a general credit; and could therefore be entitled to no more than what properly was the bankrupt's: and against the bankrupt himself, the plaintiff, had a plain equity, and he must have been decreed to have supplied his defective conveyance: therefore decreed the defendants to pay the plaintiff his principal, interest and costs, or to be foreclosed, and the plaintiff to be admitted to hold and enjoy against the defendants. (2)

[ 566 ]

(1) 21 Jac. 1. Cap. 19. vide the doctrine on this statute a good deal discussed in *Brown v. Heathcote*, 1 Atk. 160. *Ryall v. Rolle*, ibid. p. 165.

(2) The principle upon which the decision in the principal case goes, is considered as settled in *Whitacre v. Pawlin*, ante p. 229. *Child v. Pitt*, Sel. Ca. in Chan. 16. *Finch v. Earl of Winchelsea*, 1 P. Wms. 277. and cases cited in not. (2) p. 280, there. *South Sea Company v. Wymondsell*, 3 P. Wms. 144. *Ex parte Dumas* 1 Atk. 232. 2 Vez. 582. *S. C. Hinton v. Hin-*

*ton*, 2 Vez. 631, 633. *Walker v. Burrows*, 1 Atk. 93. *Brown v. Heathcote*, ibid. 162. *Pye v. Daubuz*, 3 Bro. Ch. Rep. 595. where tenant in tail, made a mortgage with covenant for further assurance, and then became bankrupt; his assignees held bound by the covenant, *Mitford v. Mitford*, 9 Ves. 100. et vide *Peters & Al. v. Soames & Al.* ante 428. and cases cited in not. p. 429. there. [And see *Jacobson v. Williamson*, 1 P. Wms. 382. and cases cited there.]

BROMPTON *versus* ALKIS.CASE 514.  
Nov. 25.

**RICHARD BROMPTON** seised of a reversion expectant on the determination of an estate for life, conveyed the same to trustees, to be sold for payment of debts in a schedule; and if any surplus, to go to his heirs, executors and administrators.

A feme seised in fee of lands charged with specific debts, marries. The husband receives the rents, but does not pay the

interest of the debts. The wife dies without issue. On a bill by her heir, decreed the husband ought to have kept down the interest. Q.

The defendant *Alkis* married the sole daughter and heir of *Richard Brompton*, and in 1681 obtained a conveyance from the trustees to him and his heirs, and paid some of the debts; his wife died without issue, and the plaintiff, being her cousin

BROMPTON v.  
ALKIS.

and heir, brought his bill to have a reconveyance, there having been, as was surmised, sufficient raised by rents and profits for the payment of the debts.

[ 567 ]

The defendant insisted, that what rents and profits were received by him, were received in right of his wife, and that he was entitled to retain them; and if the plaintiff will redeem, he ought to pay what the defendant paid for debts, with interest and costs; and that this was not like the case of a tenant for life, and a remainder-man in fee; there the tenant for life shall be obliged to pay one third of the debt, or to pay the interest out of the profits: but where there is a debt charged upon the estate of tenant in fee simple, he may do what he thinks fit with the land, and much more with the profits; and his heir cannot call him to an account, or complain that he did not pay either principal or interest; and where a man marries an inheritrix, what the husband doth as to the management of the estate is the same as if done by the wife; nor shall he be so much as restrained or enjoined from committing of waste; and there can be no one to question, or call him to account. Tenant in fee-simple, as he has the whole estate, so also he has his heirs in him. *Non est hæres viventis.*

*Per Cur.* The husband, who received the profits in right of his wife, ought thereout to have paid the interest, and shall not suffer the debt to increase; and decreed the defendant to account accordingly. *Q. tamen. (1)*

(1) The statement in the Register's Book is rather confused, but on the whole appears as follows; the bill was for an account of the rents and profits of certain premises called *Underwood's*, *Morgan's*, and the *Pools*, and other premises, from the death of the defendant's wife, and for possession of the premises: to so much of the bill as extended to *Underwood's* and *Morgan's*, the defendant put in a plea, and thereby insisted that the said *Richard Brompton* the testator, being seised in fee of *Morgan's*, and seised of the reversion of *Underwood's*, conveyed the same to trustees, to sell, as in the printed report, and to pay the money thereby raised, proportionably to the debts: that the premises were extended by one *Langley*, and suits were commenced against *Forrester*, one of the said trustees, to compel him to sell and pay the debts;

that the premises were not above 16*l.* *per ann.* and yet the said defendant and *Forrester* agreed that the defendant should take upon him to pay the debts in his said plea particularly mentioned, amounting to 1194*l.* 10*s.* and that in consideration thereof, *Forrester* should absolutely sell the said premises to the said defendant and his heirs; that the said defendant actually paid the debts of the said *Richard Brompton*, to the value of 552*l.* and the said *Forrester*, by indenture of lease and release, 13th and 14th of *Sept.* 1681, sold the said premises to the defendant and his heirs, and he entered and enjoyed the same 22 years, and was at great expense in suits in defending his title, and insisted he was a purchaser of the said premises for a valuable consideration: and as to the personal estate, and the premises called *Pools*, and the

other premises, that no part thereof, or of the rents and profits thereof, had ever come to his hands; that in regard three of the schedule creditors were not paid, he gave *Forrester* bond to save him harmless; and believed that all the said *Richard Brompton's* debts were paid by him the said defendant *Samuel Brompton*, the brother of the defendant's late wife, and by *Anchorett* the widow of the said *Richard Brompton*, and the mother of *Samuel* and *Anchorett* the defendant's late wife; and the decree was, "where-  
 " upon, &c. His Lordship declared that  
 " what money was paid by, or by the  
 " order of *Anchorett* the mother, was  
 " paid in discharge of her son *Samuel's*  
 " estate, and daughter's inheritance;  
 " but that the defendant ought to be  
 " allowed what he hath paid in dis-  
 " charge of any of the debts within the  
 " trust, but that the same ought not  
 " to carry interest during his wife's  
 " life; nor ought the defendant to ac-

" count for the rents and profits of the  
 " premises during her life, but that he  
 " ought to account for the rents and  
 " profits since her death, and that the  
 " plaintiff ought to be admitted to a  
 " redemption of the premises on pay-  
 " ment of what shall appear so due to  
 " the defendant, the defendant dis-  
 " counting for the rents and profits by  
 " him received since his wife's death:"  
 and then the decree refers it to the  
 Master to take the account accordingly,  
 and the Master, in taking such account,  
 was to compute interest on the debts  
 paid by the said defendant within the  
 said trust from the death of his said  
 wife; defendant to pay plaintiff the  
 costs to be taxed and the overplus of  
 monies on the account, if any, Reg.  
 Lib. 1706. A. fol. 143. Vide as to the  
 proportions of tenants for life and re-  
 mainder-men, in respect of principal  
 and interest, *James v. Hales*, ante p.  
 267. and cases cited in not. there.

DE

[ 568 ]

## TERM. S. HILLARII, 1706.

## IN CURIA CANCELLARIÆ.

FRENCH & Ux'. *versus* CHICHESTER.

CASE 515.

Jan. 18.

UPON a bill of review the error assigned and relied on was, that *John Chichester*, as heir and executor to his father, having raised sufficient out of the real and personal estate for payment of his sister's portions, devised to them by his father's will; and having paid all but his sister *Katharine*, who was under age, did by deed convey several lands to trustees for payment of his debts, and afterwards made his will; and thereby also directed that his trustees should, out of his trust-estate pay his debts, legacies, and funerals; and thereby devised to

*A.* by will charges his real estate with the payment of his debts, legacies and funerals; and devised to his wife, whom he made his executrix, all his personal estate, not otherwise disposed of. De-

creed the personal estate to be applied in ease of the real; there being no words in the will to exempt the personal estate from the debts, and the wife taking the personal estate as executrix.

FRENCH v.  
CHICHESTER.

his wife, now the wife of the plaintiff *French*, whom he made his executrix, all his personal estate not otherwise disposed of, intending thereby a provision for her, she having been prevailed upon to sell away part of her own inheritance.

[ 569 ] And the question now was between the heir and the executor, whether the wife and executrix should have the personal estate as devised to her, and leave the debts charged upon the land; or whether the personal estate should be applied in ease and exoneration of the real estate.

The defendant Mr. *Chichester*, having paid *Katharine's* portion, brought his bill to be reimbursed out of the personal estate, and obtained a decree for that purpose.

For *French* and his wife, the executrix of *John Chichester*, it was insisted, that *John Chichester* having charged his debts upon his land, and afterwards by his will having charged even his legacies and funerals upon his land, and devised his personal estate to his wife, doth sufficiently manifest his intention that his wife should have his personal estate as a provision for her, and to her own use; and the same was but a small recompense for the inheritance she parted with; but if made liable to debts, the whole will be exhausted, and the provision intended for the wife defeated: and the known rule is, that where the personal estate is devised away, the heir shall not have it applied in exoneration of the real.

But the Lord Keeper *Wright*, upon the former hearing, and the present *Lord Keeper*, on the bill of review, were both of opinion, that the devise being in the same clause, in which she was named executrix, and not said free and exempt from payment of debts; she must therefore take it as executrix, and the same must be applied to the payment of debts; and therefore allowed the demurrer, (1) and dismissed the bill of review.

(1) Reg. Lib. 1706. A. fol. 164. The demurrer was, that no error in law in the original decree was set forth in the bill of review, and that the affidavit annexed to the bill of review was imperfect, and contained no new matter not in issue in the former cause. Vide *Mead v. Hide*, ante p. 120. *Cutler v. Coxeter*, ante p. 302. and cases cited in

not. there respectively. Et vide particularly *Talbot*, Lord Chancellor's observations on the principal case in *Stapleton v. Colville*, Forr. p. 209, and the note there, and the decree in the principal case affirmed in Dom. Proc. 1 Bro. P. C. 192. So *White v. White*, ante p. 43.

MURRELL *versus* COX and PITT.

CASE 516.

Jan. 24.

LORD  
KEEPER.Eq. Ca. Ab.  
247. pl. 3. S.C.  
better reported.If executors  
join in receiving  
money, both are answerable.Otherwise  
where trustees  
join.

THE plaintiffs, as residuary legatees, brought their bill against the defendants the executors for an account and payment of the surplus; they appeared and put in a joint answer, and in a schedule thereunto annexed, set forth all their receipts and payments, and make themselves jointly debtors for the balance; and *inter al'*. therein mentioned for 200*l.* stock in the *East India Company*, as remaining in their hands undisposed of.

After the answer put in, the defendants sell the stock in the *East India Company*, both join in the transfer, and divide the money; the one receiving 106*l.* and the other the like sum. *Cox* after this became insolvent, and the defendant *Pitt* insisted, that he ought to be charged only with 106*l.* which was all that he received.

The cause was first heard at the *Rolls*, and the decree joint against them both, and consequently the defendant *Pitt* liable to pay the whole; and now upon an appeal, the *Lord Keeper* affirmed the decree. (1)

For the defendant *Pitt*, the cases of *Fellowes* and *Owen*, (2) and of *Heaton* and *Marriott*, were cited; where although trustees had joined in selling and conveying a trust-estate, yet each was charged but with his own receipts: but it was answered that those cases, where a trustee joins only for conformity, and in order to pass over the estate to a purchaser, which cannot be done without his joining or releasing to his co-trustee, differ from the case of executors, who need not join, but may act severally, if they think fit; each may sell, assign, or release the whole, without joining with the other; and in the case cited of *Fellowes* and *Owen*, that was done, with the privity and approbation of the *cestuy que trust*.

[ 571 ]

(1) There appear to have been two hearings at the *Rolls* before the appeal; the decree on the first hearing, 5th Feb. 1794, against the defendant *Pitt*, on the ground that *Cox* and *Pitt* had acted jointly in transferring the stock. The

second hearing 15th April, 1705, when decree affirmed, and then the appeal as above. Reg. Lib. 1706. B. fol. 156.

(2) Ante p. 504, 515, *quod vide*, and the note there for the cases on this subject.

CITY of LONDON *versus* GARWAY & Al'.

CASE 517.

Eq. Ca. Ab.

272. pl. 5. S.C.

THOMAS GARWAY devised several lands to his wife for life, she paying 20*l.* per ann. to A. and B. for their lives, and to trustees to sell, and to dispose of the money as he by writing should appoint, and for want of appointment, to his four nephews. A. by writing appoints his trustees to pay several sums to several persons; but not near the value of the lands. Decreed the surplus to the heir, and not to the nephews, as an interest resulting, and not disposed of.

A. by will devises his lands

and for want of appointment, to his four nephews.

CITY OF  
LONDON v.  
GARWAY  
& AL'.

the life of the longer liver of them; and if she died before them, his trustees to pay the 20*l.* *per ann.* out of the lands devised to them; and therein devises several lands therein mentioned to *three* trustees and their heirs upon trust to sell, and to dispose of the monies to be raised by such sale to such persons, as he should by a paper, to be signed by him, direct and appoint: provided if he left no such paper of appointment, then the trustees to stand seised, in trust for the benefit of his *four* nephews, and if any of the appointees died before sale and payment of the money, such share to resort to his nephews.

*Thomas Garway*, by a paper signed by him, appointed his trustees to pay several sums of money to several persons therein named; but not near to the value of the land.

There must either be express words in a will, or a necessary implication, to disinherit an heir at law.

A devise of lands to the heir after the death of the wife by a necessary implication gives an estate for life to the wife. Otherwise where the devise is to a stranger.

[\*572]

The question was, whether the surplus should pass by the will to the nephews, or result as undisposed of to the heir at law; and decreed it to the heir at law:—The *Lord Keeper* saying, this was not so strong a case as that of *Sir Caesar Cramer* and the *Duke of Southampton*; and that to disinherit an heir at law, there must either be express words, or a necessary implication, according to the case\* in the year-book of *H. 7.* (1) A devise of lands to the heir after the death of the wife, by a necessary implication, gives an estate for life to the wife, because the heir was not to take till after her death; but if the devise be to a stranger after the death of the wife, *that* gives no estate for life to the wife by implication; but the estate during her life shall descend, and go to the heir at law. (2)

(1) 13 *Hen. 7.* p. 13. Bro. Ab. 52. tit. devise.

(2) Vide on this subject, *Faulkner v. Faulkner*, ante 1 vol. 22, and cases cited in not. there: and the principle fully recognised, that whatever is not

disposed of in equity, results to the heir, as at law, *Stansfield v. Haberg-ham*, 10 Ves. 273, 280; and the general principle in *Berry v. Usher*, 11 Ves. 87. *Wilson v. Major*, ibid. 205.

CASE 518.

Jan. 25.

LORD  
KEEPER.

Eq. Ca. Ab.  
111. pl. 5.

S. C.

CREAGH & Ux'. versus WILSON & AL'.

*JOHN WILSON*, a minister of *Northamptonshire*, devised by his will to his grand-daughter, the plaintiff *Elizabeth*, 200*l.* provided she continued with his executors, until she attained

*A.* by will gives his grand-daughter 200*l.* on condition she continued with his executors till she was twenty-one; but if she was taken from them by her father who was a papist, before twenty-one, or married against the consent of his executors, then he gave her but 10*l.* The daughter was placed by the executors with a clergyman, who, before she was twenty-one, with consent of one of the executors, permitted her to make a visit to her father; and he took that opportunity to marry her to a papist. Decreed she should only have the 10*l.*



CARLTON v.  
WILSON.

the age of *twenty-one* ; but if she should be taken from them by her father, who was a *Roman Catholic*, before she attained her age of *twenty-one*, or in case she should marry against the consent of his executors, then he gave her but 10*l.* and made *John* and *Jane Wilson* his executors.

The plaintiff *Elizabeth* did not reside with the executrix *Jane Wilson*, one of the executors, she being a boarder herself ; and although *John Wilson*, the other executor, was a housekeeper, yet he was not willing to receive her : and thereupon, with the consent of the executors, she was placed with Mr. *Joseph Wilson*, a clergyman ; and after she had been there some time had his leave, as also the consent of one of the executors, to make her father a visit, not being *twenty-one* years of age, who took that opportunity to marry her to a papist, and gave her a portion of 800*l.* And the executors refusing to pay the 200*l.* legacy, the bill was brought by the plaintiffs for recovery thereof, and obtained a decree at the *Rolls* for the payment of the legacy, with interest and costs.

[ 573 ]

But now upon an appeal to the *Lord Keeper*, he declared the 200*l.* legacy was given upon a condition precedent : the condition describing the qualification of the person, who is to take, is in its nature a condition precedent : that she should continue with the executors, is to be understood with them, or with such person as they should appoint or approve of, as under their direction ; and they accordingly placed her very properly with Mr. *Joseph Wilson*, a clergyman, which was agreeable to the intent of the testator, that she might be bred a *protestant*. And although she had the consent of the executors that she might go and visit her father ; yet they did not consent that the father should marry her ; *that* was the very thing the testator intended to provide against ; and although there may be a difference between a condition, that she shall not marry without consent, and where it is (as in this case) that she shall not marry against their consent ; according to the case of *Flemming* and *Walgrave*, in 1 *Chanc. Rep.* yet it is the same thing Fol. 58. where the marriage is without consent of the executors. When they have not an opportunity before the marriage to declare their dislike, it is a marriage against their consent, if upon notice of it they dissent, and declare their dislike of it ; and therefore reversed the decree made at the *Rolls*, and dismissed the bill with costs as to the 200*l.* and decreed payment of the 10*l.* only. (1)

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(1) The decree by the *Master of the Rolls*, 27th May, 1705, as above ; and

case stated, Reg. Lib. 1705. A. fol. 405. the decree on the appeal as above, Reg. Lib. 1706. A. fol. 193.—*Note.* It appears by the answer of one of the defendants, that the will was made after the grandfather had discovered that the father, under pretence of sending the plaintiff's wife, his daughter, to boarding school, had attempted to send her abroad to be educated in the Roman Catholic religion. Vide on this subject *Jarvis & Ux'. v. Duke*, ante 1 vol. 19. *Garret & Ux'. v. Pritty & Al'*. ante p. 293, and cases cited in not. there re-

spectively. Et vide further *Dashwood v. Lord Bulkeley*, 10 Ves. 230, 240. which was the case of a consent, conditional upon the offer of a settlement, but retracted on a subsequent refusal to settle; and the marriage taking place afterwards, held there was no relief against the forfeiture, but per *Eldon*, Lord Chan. "The cases have gone this length, that, if consent is once given, it shall not be withdrawn by adding terms, that do not go to the propriety of giving the consent, *ibid.* p. 242.

[ 574 ]

CASE 519.

Jan. 28.

LORD  
KEEPER.Eq. Ca. Ab.  
330. pl. 3. (A.)

S. C.

A. makes three several mortgages to B. C. and D. and in the last mortgage B. is a party, and agrees that after he is paid, he will stand a trustee for D.

Decreed that C. shall be paid before D.

For all the securities being

transacted by the same scrivener, notice to him was notice to D. Post, Case 547.

BROTHERTON, Widow, *versus* HATT, Widow, MARTHA COY, Sir EDWARD HUNGERFORD & Al'. & à contra.

SIR *Edward Hungerford* mortgaged his manor of *Blackwater* to *Marsh* and his heirs, for securing 3000*l.* and interest; and afterwards Mr. *Gunter*, the father of the plaintiff *Brotherton*, lent Sir *Edward Hungerford* 2800*l.* and by deed, reciting the mortgage to *Marsh* for 3000*l.*, Sir *Edward* declares, that after the 3000*l.* and interest paid, the estate shall stand charged, and be a security to *Gunter* for the 2800*l.* and interest; but *Marsh* was no party to that deed. Afterwards the defendant Mrs. *Hatt*, lent Sir *Edward* 400*l.* and obtains a deed, as well from Sir *Edward*, as from *Marsh*; that after *Marsh* was paid, the estate should in the next place stand charged with her 400*l.* and in like manner for *Coy*, and several other persons.

And the question now was, Whether Mrs. *Brotherton* should be paid, next after *Marsh's* 3000*l.* her security being the next in point of time; or whether *Hatt* or *Coy*, &c. should be preferred, because they had got a declaration, not only from Sir *Edward Hungerford*, but also from *Marsh*, who by that means became a trustee for them after his own money paid.

It was first decreed at the *Rolls*, and now affirmed upon an appeal to the *Lord Keeper*, that Mrs. *Brotherton* should be paid next after *Marsh*, and then Mrs. *Hatt*, and so the rest, as they stood in order of time; because all the securities being transacted at the shop of *Williams* and *Ellecker* the scriveners, who were witnesses, and engrossed all the securities, and were in nature of agents to all the several lenders; and notice to the \*agent is good notice to the party, and consequently they the \*agent is good notice to the party, and consequently they

Notice to the agent is notice to the party.

Where there are several

mortgages, they that lend last must come last, having notice of what was before lent.

[ \*575 ]

that lend last must come last, having notice of what was before lent; and the circumstance of Mrs. *Hatt*, and those who came after Mrs. *Brotherton*, having made *Marsh* a party to their securities seems not very material, since a mortgagee, when his money is paid, is but a trustee for the mortgagor; and he cannot by any act of his alone bring a farther charge upon the estate; but however the mortgagor alone, without the mortgagee, may well charge the equity of redemption; and if any one after notice thereof lend more money, although they should obtain the legal estate; yet would in equity stand affected with the notice, and be bound thereby. (1)

BROTHERTON  
v. HATT.

(1) So *Le Neve v. Le Neve*, 3 Atk. 646. The decree at the *Rolls*, as above, 26th June, 1705, and the case stated, Reg. Lib. 1705. A. fol. 507. Affirmed as above, Reg. Lib. 1706. A. fol. 184, entered *Brotherton v. Hungerford*. As to notice, vide *Preston v. Tubbin*, ante 1 vol. p. 287.

### BRUGES & Al'. versus CURWIN & Al'.

CASE 520.  
Jan. 29.

LORD  
KEEPER.

THE plaintiffs being the greatest part of the landholders of the hamlets of *Cleeve* and *Woodmacott*, in the parish of *Bishop's Cleeve* in Com' *Gloucester*, in which hamlets there were about 5000 acres of land, which when not sown with corn, were used in common, and were of little benefit, when over stocked; and the landholders had agreed therefore to a stint, viz. that every landholder should put in but two sheep for each acre he had in the land, or one cow for two acres, or one horse for four acres; but the defendant, the rector, and about nine others would not agree thereto.

The greatest part of the landholders intitled to right of common agree to a stint. This will not bind the rest.

For the plaintiff it was insisted, that the bill was not to take away any just right the defendants had, but that they might so use their property, as not to injure their neighbours; and that upon a bill of the like nature, a decree was obtained 1 *Will.* 3. for the like stint in the hamlet of *Southam*, in the same parish. But the bill was dismissed first at the *Rolls*, and now affirmed upon an appeal. (2)

(2) Nine persons who were represented to be small landholders, and intitled to common, disagreed; and the decree at the *Rolls* was as above, on the ground "that a right of common cannot be altered without the consent of all parties concerned therein," 9th May, 1706. Reg. Lib. 1705. A. fol. 319. and affirmed as above, Reg. Lib. 1706. A. fol. 179. entered *Bruges v. Curwin*, *Bruges v. Rogers*. Vide *Delabeere v. Beddingfield*, ante p. 103. and cases cited in not. there.

CASE 522.

Feb. 1.

LORD

KEEPER.

Lands by marriage settlement are limited to the sons in tail male, remainder to *A.* the husband in fee. Provided if *A.* and his wife, or either of them, die without issue male living at the time of his or her death, leaving only one daughter unmarried, the

trustees to stand seised till they have raised 1,500*l.* for such daughter; and if more daughters unmarried at the death of *A.* and his wife, or either of them, and no issue male living begotten between them, then 3000*l.* for such daughters. *A.* dies leaving daughters, and his wife *enseint* of a son, which is afterwards born. Whether the daughters are intitled to the 3000*l.*

[\*579]

PALMER *versus* CRACROFT & Al'.

**ROBERT CRACROFT** the father, the 18th of *October*, 15 *Car.* 2. upon his marriage settled his estate at *Wisby* in *Lincolnshire*, to himself for life, to his wife for her jointure, and to their first and other sons in tail male, remainder to the right heirs of the grandfather. \*Provided, if *Robert* and *Anne* his wife, or either of them die without issue male living at the time of his or her death, leaving only one daughter unmarried, the conusee of the fine to stand seised until he had raised 1500*l.* for such daughter's portion; and if more daughters than one unmarried at the time of the death of the said *Robert* and *Anne*, or either of them, begotten of their two bodies, and no issue male living begotten by *Robert* on *Anne*, 3000*l.* for such daughters.

*Robert* died leaving five daughters at the time of his death, and his wife *enseint* of a son, the defendant, who was born in about six weeks after his father's death; the plaintiff, who married one of the daughters, as administrator to his wife, brought his bill to have his wife's share of the three thousand pounds raised, her sisters having had their portions paid them.

Question was, whether upon the wording of this proviso, the *posthumous* son should defeat the daughters of their portions.

It was agreed, that there being no provision for a *posthumous* son; and the father dying before the son born, the son could not take by the settlement; for the remainder must immediately vest, when the particular estate determined. (1) And it was insisted, that as the proviso was worded, a construction could not be made, that the daughters were to have portions upon failer of issue male; and whilst issue male no portions to arise; for that the proviso is special, and operates both ways, *viz.* if a son living at the decease of *Anne* or *Robert* first dying; though there should afterwards be a failer of issue male, no portions could arise to the daughters: so *e converso*, if no son living at the decease of *Robert* or *Anne*, the portions should arise, although a son should be after born.

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(1) Vide *Reeve v. Long*, 1 Salk. 227. Cont. Rem. 4 edit. 1 vol. p. 455. et 4 Mod. 282. 3 Lev. 408. S. C. Fearne seq. and cases there referred to.

PALMER v.  
CRACROFT.

*Lord Keeper.* Generally and most commonly it is the intent of the parties, that the daughters are not to have portions provided by the settlement, if there be a son : so when no provision is made for a *posthumous* son, although it is the intent of the parties that the son should have it; yet until the late statute (1) such *posthumous* son could not take; so that what might be the intent of the parties, cannot be the rule. And if in this case the daughters (upon the wording of the settlement, and as it were by accident not being directly intended by the parties) become intitled to a reasonable provision and portion, he thought equity would not take it away; but would be further informed as to the value of the estate; and whether the other daughters had received their portions.

(1) 10th and 11th Will. III. cap. 16, by which it is enacted, "That where any estate is settled in remainder to children with remainder over, any posthumous child may take in the same manner as if born in the father's lifetime," and a child *en ventre sa mere* is considered as a child living, to all intents and purposes, *Beale v. Beale*, 1 P. Wms. 246. *Northey v. Strange*, *ibid.* 342. where however the Court held the words *living at my death* necessary, on the ground that a devise to one's children and grandchildren should *primâ facie* refer only to such children and grandchildren as were living at the time of making the will, *Burdet v. Hopegood*, 1 P. Wms. 486. *Gulliver v. Wickett*, 1 Wils. 105. where devise to wife for life, and after his death, to such child as she was supposed to be enseint with, and to the heirs of such child for ever; provided if such child (being born) should die before twenty-one, leaving no issue of its body, the reversion should go to the wife and two sisters in thirds; and per *Lee*, Chief Just. the devise to the child is a contingent remainder and a fee; but the proviso makes it a fee simple conditional. So as well for taking personal estate under the statute of distributions, as real estate, *Wallis v. Hodson*, 2 Atk. 114. So under a marriage settlement where 1500*l.* to be raised for such child or children of A. as should be living at the time of his death, *Hale v. Hale*, Pre. Ch. 50. So where 2000*l.*

to be raised for such child or children of the marriage, as should be living at the death of the father or mother, *Millar v. Turner*, 1 Vez. 85. In these cases the children meant, appear to be the children of the testator; but where testator left money in trust for certain of his relations, a child *en ventre sa mere*, and born after the death of testator, claiming as a relation, and no dispute as to the relationship, the claim was disallowed by *Apsley*, Lord Chancellor, on the ground, "that the Court has never put such a construction upon a will, but in the case of a devise to children," *Bennett v. Honeywood*, Amb. 708, 712. So as to a devise to children of a person other than the testator living at the testator's death, it appears to have been held, that a child *en ventre sa mere*, not being in esse at the time, could not take the legacy, *Ellison v. Airey*, 1 Vez. 111. *Pierson v. Garnet*, 2 Bro. Ch. Rep. 38, 47. *Cooper v. Forbes* *ibid.* 63: but that doctrine seems to be gone; for where a devise to the use of such child or children of testator's brother, whether male or female, as should be living at the time of his said brother's death as tenants in common, a child *en ventre sa mere* held intitled per *Thurlow*, Lord Chancellor, *Clarke v. Blake*, 2 Bro. Ch. Rep. 320. 2 Ves. jun. 673. S. C. And further as to this doctrine, and the capacities of infant *en ventre sa mere*, vide *Thellusson v. Woodford*, 4 Ves. 322, 342.

CASE 523.

Feb. 3.

LORD

KEEPER.

Eq. Ca. Ab.

111. pl. 7. S.C.

*A.* devised300*l.* to *B.* her

daughter, and

that if she

married under

twenty-one,

without con-

sent of the

executors, or

major part of them, the legacy to go to the children of her sister the wife of *C.* and made *C.*and two others executors. *B.* being at the house of *C.* there marries his son by a formerwife, with his privity, being under twenty-one : *B.* and her husband bring a bill for the le-gacy. *C.* in favour of his other children, insists the legacy forfeited. The other executors

confessed, they had notice of the courtship, and did not contradict or disapprove of it. De-

creed the 300*l.* to the plaintiffs there being at least a tacit consent.MESGRETT & Ux'. *versus* MESGRETT & Al'.

*HESTER TANDEN* devised to the plaintiff *Maria*, her only child, the sum of *three hundred pounds*, a pearl necklace, and her jewels ; but if she married before the age of *twenty-one*, without the consent of the executors, or the major part of them, in such case what she had devised to her daughter the plaintiff, should go to the children of her sister, the wife of the defendant *David Mesgrett*; (1) and made the defendant *David Mesgrett*, one *Tanden* and *Chawell* executors.

*A.* devised 300*l.* to *B.* her daughter, and that if she married under twenty-one, without consent of the executors, or major part of them, the legacy to go to the children of her sister the wife of *C.* and made *C.* and two others executors. *B.* being at the house of *C.* there marries his son by a former wife, with his privity, being under twenty-one : *B.* and her husband bring a bill for the legacy. *C.* in favour of his other children, insists the legacy forfeited. The other executors confessed, they had notice of the courtship, and did not contradict or disapprove of it. Decreed the 300*l.* to the plaintiffs there being at least a tacit consent.

The plaintiff *Maria* being eleven years old at the death of her mother, lived for some time afterwards with *Chawell*, one of the executors, and was there courted by the plaintiff her now husband, the son of *David Mesgrett* by a former wife ; and afterwards the plaintiff *Maria* removed to the house of the said *David Mesgrett*, where the marriage was had with the privity of the said *David Mesgrett* ; although he now sets up a pretence that the legacy was forfeited, and devised over to his children by his *second* wife, the sister of the testatrix ; and the other executors by answer confessing that they had notice such match was carrying on, did not contradict or disapprove of it ; nor remove the young woman, as they might have done.

*Lord Keeper* decreed for the plaintiffs ; it plainly appearing there was at least a tacit consent ; and the will not prescribing the manner of the consent to be in writing or otherwise : and looked upon it as a fraud in *David Mesgrett* in promoting the marriage ; and afterwards to pretend a forfeiture for want of a consent to gain the legacy to his children by his last wife. (2)

(1) The words of the bequest are, "to *Susanna Maria*;" meaning the wife of the plaintiff, "300*l.* necklace, "jewels, &c." and did recommend her and her education to her the said testatrix's said executors, and three of the defendants : and did further will, that if the plaintiff's wife should marry before the age of twenty-one years, unless with the consent of the executors, or such as should be living ; or if she should refuse to be educated as her executors or two of them should appoint, in either of the said cases, she, the said

testatrix declared she gave the plaintiff's wife nothing, but did give the same over to the children of her sister *Mesgrett* that should be living ; and made the said plaintiff's wife residuary legatee, R. L.

(2) The Court declared it sufficiently appeared, that the plaintiffs intermarried with the consent of all three executors, and that the conditions of the said will were performed, Reg. Lib. 1706, B. fol. 471. Vide *Creagh & Ux'. v. Wilson & Al'*. ante 572. and cases cited in not. there.



NOYS & Ux'. *versus* MORDAUNT & Al'.

**JOHN EVERARD** having *two* daughters, in 1686 makes his will, and devises to *Margaret*, his eldest daughter, his lands in *Beeston*, and *eight hundred pounds* in money : to *Mary* his *second* daughter, his lands in *Stanborn* and *Broom*, and *one thousand three hundred pounds* in money ; provided and on condition she released, conveyed and assured *Beeston* lands to her sister *Margaret* ; and devised to his said *second* daughter *one thousand three hundred pounds* in money. (1) Provided if he should have a son, what was devised to his daughters to be void ; and in such case gave to *Margaret* *one thousand two hundred pounds*, and to *Mary* *one thousand pounds*. Provided if he should have another daughter, then he gave the *eight hundred pounds* devised to *Margaret*, to such after-born daughter, and the lands at *Stanborn* and *Broom*\* and the *one thousand three hundred pounds* devised to *Mary* the *second* daughter to the said *Mary*, and such after-born daughter equally between them. He shortly afterwards died, and left his wife *enseint* of a daughter *Elizabeth*. *Mary* married *Higgs*, and died without issue, not having given any release to *Margaret* her sister according to the will.

was upon an implied condition they should release

*Elizabeth* claimed not only the lands devised to her by the will, and a moiety of what was devised to her sister *Mary* ; but also a moiety of the *Beeston* lands devised to *Margaret* ; the same on the testator's marriage, being settled on himself for life, and his wife for her jointure, and to the first and other sons, and in default of issue male, to the heirs of his body.

Question was, whether she should be at liberty so to do, or ought not to acquiesce in the will ; or renounce *any benefit* thereby.

**Lord Keeper.** In all cases of this kind, where a man is disposing of his estate amongst his children, and gives to one fee-simple lands, and to another lands intailed, or under settlement ; it is upon an *implied condition*, that each party acquit and release the other ; especially as in this case, where plainly he had the distribution of his whole estate under his consideration, and has given much more to *Elizabeth*, than what belonged to her by the settlement ; and had it in his power to cut off the intail. (2)

CASE 524.

Feb. 4.

LORD  
KEEPER.

Eq. Ca. Ab.  
273. pl. 3. Pre.  
Ch. 265. Gilb.  
Eq. Rep. 2.  
S. C.

*A.* having two daughters, *B.* and *C.* devises fee-simple lands to *B.* and lands which were settled upon him in tail to *C.* If *B.* will claim a share of the intailed lands under the settlement, she must quit the fee-simple lands, for the testator having disposed of his whole estate amongst his children, what he gave them to each other.

[\*582.]

(1) This last bequest of 1300*l.* in money, seems to be a repetition of the first bequest of that sum with the lands, in *Stanborn* and *Broom*.

(2) The principle of the above case is fully recognised in *Streatfield v. Streatfield*, Forr. 176. So *Forrester v. Dr. Cotten*, Amb. 338. [1 Eden. 532.]

**NOYS v. MORDAUNT.** In this case the testator having several mortgages, and, amongst the rest, a mortgage in fee of lands in *Fenlake*, he devises his mortgages to his two daughters,\* and their executors and administrators; and devises his lands in *Fenlake* (upon which he had entered upon forfeiture of the mortgage) to his two daughters and their heirs. *Mary* one of the daughters dying without issue, *Higgs* the husband and administrator, claims a moiety of the lands in *Fenlake*, as part of his wife's personal estate; it being a mortgage not foreclosed, nor the equity of redemption released.

A man having mortgages, one of which was a mortgage in fee of lands in *D.* on which he had entered, devises those lands to his two daughters and their heirs, and the other mortgages to them, their executors, &c.; one of the daughters dies. Her share of the land in *D.* shall go to her heir, and not to her administrator; for the testator might intend those lands to pass as real estate to his daughters, though as between him and the mortgagor, they were but a mortgage.

[\*583 ]

but in that case considered as not to operate where mere general words. (So *Stratton v. Best*, 1 Ves. jun. 285. where general devise of all testator's real and personal estate) nor further than simple plain devises of the inheritance, and not where there are limitations; as to which, vide also, *Finch v. Finch*, 1 Ves. jun. 534, 541. [4 Bro. C. C. 38.] where devise of *all his lands*, and testator in possession of the particular lands there in question, and election decreed, *Rutter v. Maclean*, 4 Ves. 531. where the point of possession considered. As to the cases in which the doctrine of election operates; it was formerly considered as confined to the cases of wills, but in *Bigland v. Huddleston*, in not. to *Freke v. Lord Barrington*, 3 Bro. Ch. Rep. 274, 285. it was held to apply equally to a deed. The cases of election are generally to be considered (it is presumed,) as identified with the cases of *implied* conditions; but there appears to be a principle that distinguishes between the cases of election and those of *express* condition, and is thus stated by *De Grey*, Chief Just. and adopted by *Loughborough*, Lord Chancellor, according to the report of the case of *Lady Cavan v. Pulteney*, 2 Ves. jun. 544, 560. "An express condition must be performed as framed; and if it is not, that will induce a forfeiture, but the equity of this Court, (i. e. to compel election,) is to sequester the devised interest, *quousque*, till satisfaction is made to

"the disappointed devisee." Et vide further on this point, the judgment of *Hardwicke*, Lord Chancellor, in *Boughton v. Boughton*, 2 Ves. 14, 15. There appears further, to be a principle that distinguishes between the cases of election and those of satisfaction, and is found to be recognised by *Eldon*, Lord Chancellor, in the case of *Pole v. Lord Somers*, 6 Ves. 309, 318. where certain trust funds were, by indentures of settlement made on the marriage of testator, directed to be paid to trustees therein named, to be laid out in the purchase of lands of inheritance to be settled: part of these funds were received by the trustees, and laid out in the purchase of the manor of *Cotleigh*, which was conveyed to the uses of the settlement, which contained a power of appointment to testator: a great part of the remainder of the trust funds was received by the testator, and *mixed with his own money*. There were several children of the marriage: testator, by his will, gave his children legacies to an amount larger than the sum they would have been intitled to out of the said trust fund, under the settlement; and he directed, as to the manor of *Cotleigh*, that his executors should if necessary sell the same, and apply the produce for the benefit of one of his children in particular, contrary to the uses of the settlement, and beyond his power; and per *Eldon*, Lord Chancellor, "this is not purely a case either of satisfaction or election; as to the

*Per Cur.* Although it is a mortgage, as between the mortgagor and mortgagee; yet the testator's intent was, it should pass to his daughters as a real estate, to them and their heirs, and not as part of his personal estate; and

NOYS v.  
MORDAUNT.

“manor of *Cotleigh*, it is a case of election; as to the sum mixed with the property of the testator, it is a case of satisfaction.” And the principle that distinguishes them is presumed to be this, namely, that the case of election can arise only where testator affects to give something which is not his to give, but belongs to some other person, and gives that person some estate of his own, *Broome v. Monk*, 10 Ves. 609, 616. As to the question whether, where will of both real and personal estate, but the will not executed so as to pass the real estate, party shall be compelled to elect as to the personal, the affirmative is settled in *Newman v. Newman*, on appeal from the Rolls, 1 Bro. Ch. Rep. 186. et vide *Boughton v. Boughton*, 2 Vez. 14. in which latter case the doctrine, it is said *arg.* was carried to compel an heir at law to elect, he claiming against an unattested will, *Sheddon v. Goodrich*, 8 Ves. 492, but the case of *Boughton v. Boughton*, was not, it is apprehended, so much a case of election as of an express condition annexed to a personal legacy: and that doctrine as to express condition recognised in *Whistler v. Webster*, 2 Ves. jun. 367, 371. *Sheddon v. Goodrich*, ub. sup. p. 497. but it is clearly understood that where nothing in an unattested will, but a mere devise of real estate, there no case of election against an heir at law claiming a real estate under the will, and also one against the will, *Sheddon v. Goodrich*, ub. sup. So where heir claims a personal legacy, *Hearle v. Greenbank*, 1 Vez. 307, et vide on this point, the case of *Carey v. Askew*, cited *arg.* in *Sheddon v. Goodrich*, ub. sup. p. 492. But yet it is settled, that in the case of an unsurrendered copyhold, upon which the will can have no operation, the heir shall be put to his election, *Pettiward v. Prescott*, 7 Ves. 541, 544. *Standish v. Standish* in the Exchequer referred to, and the doctrine admitted, *arg.* *Blunt v. Clitherow*, 10

Ves. 591. And it seems indeed, that the question of election can never arise so as to enable the Court to decide upon it, unless upon a presumed intention of the testator, *Crosbie v. Murray*, 1 Ves. jun. 557; nor can that intention appear to the Court, but by the evidence arising from legal instruments, e. g. as to personal estate, the probate of the will, &c. *Rich v. Hull*, 9 Ves. 369. And it must either be directly expressed, or necessarily implied, *Blake v. Bunbury*, 1 Ves. jun. 523. *Finch v. Finch*, ibid. 541. As to evidence of such intention, and when allowed, *Pole v. Lord Somers*, 6 Ves. 309. *Druce v. Denison*, ibid. 385. and cases there referred to respectively; and election cannot be compelled but upon something in the will, *Stratton v. Best*, 1 Ves. jun. 285: but where that is clear, and the party intitled under a will claims paramount and against it, there election decreed upon the general principle, that no one claiming under a will can contravene it: so as to *feme covert*, where annuity by will, to her separate use for life, charged upon a devised estate, and a title paramount, to part of the same estate in tail, and possession taken by the husband under that title, the feme allowed to elect, *Wilson v. Lord Townshend*, 2 Ves. jun. 693. *Wilson v. Mount*, 3 Ves. 191. and upon this principle, in all cases where parties have claims under and against a will, there they must elect, *Wollen v. Tanner*, 5 Ves. 218. *Blount v. Bestland*, ibid. 515. As to the question how far party claiming under person electing, is bound by election of that person, vide *Long v. Long*, ibid. 445. As to issue of tenant in tail being bound by election of tenant in tail, the question not decided; but in *Ward v. Baugh*, 4 Ves. 623. it was decided that the children were not bound by the election of the parent; but that seems to arise there rather out of the circumstances of the particular case, than from any general principle; the words of the Master of the Rolls

NOYS v.  
MORDAUNT.

*Mary* the wife of *Higgs* being dead without issue, it descends and goes to her sisters, as her heirs at law ; and *Higgs* as administrator to his wife, ought not to have any part thereof as personal estate. (1)

being " upon reading this will I have  
" no doubt, that the children are not  
" bound by the election of the parent." Note, in *Long v. Long*, ub. sup. the principle of the doctrine of election, and the point as to the issue in tail being bound are thus stated in Mr. *Richards's* argument, " with respect to  
" the second point (viz. election,) elec-  
" tion proceeds upon this principle: it  
" is an offer by way of bargain on the  
" part of the testator ; upon which the  
" Court says, if they (i. e. the devisees)  
" do not accept the offer, they shall not  
" have the estate under the will : then  
" it is like any other bargain with te-  
" nant in tail : but the issue in tail is  
" not bound to accept that offer." The Court observed that the point might admit a good deal of argument. As to the issue in tail being bound by agreement of tenant in tail, which they are not ; vide *Hinton v. Hinton*, 2 Ves. 634. vide further on the general head of election, *Wilson v. Lord Townshend*, 2 Ves. jun. 693. *Yate v. Moseley*, 5 Ves. 480. [*Moore v. Butler*, 2 Sch. & Lef. 249. *Judd v. Pratt*, 13 Ves. 168. 15 Ves. 390. *Thellusson v. Wood-*

*ford*, 13 Ves. 209. 1 Dow, 249. *Dashwood v. Peyton*, 18 Ves. 27. *Dillon v. Parker*, 1 Swan. 359. *Gretton v. Haward*, ib. 409. *Hume v. Rundell*, 2 S. & S. 178, Jacob, 505. *Tibbits v. Tibbits*, Jacob, 317. *Back v. Kett*, ib. 534. *Blommart v. Blommart*, 1 S. & S. 597.] The cases above cited seem to include all that can be gathered of principle relating to the doctrine of election : as to what shall or shall not be construed intention on the part of the testator, that, it is presumed, must depend upon particular construction and circumstances.

(1) " The same not being devised as  
" a mortgage but as lands of inherit-  
" ance, but if there are any other lands  
" contained in that mortgage, which  
" are not within that distinction, then  
" that such lands ought to be taken as  
" the testator's estate of inheritance not  
" devised or disposed of by the will,  
" and that the profits thereof ought to  
" be applied as lands not devised by  
" the will." Reg. Lib. 1706. B. fol. 370. Vide on this head *Winn v. Little-*  
*ton*, ante 1 vol. p. 4. and cases cited in  
not. there.

CASE 525.  
LORD  
KREPER.  
Feb. 27,  
Eq. Ca. Ab.  
122. pl. 5. S. C.  
A. being te-  
nant in tail of  
the trust of a  
copyhold es-  
tate, with re-  
mainder over,  
and trustees  
refusing to  
surrender the  
legal estate to  
him, he  
brought his  
bill for that

BARBARA OTWAY Widow and Executrix of ROGER  
OTWAY *versus* HENRY HUDSON, JOHN MILLS,  
THOMAS FENWICK, ANNE DOVE, MARY WARNER  
& Al'.

THOMAS OTWAY being seised of three copyhold mes-  
suages, held of the manor of *Tyneman* in the County of *Northum-*  
*berland*, surrendered to trustees to the use of himself for life,  
remainder to *Susanna* his wife for life, remainder to the heirs  
of their bodies ; and in default of such issue, the said trustees  
were to surrender to such other trustees, as he should by will  
appoint to such uses as should be therein mentioned ; May 22,  
purpose, and pending that suit, went to the Lord's Court, and offered to surrender ; but was  
refused, not having the legal estate, and thereupon he made his will and gave the estate to  
his wife and children. Decreed the estate to go according to the will, the Court conceiving  
the will sufficient to bar the intail of a trust.

OTWAY v.  
HUDSON.  
[ 584 ]

1696, he made his will, and thereby directed his trustees to surrender to *Hudson* and *Mills*, in trust to permit *John Otway* and the heirs of his body to take the profits, remainder to *Roger Otway*, the plaintiff's late husband, in tail male, remainder to *John Dove* in tail male, remainder to his own right heirs, and shortly after died; *John Otway* also died without issue; and *Susanna* the wife of the testator being also dead, *Roger Otway*, the plaintiff's late husband, requested the trustees to surrender to him in tail male; which they refusing, *Roger Otway* brought a bill to compel them to surrender to him, and they put in their answers thereto; but before any further proceedings *Roger Otway* died; but pending that suit, he went to the Lord's Court, and desired to be admitted to surrender; which was refused, because the legal estate was in the trustees. Matters standing thus, *Roger Otway* made his will, and devised the premises to his wife for life, remainder to her children by a former husband and their heirs, subject to the payment of his debts.

The plaintiff's bill therefore was, that whereas by the custom, every widow of a copyholder is intitled to her *free bench*, (1) or widow's estate; and although the husband had not the legal estate, yet was tenant in tail of the trust, and endeavoured to have had the estate at law surrendered to him; and although the trustees refused so to do in favour of the remainder-man; yet *that* ought not to turn to her prejudice: and the bill likewise prayed relief upon the will of her husband, by which as far as in him lay, he had devised the premises in manner above-mentioned,

The defendants *Dove* and *Warner*, as co-heirs to the testator, insisted the intail was never well barred, and that they were well intitled,

*Per Cur.* Decree the estate to go according to the will of *Roger Otway*, he having endeavoured to get in the legal estate, [ 585 ]

(1) *Free Bench* is merely a widow's estate in such lands as the husband dies seised of, not that he is seised of during the coverture, as dower is, *Godwin v. Winsmore*, 2 Atk. 526. where the custom was laid for the wife to have the whole lands as her free bench. [And she shall not have free bench of a trust estate of a copyhold, *Forder v. Wade*, 4 Bro. C. C. 521.] As to the power of husband to bar widow of her free bench; it appears that any act for va-

luable consideration in equity, (e. g. a covenant,) is equivalent to bar with a surrender at law, *Brown v. Raindle*, 3 Ves. 256, and cases there referred to, *Musgrave v. Dashwood*, ante 45, 63. contra. Note, there is in equity this distinction between actual assignment, and a mere voluntary covenant to assign, that equity will not construe such a covenant beyond the letter, *Basse v. Grey*, Bart. post 692.



OTWAY v.  
HUDSON.

Where there is no particular method in the Lord's Court to bar intails, a common surrender is sufficient, though the intail is of a legal estate.

The widow of the *cestuy que trust* of a copyhold estate shall have her free bench, as well as if her husband had had the legal estate. Money is to be invested in land and settled on a woman in tail. She marries, has a child and dies, before the money is laid out.

The husband

shall have the interest of the money for his life. A man shall be tenant by the courtesy of a trust, as well as of a legal estate.

to the intent he might have made a regular and proper surrender; but the trustees refusing to comply, he brought a bill to enforce them, and repaired to the Lords' Court, and made or tendered to make such surrender as he could; and having devised the estate to the uses and purposes in his will, the *Lord Keeper* conceived *that* sufficient to bar the intail of a trust. (1) Where there is no particular method in the Lord's Court for barring of intails, (2) a general or common surrender is sufficient, even where the intail is of the legal estate. (3)

The widow of the *cestuy que trust* of a copyhold estate, ought to have her *free bench* or widow's estate, as well as if the husband had had the legal estate in him: there it may be said, that *equitas sequitur legem*; and the case of *Sweetapple and Bindon*, (4) was for that purpose cited: where money was to be invested in land, and settled on the wife and the heirs of her body; she married and had issue, but died before the money was laid out and invested in land, the husband her surviving. The *Lord Keeper* decreed, he should have the interest of the money for his life, as he must have had the profits of the lands if it had in his wife's life-time been laid out and invested in land according to the trust; and that he ought to be tenant by the courtesy of a trust, as well as of a legal estate.

(1) Reg. Lib. 1706. B. fol. 192. Note, *Roger Otway*, was in possession and receipt of the rents and profits till his death. As to costs, none were given on either side, "*unless the defendants shall put the plaintiff to the trouble and charge of inrolling this decree; but in case they shall so do, they are to pay unto the plaintiff the costs of this suit to be taxed.*"

(2) Which there did not appear to be in the principal case, R. L.

(3) As to this position, vide *Godwin v. Winsmore*, 2 Atk. 525, where *Hardwicke*, Lord Chancellor, is reported to say, after stating the ground of the decree, "but as to the general doctrine at the latter end," (i. e. it is presumed, the above mentioned position,) "that is not warranted by the decree." Sed vide this subject very fully discussed in *Moore v. Moore*, 2 Vez. 596, latter part, 601. *Carr v. Singer*, C. B. *ibid.* p. 604. and the cases there res-

pectively referred to: from which, it appears that the doctrine that a surrender, (though only to the use of the will,) will be sufficient to bar without a custom, is fully established, although *Willes*, Chief Justice, in the above mentioned case of *Carr v. Singer*, was of opinion it was against the law, but three Justices against him. This was certainly, however, not considered formerly as the law, vide Co. Litt. 60. b. and particularly not. 406, 407. there. Note, three ways of barring are mentioned in the argument of *Birch*, Justice, in *Carr v. Singer*, 1st. Recovery in the Lord's Court. 2d. Surrender. 3d. Forfeiture and regrant. [A custom to bar by surrender may be concurrent with a custom to bar by recovery. *Everall v. Smalley*, 1 Wils. 26. 2 Stra. 1197. *Doe v. Truby*, 2 Blac. Rep. 944. *Doe v. Ossingbrooke*, 2 Bing. 70.]

(4) Ante p. 536. et vide the not. there.



DE  
TERMINO PASCHÆ, 1707.

IN CURIA CANCELLARIÆ.

SMITH *versus* GOODMAN, & é contra.

CASE 526.

LORD  
KREPER.

May 14.

**EDWARD WARNETT** in 1702 made his will, and thereby devised lands to be sold for the payment of his debts and legacies; and the surplus after debts and legacies paid, he devised to *five* of his relations, to each a *fifth* part, of whom *John Smith, jun.* one of his coheirs, (*to wit*) a sister's son, was one, and made *Edward Goodman* his other coheir, his sole executor, without any devise to him of his personal estate; but devised several lands to him and his heirs. After the will, the testator mortgages part of the lands devised for a term of *five hundred years* to *John Smith, sen.* and levied a fine *sur conu- zance de droit* for confirmation of it.

It fell out, that the person, whom he had directed to draw his will, had inserted in the draught thereof a clause subjecting as well his personal estate, as the lands directed to be sold, for payment of his debts and legacies; which the testator observing, he struck that clause out, and told the drawer of his will, that he intended his personal estate for his executor, and bade him insert a clause in his will to that purpose: who replied, that was not necessary; the clause being struck out that made it liable to debts and legacies, the executor would of course, or without more, have the personal estate.

[ 587 ]

The will was afterwards ingrossed, leaving out the clause struck out by the testator; by which the personal estate was expressly mentioned to be subject and liable to the payment of debts and legacies, and without any express devise inserted of the personal estate to the executor; and for the plaintiff *Smith* it was insisted, that the case of the Countess of *Gainsborough* (1) was a case in point.

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(1) Ante, p. 252. et vide *Selwin v. Brown*, 4 Bro. P. C. 179.

DE

## TERM S. MICHAELIS, 1707.

IN CURIA CANCELLARIÆ.

KEAT *versus* ALLEN.

CASE 527.

LORD  
KEEPER.

Oct. 28.

Eq. Ca. Ab. 90.

pl. 5. Pre. Ch.

267. Case 219.

Anon. S. C.

Bond given to the wife's father, in order to obtain his consent to the marriage of his daughter, to repay part of the portion if the daughter died without issue, where the daughter was

intituled to her portion by a collateral ancestor, Bond set aside as a marriage brocage bond.

THE plaintiff *Keat* on his marriage with the defendant's daughter, with whom he received *one thousand two hundred pounds* as a marriage-portion, was obliged by the defendant, in order to obtain his consent to his daughter's marriage, to give bond to pay the defendant *two hundred pounds* : (1) if the plaintiff's wife died without issue, or the issue (2) died before *eighteen* or marriage ; (3) and the wife being dead without issue, the bill was to be relieved against that bond, as unduly obtained ; the 1200*l.* portion being given to the plaintiff's wife by an aunt ; and as the father gave her no portion, there was no reason for him to require or exact such bond upon the contingencies before mentioned. (4)

*Per Cur.* It is in nature of a *Brocage*-bond ; and decreed it to be delivered up to be cancelled, and the defendant to refund what had been paid for interest, but without costs. (5)

(1) To the use of the defendant's son.

(2) If female.

(3) If male before twenty-one.

(4) The plaintiff entered into a recognizance in the nature of a statute staple to the defendant, in the penalty of 2400*l.* for securing the payment of 1200*l.* to the said defendant's daughter, or to the issue of her body lawfully

begotten by the plaintiff if she or any of them should survive the plaintiff. R. L.

(5) Unless the defendants delayed to perform the decree, and in such case to pay costs, Reg. Lib. 1707. *A.* fol. 22. Note, the reason of the decree does not appear ; vide on this point, *Drury v. Hooke*, ante 1 vol. 412, and cases cited in not. there.

STAFFORD & Al'. *versus* SELBY.

CASE 528.

Eq. Ca. Ab.  
320. pl. 5. S. P.

THE bill was brought by the plaintiff, as being a creditor of *Charles Stafford*, who had made a deed of trust for payment of debts, and for securing portions to his brothers and sisters, (of which the plaintiff was one) and had afterwards sold and conveyed to the defendant, who had also taken in a mortgage from the *Lady Neville*.

A person who will take advantage of the statute against clandestine mortgages, must be an honest

mortgagee : and therefore if a man has used any fraud, or ill practice in obtaining a second mortgage, he shall not have the benefit of the statute.

The defendant pleaded in bar to the bill, that he was a purchaser without notice ; and also pleaded the statute against *clandestine mortgages* ; and that the said *Stafford* before the making of the said deed of trust, had mortgaged the premises to the *Lady Neville*, and did not, as the statute requires, give a writing under his hand of all the prior incumbrances ; but made an affidavit ; wherein he set forth several of the incumbrances, but omitted others of them, particularly mentioned in his plea.

4 & 5 W. & M.  
Ca. 16.

The plea having been replied to, and the cause now brought on to hearing, the defendant chiefly insisted on his plea of the statute made against *clandestine mortgages* ; that notice in writing under *Stafford's* hand of all prior incumbrances was absolutely necessary, as much as *three* subscribing witnesses are necessary to a will concerning lands ; and as the statute concerns the redemption of mortgages, it was intended as a rule and law to Courts of equity, where persons come to redeem mortgages ; and therefore to be observed according to the letter. But the plea was overruled, and a redemption decreed, and *that* without costs.

In speaking to the case, the *Lord Keeper* admitted, that *Charles Stafford* had not observed the directions of the act of parliament ; and for aught appeared in the case of the *Lady Neville*, she might have taken advantage of the act of parliament, notice not being given of all the prior incumbrances.

(1)

(1) The words of the decree as to this point are, " that although the *Lady Neville*, (who for aught that appeared, innocently lent her money,) might have insisted on this statute, yet upon the whole matter, the defendant, Serjeant *Selby*, though he hath taken in her mortgage, doth not stand in her place for that purpose,

" he being the person originally guilty of the fraud as aforesaid, and the mortgage afterwards coming to him, did give an equity to *Charles Stafford* to be relieved against the same in his hands upon the point of fraud appearing in obtaining thereof," and then the decree goes on to say " that the said defendant *Selby's* purchase

STAFFORD v.  
SELBY.

If a mortgage by the statute becomes irredeemable, it will remain so in the hands of the assignee, though assigned in consideration of the principal,

*Secondly*, that a mortgage, which thus by the statute became irredeemable, a foreclosing mortgage, as he called it, although assigned over to another in consideration of what was really due thereon for principal, interest and costs; yet in the hands of such assignee it would remain irredeemable, and such assignee might take advantage of the statute against clandestine mortgages.

interest and costs due thereon.

If a subsequent mortgagee redeems such mortgage, he shall hold the estate irredeemable.

*Thirdly*, If a subsequent mortgagee had redeemed such foreclosing mortgage, he should also have held the estate irredeemable.

If there are more lands in the second mortgage, than in the first; that seems to be a case omitted out of the statute; but the adding an acre or two shall not exempt it, for that may be a contrivance to evade the statute.

But part of the lands being only in the prior mortgages, and new and other lands added in the mortgage to the Lady *Neville*, this seems to be in that respect a case omitted out of the statute; and this penal law is to be taken with some strictness: but the adding of an acre or two, or the like, should not exempt it out of the statute, but should be looked upon as a contrivance to have evaded the statute; but chiefly and principally relied upon it, that the defendant had acted unfairly in this matter, contriving with *Stewkley*, and others, to sink part of the consideration money, by giving Goldsmiths' notes for no less than 1000*l.* part of it, and paying them into *Stewkley's* hands, who was insolvent, and upon a private agreement to share with him part of that money; and insisting on a premium of 50*l.* for advancing of it, so that that part of the money stuck by the way; whereas the statute intended to recompense honest mortgagees for the trouble, hazard and charge, they might be put unto: and not to cover a fraud, or ill practice, in obtaining an assignment of a mortgage, or in becoming a purchaser; and the statute therefore does not concern this equity, where a man was imposed upon in the mortgage itself; the defendant *Selby* acting as counsel for *Stafford*, when he redeemed the mortgage from *Bacon*, and procured the money from the Lady *Neville*, and had a premium of 50*l.* for doing it; and to bring *Stafford* to those terms had exhibited a bill in *Bacon's* name to foreclose him, without *Bacon's* privity; and when he had so distressed him, at last pretended to purchase.— And as to the other part of his plea, of being a purchaser with-

[ 591 ]

“ being made upon that foundation was  
“ therefore to be set aside, and the ru-  
“ ther for that it further appeared, that

“ the defendant *Selby* had notice of the  
“ deed of trust before such purchase  
“ made.” R. L.

out notice, he had plainly notice of the deed of trust, and therefore decreed as above. (1) STAFFORD v. SELBY.

(1) The defendant *Selby*, was to have all just allowance as a mortgagee in account; but as to the costs, the decree declared that (on the said defendant being redeemed,) in respect of the hardship the plaintiff and the said *Charles Stafford* had been put to, they ought to be admitted to the said redemption without payment of any costs, and that the consideration whether the defendant *Selby* should not pay costs should be reserved till after the account taken, Reg. Lib. 1707. B. fol. 244.

COMBS *versus* DOWELL, and SQUIRE *versus* DOWELL.

CASE 529.

LORD  
KEEPER.

Nov. 4.

Eq. Ca. Ab.  
28. pl. 7. S. C.  
Upon an issue at law, whether a deed to lead the uses of a fine levied by a man and his wife was duly executed by them, the deed having been enrolled for safe custody, and afterwards lost; a copy of the inrollment was allowed at the trial to be given in evidence.

A DEED made by *Robert Spencer* and *Elizabeth* his wife, to declare the uses of a fine levied by them of the wife's inheritance, being lost, but having been inrolled for safe custody; upon the first hearing of these causes, it being objected that the conveyance was not a bargain and sale and so did not operate by the inrollment; and that therefore the copy of the inrollment not to be allowed as evidence; and the Court seemed to be of that opinion. But an issue at law being directed to try, whether the deed to lead the uses of the fine was duly executed by Mr. *Spencer* and his wife: the Lord Chief Justice allowed the copy of the inrollment to be given in evidence; and a *Scrivener* also, who drew the deed, being examined, a verdict passed for the plaintiffs, that the deed was duly executed. (2)

(2) A verdict at law is stated to have passed for the plaintiff on an issue directed in this cause; but the point above mentioned does not appear in the Register's Book, Reg. Lib. 1707. A. fol. 136. vide ante, p. 471. S. C. *Smartle v. Williams*, 1 Salk. 280.

WALTON *versus* HANBURY & AL.

CASE 530.

Nov. 7.

IN 1695, the defendant and others, part-owners of the *Danby* galley, fitted her out as a privateer, and made the plaintiff *Walton*, captain, and obtained a commission by letter of *marque* from the Duke of *Savoy*, and sent her to cruise in the *Mediterranean*; where in the year 1695, the captain took a *French* ship, on board whereof were several *Turks* and *Tripolins*. The captain set the *Turks* on shore, but detained some of their effects.

**CUTHBERT v. PEACOCK.** testator's intention ; (1) and upon reading the proofs, decreed the 300*l.* legacy (2) over and above the debt ; for otherwise the favourite niece (as *Frances* was proved to be) deducting the 200*l.* and interest due to her out of the 300*l.* there would not remain above 80*l.* and she reduced to a less legacy than what was given to her sisters, contrary to the testator's intention.

- (1) Vide *Fane v. Fane*, ante 1 vol. *per cent.* to be computed from eight-  
p. 30, and cases cited in not. there.      teen months after the testator's death.  
(2) And interest after the rate of 5*l.* R. L.

CASE 533.

LORD

KEEPER.

Nov. 11.

Eq. Ca. Ab.

108. pl. 4.

1 Salk. 156.

S. C.

*A.* by will gives his grand-daughter 30,000*l.* to be paid by 1000*l.* a year, and devises his lands to *B.* and his heirs, on condition that he pays his debts and legacies. The 1000*l.* a year not being paid, the grand-daughter enters. If *B.* is relieved against the breach of the condition, it must be upon payment of interest for each 1000*l.* from the time it became due, together with costs.

**GRIMSTON versus DOMINUM BRUCE & Ux'. & Al'.**

*SIR Samuel Grimston* devised, *inter alia*, 30,000*l.* to his grand-daughter and heir, now the wife of the Lord *Bruce*, to be paid by 1000*l.* *per ann.* for sixteen years, then 2000*l.* *per ann.* until the 16,000*l.* was made up 30,000*l.* but if his grand-daughter dies (3) before it be raised, then payment to cease : and devises to the plaintiff, second son of *Sir William Lucking*, all his lands in *Hertfordshire* for his life, remainder to his first and other sons in tail, &c. and all the rest and residue of his estate, real and personal, he devises to him and the heirs of his body, upon condition in both bequests, that he pays his debts and legacies.

[ 595 ] *Per Cur.* The plaintiff must pay interest for each 1000*l.* as it became due, and that without any deduction for taxes, and with costs, he being relieved against the forfeiture by breach of the condition, upon which defendants had entered ; (4) and held that the condition extended to both devises, viz. as well to the *Hertfordshire*, estate, as to what passed by the general devise of the rest and residue of real and personal.

(3) Without issue. R. L.

(4) Which was the question raised by the bill, the annuity having run into arrear, on which the defendants had entered ; the interest at the rate of 5*l.* *per cent.* *per ann.* and in default of payment in future, all growing arrears to carry interest in like manner. Reg.

Lib. 1707. *A.* fol. 112. but nothing in the decree is said of the rest and residue of the real and personal estate in particular, but an account was ordered of the personal. Vide *Popham v. Bampfild*, ante 1 vol. p. 83. and cases in not. there.



CROUCH *versus* MARTIN & HARRIS & Al'.

CASE 534.

Eq. Ca. Ab.  
45 pl. 7. S. C.  
A seaman assigns his wages, as a security for money, and dies indebted to other persons. This assignment specifically binds the wages, and the money secured thereby shall be paid preferable to all other debts.

THE plaintiff lent *Arthur Harris*, late husband of the defendant, 100*l.* on *Bottom-Rhea*; and he, as a farther security, assigned (1) to the plaintiff the wages that would become due to him in the voyage to the *Indies*, as chirurgion of the ship at 4*l.* 10*s.* per month; the ship returned safe to *London*, and 145*l.* became due on the *Bottom-Rhea* bond. *Arthur Harris* died in the voyage; the defendant, his widow, took out administration; and there being a bond given by her husband on her marriage to leave her 400*l.* if she survived him, (2) she confessed judgment thereon, and insisted *that* judgment ought to be first paid, and the wages due to the husband applied to that purpose.

*Per Cur.* Seamen's wages are assignable; and the assignment specifically binds the wages; and in truth the advancing the 100*l.* on the credit of the wages is, as it were, paying the wages before hand; and the seaman or his widow must not have his wages twice. (3)

It is a *chose en action*, being due by contract, although the service not then done, and a *chose en action* is assignable in equity upon a consideration paid. (4)

A *chose en action* is assignable in equity, upon a consideration paid.

(1) By deed poll, dated 15th *Feb.* 1702.

(2) This bond was stated in the defendant *Harris's* answer to be in consideration of a bond given by the defendant's mother to the defendant's late husband, to pay a portion in money and in goods on the marriage, and that the said defendant's mother should, for a year after the marriage, provide meat, drink, washing, and lodging, for the defendant, her husband, and their family, which was done, and the portion made good after the marriage. R. L.

(3) 63*l.* 10*s.* 10*d.* the amount of the

wages were paid into Court, and ordered to be paid to the plaintiff, and the defendant *Harris* to pay plaintiff his costs, to be taxed. Reg. Lib. 1707. A. fol. 74. All assignments of seamen's wages are void by stat. 1 Geo. II. cap. 14. sect. 7. So as to the half pay of an officer in the army, not assignable, *Stone v. Lidderdale & others*, 2 Anstr. 533, where the subject is a good deal canvassed. Et vide *Mitchell v. Edes*, ante 391.

(4) As to this point, vide *Thomas v. Freeman*, ante p. 563, and cases cited in not. there.

WATSON *versus* HINSWORTH HOSPITAL.

[ 596 ]

CASE 535.

Nov. 13.

Eq. Ca. Ab.  
100. pl. 8. S. C.

THE hospital, consisting of a *master* and *twenty* poor men and women of the gift of Dr. *Holgate*, Archbishop of *York*, who

In the constitutions for founding an hospital, it was ordained that no lease should be made for above 21 years, and the rent not to be raised, nor above three years rent taken for a fine. Though the tenant of the hospital lands is entitled to a beneficial lease upon renewal; yet this constitution is not to be followed according to the letter, but as times alter, and the price of provisions increases, so the rent ought to be raised in proportion.

WATSON v.  
HINSWORTH  
HOSPITAL.

devised his lands to his executors, and all his personal estate to be laid out in founding of the hospital; the executors procured letters patent for that purpose, with power for them to make ordinances and constitutions for the governing the hospital; and they, amongst other things did ordain that no lease should be made for above *twenty-one* years, the rent not to be raised, nor above *three* years rent taken for a fine, or *greesam*. (1)

The executors sold part, and leased out the residue, reserving only 120*l. per ann.* (2)

On a bill by the master and hospital, Sir *Edward Philips* decreed the lessees to enjoy, paying 120*l. per ann.* and afterwards the cause was heard again by the Lord *Elsmere*, and by the Lord *Clarendon*; and although the lease was long before expired; yet decreed by Lord *Elsmere*, the lessee to account at 120*l. per ann.* only, and to have a new lease for 21 years at 120*l. per ann.* although it appeared by the decree the lands were 250*l. (3) per ann.* so 120*l.* only to the hospital, and 130*l.* allowed to the tenant in respect of improvements made by him, and of the rule or ordinance, that the rent should not be raised.

(1) And by the ordinances there was reserved the sum of *twenty marks* yearly for the maintenance of the master, and of *four marks* yearly for the maintenance of each of the brothers and sisters; but if afterwards the living of the master and brothers and sisters could be augmented (from what source does not appear) then it was thereby provided that the master should have 20*l.* and the brothers and sisters 4*l. per ann.* a-piece, or as near to those sums as the land would amount to. R. L.

(2) But this 120*l. per ann.* was an increased rent. The ordinances and rules in question were made by deed dated 20th *September*, 4 and 5 *Phil.* and *Mary*, by Sir *William Petre*, and the rest of the surviving executors of the *Archbishop*, as in the printed report and note (1) mentioned; afterwards some differences arising touching the title to the premises, a commission was issued on the statute for charitable uses, which was executed, and a decree made thereon, 19th *July*, 9 Ch. I. to which two parties, *Tobias Blackiston* and *William Blackiston*,

lessees of the premises, having filed exceptions, they came on to be heard before Lord Keeper *Coventry*, who, by decree, 24th *January*, 12 Ch. I. confirmed the decree of the Commissioners, but did declare that forasmuch as it did appear by the certificate of the Commissioners, authorised by this Court for that purpose, that there had been very great charge of building upon the said lands by the said *Blackistons*, and those under whom they claimed, and that 1200*l.* was paid the 25 *Eliz.* by the ancestors of the said *Blackistons*, for the purchase of the said premises, the Court did therefore decree the said master, brethren and sisters to make to the said *Blackistons* a lease of the said lands so decreed to the said hospital for 21 years at the rent of 120*l. per ann.* being about 50*l. per ann. increase of the former rent*, which said 50*l. per ann.* so increased, was to make up the stipend to the master 20*l. per ann.* and to the brothers and sisters 4*l. per ann.* a-piece, and other incident charges. R. L.

(3) 130*l.* only. So stated in the bill which sought to fix the rent. R. L.

WATSON v.  
HINAWORTH  
HOSPITAL.

In 1663, decreed again by Lord *Clarendon*, assisted with Chief Justice *Hide*, and Chief Baron *Hale*, that the lease of *twenty-one* years, having been some time since expired, the tenant should account from the expiration of the lease at 120*l. per ann.* and that the tenant should have a new lease on reasonable terms, and recommended it to the Archbishop of *York*, to call the parties before him, and to certify what terms were thought reasonable for a new lease, who certified the hospital had agreed to accept *one hundred pounds* fine, and 120*l. per ann.* (1)

[ 597 ]

*Watson*, the present tenant, having purchased the lease in being, now near expiring, and laid out *two thousand pounds* in improvements, brought his bill to have a new lease, the master refusing to renew. (2)

*Lord Chancellor*. The constitution just and charitable, that the rent should not be raised for the encouragement of the tenant to improve the estate; and he ought to find a benefit by it; and the hospital also will find an advantage in having the rent well secured by an estate of greater value, and constantly paid; but the rule or constitution is not to be followed according to the letter, that no more rent should be taken, than what was at first reserved; but as times alter, and the

(1) 7th July, 1663. One moiety of the lands in question was assigned by *Tobias* and *William Blackiston* to one *Henry Blackiston*, for the remainder of their term on the expiration of which the master, and brethren and sisters executed a new lease to him of the last mentioned moiety, at the yearly rent of 60*l.* and the term in the other moiety also expiring, the said *Tobias* and *William Blackiston* continued their possession, and refused to pay their rent, and set up their former title, whereupon process issued against *William Blackiston*, for performing the decree made on the report of the Commissioners of charitable uses, who putting in exceptions thereto, the then master, brethren and sisters, pleaded the said Lord *Coventry's* decree, acceptance of a lease pursuant thereto, and enjoyment of the premises under the same in bar of the said exceptions, which plea was allowed on argument. Afterwards the cause coming on before *Clarendon*, Lord Chancellor, Chief Justice *Hide*,

and Chief Baron *Hale*, the Court declared that the exceptant, *William Blackiston*, ought to have a lease according to the ancient constitution of the said hospital, and pursuant thereto a lease was granted upon the terms of the former lease. R. L.

(2) The plaintiff purchased the term in *William Blackiston's* moiety for 1320*l.* and that in *Henry Blackiston's* moiety for 1500*l.* and states that he laid out above 1500*l.* in lasting improvements, and he was offered a lease of the whole for the term of 21 years, at the yearly rent of 200*l.* and a fine of 300*l.* Note. The answer stated, that the buildings were gone to decay, and that therefore it was agreed that the master, brethren, and sisters, would content themselves with the aforesaid salary of 20*l.* a year, and 4*l.* a year each, and that the fine and additional rent should be laid out in re-building, repairing, and improving the said hospital and buildings as occasion should require. R. L.

WATSON v.  
HINSWORTH  
HOSPITAL.

price of provisions, &c. increases, so the rent ought to be raised in proportion; and declared the tenant was intitled to a beneficial lease, but not at any certain rent. That he regarded the constitution, not in the letter, but in the reason of it; (3) and referred it to a Master to certify the value of what had been laid out in improvements, (4) and when that was ascertained, referred it to the Archbishop of *York* to certify what fine and what rent he thought reasonable. (5)

(3) The words of the decree as to this part are,—“Whereupon, &c. his Lordship declared that the plaintiff is not entitled to have leases of the said premises from the said hospital, for any fine certain, or at any certain rent; but that he ought to have beneficial leases made to him as well in regard to the constitutions of the said hospital, as also the former decrees made by the Lord Keeper *Coventry* and Lord Chancellor *Clarendon*, and the usage since, and likewise in respect of what the plaintiff hath laid out in building, and other lasting improvements upon the premises, and that the fine or fines to be paid by the said plaintiff to the said hospital, for such beneficial leases ought not to exceed three years value of the premises, and doth order and decree the same accordingly.” R. L.

(4) “Since the last leases made by the said hospital beyond the covenants in such leases, and what the annual value of the premises are reasonably worth to be let.” R. L.

(5) “But which said fine is not to exceed three years’ value, as aforesaid, and in the ascertaining such rent and fine, regard is to be had to the repairs of the said hospital, and to what the plaintiff and the said *Blackistons* under whom he claims, have expended in building and other lasting improvements upon the said premises beyond the covenants in the said hospital leases, and beyond the last leases; consideration being also had for paying the costs of this suit out of the fines to all parties, except the defendants *Mann* and *Farrer*, (for their improper acting as therein mentioned) and likewise that a rea-

sonable part of such fine or fines be set apart by the said Archbishop, for suing out a commission of charitable uses for the better taking care of this charity. The consideration how the surplus of such rent and fine or fines (if any) shall be applied, is hereby reserved till the further order of this Court.” Reg. Lib. 1707. B. fol. 107, entered *Watson v. Mann*. Note, it appears from a copy of the exemplification of the decree in this cause, with which the editor has been favoured, that four parishes therein named, who were not parties to the suit, were entitled to part of the charity in question; and that a Sir *Rowland Wynne*, and several other persons on behalf of those parishes, attended the Archbishop of *York*, on the subject of settling the fines, and then the said four parishes appeared in Court, by their counsel, and were heard on exceptions to the Master’s Report taken by the defendants, against the allowances prayed by the plaintiff, and other matters in the suit. The Master was ordered to review his Report, and it was ordered, that a Mr. *Charles Saunderson*, as agent for the said four parishes, was to have notice with the parties to the suit, to attend the Master; and the said parishes were to have liberty to file exceptions in case they did not acquiesce in the Master’s further Report. The matter afterwards came on again, before the Lord Chancellor, when the said four parishes attended, by their counsel, and were heard, and prayed that they might have liberty to exhibit interrogatories before the said Master, in the names of the defendants; and, that the plaintiff might be examined thereon before the said Master in the names of the said defendants, before

the said Master should proceed to review his Report; to which the plaintiff insisted, that a person might be named as a relator, on the behalf of the said four parishes, to answer the costs of that proceeding; whereupon Sir Rowland Wynne, then present in Court, owning himself to be on the behalf of the said four parishes, in the nature of a relator, to answer costs; the Court ordered that the said four parishes should be at liberty to exhibit interrogatories, as above prayed. The parishes being afterwards dissatisfied with the Master's further Report, Sir Rowland Wynne, as such relator filed exceptions thereto, and to his former report, in the name of the defendants, which were afterwards argued. Afterwards, 24th July, 1710, by the decree, it was ordered, that the said plaintiff *Watson* should pay the said *Hospital* the sum of 705*l.* for a fine, the same not exceeding three

years value of the premises, exclusive of 120*l.* *per ann.* for improvement. And the Court being fully satisfied, that by the original constitutions of the said *Hospital*, as likewise by the said decree of the Lord Keeper *Coventry*, and the Lord Chancellor *Clarendon*, that the *Blackistons* had, and the complainant who claims under him hath, a tenant-right of renewal of the said leases from the said *Hospital*, and ought therefore to have beneficial leases thereof made to him, the Court declared the said complainant should pay for the future, but 150*l.* *per ann.* reserved rent to the *Hospital*, Reg. Lib. 1710. B. fol. 446. [The right to a perpetual renewal in this case has been denied by a subsequent decision, *Watson v. Hemsworth Hospital*, 14 Ves. 324. And see *Attorney General v. Warren*, 2 Swan. 297, 309.]

### ATTORNEY GENERAL *versus* BARNES & Ux'.

CASE 536.  
Eq. Ca. Ab. 97.  
pl. 7. Pre. Ch.  
270. S. C.

THE Attorney General at the relation of *Sidney Sussex College*, in *Cambridge*, set out, that one Dr. *Johnson*, a member of that college, by will in writing mentioned \* to devise his land to the college, to maintain *two* scholars, to augment vicarages, and to buy presentations, and to maintain widows; and by a codicil gave other charities.

A. devises freehold lands for a charity, but the will was not executed in the presence of three wit-

nesses. Adjudged the will being void as a will, it could not operate as an appointment within the statute of 43 Eliz.

[ \*598 ]

To the will there were no witnesses at all, but to the codicil there were *three* witnesses, who subscribed in the testator's presence.

*First.* As to such of the lands, as were copyhold, it was agreed they were well appointed, they passing by surrender, and not by the will. (1)

But such a will may operate as an appointment, as to copyhold

lands, where there is a surrender to the use of the will, they passing by the surrender, and not by the will.

(1) And it is said to have been considered as settled ever since the principal case that the Statute of Frauds does not extend to customary *i. e.* copyhold estates, per *Hardwicke*, Lord Chancellor, *Tuffnell v. Page*, 2 Atk. 38. *Attorney General v. Andrews*, 1 Vez. 225. *Attorney General v. Saw-*

*tell*, 2 Atk. 497. *Wagstaff v. Wagstaff*, 2 P. Wms. 258. *Habergham v. Vincent*, 4 Bro. Ch. Rep. 353. 2 Ves. jun. 204. [*Cary v. Askew*, 2 Bro. Ch. Rep. 58. 1 Cox, 241. *Doe v. Danvers*, 7 East. 299.] But as to customary freeholds where (it is presumed) there is no custom to surrender to the use



ATTORNEY  
GENERAL v.  
BARNES.

A. devises  
lands by will  
to which there  
are no wit-  
nesses, and

afterwards makes a codicil executed in the presence of *three* witnesses. The will is void as to the land, and the codicil will not support it. 3 Mod. 262.

*Secondly.* It was also agreed, as to the freehold, the will, as a will, was void; for although there were *three* subscribing witnesses to the codicil, yet that would not support the will; and it was so adjudged in *C. B.* in the case of *Lea and Libb.* (2)

But the great question was, admitting it void as a will, if good as an appointment; *Griffith Flood's* case, and *Collison's* case, *Hob.* 136. and *Moor*, 888.

It was insisted, that the statute of *frauds* and *perjuries* makes wills absolutely void, if there are not *three* subscribing witnesses thereto; and the statute is to be strictly taken to prevent frauds in the time when people are easiest to be imposed on.

*Lord Keeper* took time to consider of it, and afterwards adjudged, that the testator intended to dispose by will; that the writing imported a will, and being void as a will, could not operate as an appointment. (3)

the will, they are within the statute, both as to the legal estate and the trust, *Hussey v. Grills*, Amb. 299. So the statute embraces equitable as well as legal estates in freehold lands, dict. per *Hardwicke*, Lord Chancellor, *Adlington v. Cann*, 3 Atk. 151.

(2) Carth. 35. by the report there it appears there were two witnesses to the will and two to the codicil.

(3) So *Jenner v. Harper*, 1 P. Wms. 247. Pre. Ch. 389. S. C. considered as the settled doctrine. *Wagstaff v. Wagstaff*, 2 P. Wms. 258.

[ 599 ] JOHN WILKES and Others, Assignees of }  
CASE 537. JAMES BODINGTON, a Bankrupt, } Plaintiffs.

GEORGE BODINGTON, HENRY BOD- }  
INGTON and RUTH his Wife, RICH. } Defendants.  
RUSSELL, JOS. GREY & PETER GREY, }

A. purchases  
of a man who  
had commit-  
ted an act of  
bankruptcy,  
but without  
notice thereof;  
afterwards a  
commission is  
taken out, and  
there being a  
term standing  
out in trustees,  
the assignee  
brings a bill

against them and the purchaser to have the term assigned to him. Bill dismissed.

*JAMES BODINGTON*, on May 1, 1701, was arrested at the suit of one *Staines*, for a just debt of 700*l.* secured by bond; he, for delay, pleaded it was for money won at play, and held out the plaintiff above six months, which by the statute *Jac.* 1. was adjudged to be an act of bankruptcy, although he afterwards paid the debt, and many *thousand pounds* to others, and appeared publicly on the *Exchange*, and afterwards (*to wit*) *December* 1, 1707, made a settlement on the defendant his son's marriage.



WILKES v.  
BODINGTON.

The settlement was thus: *Henry Bodington* (1) had on his own marriage, settled houses (2) in *Lothbury*, on *Joseph* and *Peter Grey*, in trust to secure 2000*l.* to his wife, if she survived; and now reciting *that* settlement, with the privity of the (3) *Greys*, who were parties to it, he assigns all his estate, right, title, and interest, to the *Russells*, the wife's relations, for the benefit of *Henry* for life, and of his wife for life, &c. (4)

The plaintiff being the assignee under a statute of bankrupt taken out against *Bodington*, the question was, whether a Court of Equity would decree the *Greys* to assign the term to the plaintiff, or suffer it to rest in them to protect the settlement.

For the defendants it was insisted, that they being purchasers without notice of the bankruptcy; equity ought not to impeach their title, if they can defend themselves at law; and although they have not the legal estate in them; yet the *Greys* in whom the legal estate is, being parties to the settlement, are become their trustees: and in the case of *Blake* and *Hungerford*, (5) where trustees declared a trust for *Blake*, that gave him and those claiming under him a preference against a statute acknowledged to *Arnold*, to whom Sir *Jeremy Sambrook* was executor; although the statute was acknowledged by Sir *Edward Hungerford*, before he sold his estate for life, to his son *Anthony Hungerford*, under whom *Blake*, &c. claimed; and in the case of *Hitchcox* and *Sedgwick*, (6) it was allowed that a purchaser without notice of the bankruptcy may be protected, if he gets in a prior incumbrance. (7) But it was objected here, that it was not said by and with the consent of the *Greys*, but only with their privity.

[ 600 ]

*Lord Chancellor.* I take it to be the rule in equity, that where a man is a purchaser without notice, he shall not be annoyed in equity, not only where he has a prior legal estate, but he has got in a prior legal title, but where he has a better right to call for the legal estate, than another who has got an incumbrance prior to his title.

(1) *James Bodington*, the bankrupt, R. L.

(2) The equity of redemption of houses, R. L.

(3) The word in the answer of *Henry Bodington* and his wife is *consent*, R. L.

(4) This settlement was made in consideration of a covenant on the part of defendant *Russell*, the father of

*Ruth* to pay 1200*l.* portion, and two sums of 100*l.* on certain contingencies; and also to secure 1800*l.* to *Ruth*, if she survived defendant *Henry Bodington*.

(5) Pre. Ch. 158.

(6) Ante p. 156.

(7) Vide *Abery v. Williams*, ante 1 vol. p. 27. and cases cited in note there.

**WILKES v. BODINGTON.** where he has a better title or right to call for the legal estate than the other ; and therefore dismissed the bill. (1)

(1) Without costs. Reg. Lib. 1707, *Willoughby v. Willoughby*, 1 Term B. fol. 347. But the case is stated Rep. 763. *Cholmondely v. Clinton*, 2 Reg. Lib. 1705. B. fol. 210. [See J. & W. p. 159.]

### HIGGENS *versus* DOWLER.

CASE 538.  
A. demised lands for a long term in trust for herself for life, then to B. for life, remainder to the wife of B. for life, then to the first son for the remainder of the term, and in default of issue of such son, to the second and other sons of

**ALICE HIGGENS** possessed of a term for 999 years, demised to J. S. for 860 years, in trust for herself for life ; then to *Henry Higgens* her son for life, remainder to *Mary* his wife for life, then to the *first* son during the residue of the term ; and in default of issue of such first son, to the *second* and other sons of *Henry* and *Mary* ; and in default of issue male, to the daughter and daughters of *Henry* and *Mary*, equally to be divided between them, during the residue of the term ; and in default of issue of *Henry* and *Mary*, to *Henry* during the residue of the term.

B. and for want of issue male to the daughters of B. for the remainder of the term. There having never been a son, the limitation to the daughters was held good.

[ 601 ] Upon a demurrer the *Lord Chancellor* was of opinion, that in regard there never was any son, but only a daughter, the limitation to the daughter was good. In case of an express devise to the *first* son during the residue of the term, remainder to the daughter ; if no son, the remainder to the daughter will take place ; and where devised to the first son in tail, *that* gives him the whole term only by construction in law : and an estate by construction of law cannot be greater, or of more force to make void the remainder, than an express limitation of the residue of the term. (2)

(2) There is merely an entry of a demurrer over-ruled. Reg. Lib. 1707. A. fol. 70. sed vide 1 P. Wms. 98. S. C. and Mr. Cox's note there, and see the case itself fully stated from the record by Sir *Joseph Jekyl*, in his argument in *Stanley v. Leigh*, 2 P. Wms. 694, et seq. *Woodford v. Thellusson*, 4 Ves. 227, and decree affirmed in dom. proc. 25th June, 1805. 11 Ves. 112. As to the authority of the principal case, vide *Wyth v. Blackman*, 1 Vez. 202. where

*Hardwicke* Lord Chancellor is reported to say, "*Higgens v. Dowler* has been "oddly and differently reported, nor do "I know what to make of it." But Lord *Hardwicke* had probably not seen the statement of it by Sir *Joseph Jekyl* above referred to : so in the case of *Clare v. Clare*, Forr. 20, 26, the principal case is not treated with much respect, but, probably, for the same reason ; for *Talbot*, Lord Chancellor says, "*Higgens v. Dowler* is very im-

“ perfectly reported, and was upon a demurrer; and as to *Stanley v. Leigh*, “ it has not been particularly mentioned; so that what we have of it “ is only upon memory;” and so decided on similar circumstances contrary to the principal case. Yet in *Sheffield v. Lord Orrery*, 3 Atk. 287, three years before the case of *Wyth v. Blackman*, the principal case is cited by Lord *Hardwicke*, with other cases, in support of his judgment; and the reason and ground of the judgment in the principal case are stated by Sir *Joseph Jekyl* in his above mentioned argument from the manuscript report, which says, “ Lord Chancellor *Cowper* “ took it with great clearness, that

“ where the limitation was vested in “ the son, the remainder to the daughter is void; but if there never was a “ son, such a limitation is good.” Et vide S. C. rather differently stated, 1 Salk. 156. and remark of Sir *Joseph Jekyl* thereon in *Stanley v. Leigh*, ub. sup. and the authority of *Clare v. Clare* seems to have been considerably shaken, and the principle of the case of *Higgins v. Dowler*, established in *Sheffield v. Lord Orrery*, 3 Atk. 282. *Doe v. Fonnereau*, 2 Doug. 487. *Gower v. Grosvenor*, Barnard. 54. *Maddox v. Staines*, 2 P. Wms. 421. *Stephens v. Stephens*, Forr. 228. *Sabbarton v. Sabbarton*, ibid. 228. *Woodford v. Thellusson*, ub. sup.

### GODFREY *versus* CHADWELL.

CASE 539.

LORD

CHANCELLOR.

Dec. 18.

Eq. Ca. Ab.

318. pl. 7.

S. C.

BILL by a second mortgagee to redeem. The first mortgagee pleaded his mortgage, and decree to foreclose the mortgagor, without notice of the second mortgage.—Plea over-ruled. (1)

After a decree by first mortgagee to foreclose the mortgagor, a second mortgagee may redeem the first, though the first mortgagee had no notice of the second mortgage before the decree.

(1) There appear to have been a fol. 95. So *Morret & Al.' v. Westerne*, plea and demurrer put in which were post 663. Vide *Lomax v. Hide*, ante p. both over-ruled. Reg. Lib. 1707. A. 185.

DE

[ 602 ]

## TERM. S. HILLARII, 1707.

### IN CURIA CANCELLARIÆ.

#### SMALL *versus* ANN BRACKLEY.

CASE 540.

Jan. 31.

Eq. Ca. Ab. 28.

pl. 7. S. C.

A. intrusted by B. to receive

THE plaintiff was intrusted by the defendant to receive the interest due upon tallies, which the plaintiff had pledged or

interest on tallies, receives the principal and fails, and afterwards compounds with his creditors; but B. would not come in without having a greater composition, which A. agrees to give. A. brings a bill to be relieved against this underhand agreement; but by having been guilty of a great fraud and breach of trust, and having agreed to make some satisfaction, was entitled to no relief in equity. Bill dismissed. (2)

(2) Vide note in the next page,

SMALL v.  
BRACKLEY.

mortgaged to her, and *two or three* times he received the interest, and paid it to her, and brought back the tallies and orders; but at last wanting money, he received not only the interest, but also the principal, and shortly afterwards failed.

The creditors signed a deed to accept a composition of *nine shillings per pound*, so as all the creditors signed the deed within the time limited; otherwise to be void. Mrs. *Brackley* refused to sign and accept the composition, unless the plaintiff would pay her *one hundred pounds* down, and *three shillings* in the pound over and above the *nine shillings per pound*.

[ 603 ] The 100*l.* was paid, and security given for the 75*l.* the residue of the composition money.

Plaintiff brought a bill to be relieved, the defendant having been guilty of a fraud in signing the composition for 9*s.* per pound to blind the other creditors, and yet underhand to gain a greater benefit to herself.

The cause was heard at the *Rolls*, and Baron *Price* decreed for the plaintiff; but upon an appeal to the *Lord Chancellor*, he dismissed the bill; the plaintiff having been guilty of as great a fraud and breach of trust, as could be, and not be criminal; and having agreed to make some satisfaction he ought not to be relieved in equity. (1)

(1) The case, as stated in the pleadings, is as follows: the plaintiff being indebted to the defendant in the sum of 600*l.* secured the payment thereof by bond, 29th *Sept.* 1696, in the penalty of 1200*l.*; he then paid 100*l.* and as a further security for the remainder of the debt, deposited with the defendant two tallies and orders, and executed an assignment thereof by way of mortgage, 20th *January*, 1697. The interest becoming due upon these tallies, the plaintiff prevailed upon the defendant to deliver to him or his servant the orders, for the purpose of getting such interest, he giving a written receipt for, and undertaking at the same time to return them; the defendant delivered the orders, but kept the tallies, understanding that without the production of the tallies themselves the principal money due on them could not be received: it should seem, though it is not directly stated in the answer, that the plaintiff received the money due

upon the tallies, and then a commission of bankrupt issued against the plaintiff; but afterwards the deed of composition was agreed to; on being applied to to execute this deed, the defendant at first refused, and assigned, as a reason, the conduct of the plaintiff in respect of the tallies; but after many importunities, and it being alleged to her that she was the only creditor who stood out, she signed the same, on condition that she should have the plaintiff's bond for payment of what the composition money at 9*s.* in the pound amounted to, being 225*l.* viz. 100*l.* on the 29th *September*, 1705; 75*l.* on the 25th *March*, 1706; and 50*l.* on the 29th *September*, 1705, and also the bond of one *Turner*, with the plaintiff, for the further sum of 75*l.* and which bonds were accordingly executed 2d *July*, 1705, and the defendant afterwards received 100*l.* in part of the said 225*l.* The commission against the plaintiff was then about to be superseded,

when the defendant lodged a petition, alleging that she had been persuaded into the above agreement on the assurance that one *Heysham*, a creditor of the plaintiff's, had executed the deed of composition, which the answer stated he had not done, but on the contrary had received his whole debt; and an order was thereupon made by the *Lord Keeper*, whereby the plaintiff was to give security for what the defendant should recover at law in such action as she should bring there, and until such security should be given, the commission to continue, but not to be put into execution, and on giving the security, to be superseded: on this the bill was filed to establish the agreement, inasmuch as the plaintiff could not plead to any action that might be brought against him by the defendant on the said bond for 1200*l.* so as to have the benefit of the said agreement; the bill, of course, did not mention the fact of the plaintiff having received the money on the tallies; the defendant by her answer also submitted, that under the circumstances aforesaid, she was not bound by the agreement; and the decree on the first hearing, 4th *November*, 1707, was, that on payment of the sums of 225*l.* 75*l.* and interest, according to the aforesaid bonds of the plaintiff and *Turner*, and the said agreement,

the bonds should be delivered up to be cancelled; and the defendant should acknowledge satisfaction on the judgment obtained by her on the aforesaid bond of the 29th *September*, 1696, for 600*l.* and the recognizance given by the plaintiff to be vacated; and if the said defendant should accept the said money and perform the decree then to pay no costs, otherwise to pay the costs of the suit: before Baron *Price* and two Masters; not stated to be at the *Rolls*. Reg. Lib. 1707. B. fol. 23. Afterwards 31st *January*, the cause came on upon the before stated circumstances for rehearing before the *Lord Chancellor*, when the decree was as follows:—  
 “Whereupon, &c. his Lordship declared he saw no cause to relieve the plaintiff save against the penalty of the bond of the 29th *Sept.* 1696, and the plaintiff having given security by recognizance to abide the order to be made upon the hearing of this cause, his Lordship doth think fit and so order that it be referred to the Master to compute what was due for principal and interest on the said bond of the 29th *September*, 1696, and to tax defendant her costs at law and in this court.” Reg. Lib. 1707, B. fol. 144. Vide *Child v. Danbridge*, ante p. 71. *Lewis v. Chase*, 1 P. Wins. 620, and cases cited in not. p. 622. there.

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### WINNE *versus* LLOYD.

CASE 541.

THE defendant having obtained a bill of sale of goods, and likewise a note from his brother a little before his death, for payment of 300*l.* the plaintiff (2) insisted those were voluntarily given, and for a colour only, and that underneath the note, the defendant had subscribed an acknowledgment, that no debt was due to him.

was wrote an acknowledgment that nothing was due, allowed to be read as evidence, though not proved to be a true copy, and though the defendant had sworn there was no such acknowledgment under the note, it appearing when the note was produced, that the bottom of it was torn off.

Eq. Ca. Ab.  
 228. pl. 6. S.C.  
 Copy of a note taken by one, who had been intrusted with the note, and was since dead, under which

(2) *William Winne* and *Margaret*, his wife, who was the widow and administratrix of *Meredith Lloyd*, de-

ceased, the brother of the defendant.  
 R. L.

WINNE v.  
LLOYD.

The defendant by answer swore his debt, and denied there was any such defeasance or acknowledgment.

[ 604 ]

It appeared upon the proof, that the defendant deposited the two instruments he had so obtained, in the hands of *Sidney Lloyd* his sister, and afterwards wrote to her to send him the two instruments by a special messenger sent for that purpose, and that she should not let any one see them.

His sister sent them, but sat up all night to take copies of them, as she declared in her life-time, being dead before the commencement of this suit; and upon producing the copies so taken by the said *Sidney Lloyd*, there appeared to be such acknowledgment underwrote, that there was no real debt; and upon inspecting the instruments produced by the plaintiff upon stamped paper, it appeared that the bottom was torn off.

*Per Lord Chancellor.* You shall read the copies, being the hand-writing of *Sidney Lloyd*, although not proved to be true copies. (1)

(1) *Sidney Lloyd* had made a memorandum under each of the copies, that they were true copies. The cause came on by original and supplemental bills, and on the original bill the plaintiff paid into court the sum of 254*l.* the sum for which the defendant had got judgment at law, which was paid to the defendant on security given by defendant to abide the order of the court on the hearing; and the decree was, that on the plaintiff *Margaret* making such settlement on herself and the children of *Meredith Lloyd*, her first husband, as therein mentioned, the defendant should pay to the plain-

tiffs the said 254*l.* and interest from the time of his receiving the same out of court, together with costs both at law and in equity, to be taxed. Reg. Lib. 1707. B. fol. 350. *Note.* The answer submitted the copies taken by *Sidney Lloyd* should not be received as evidence, and nothing is said of it either way in the decree. The statement is very long, but the above seems to be the substance of it. Entered as of *Easter Term*, vide the *King v. Sir Thomas Culpepper*, Skin. 673. *Medlicot v. Joyner*, 1 Mod. 4. and cases referred to in note there.

CASE 542.  
Eq.Ca.Ab.317.  
pl. 11. S. C.  
*A.* and his  
wife mortgage  
the wife's es-  
tate, and *A.*  
covenants to  
pay the mo-  
ney, but the  
equity of re-  
demption is  
reserved to them and their heirs. *A.* dies and his wife survives. The mortgage shall be discharged out of the husband's estate.

### POCOCK versus LEE.

Mr. *Alexander* and his wife, who was the daughter and heir of one *Dayly*, made a mortgage of the wife's estate; the husband covenanted to pay the money, but the equity of redemption was reserved to them and their heirs. Mr. *Alexander* the husband died, and made the defendant his executor. The wife surviving, after a decree to account,

The question was upon exceptions to the Master's report, whether the mortgage-money should stand charged upon the



land, or the land be exonerated out of the husband's personal estate. Pocock v. LEE.

*Per Cur.* The husband having had the money, is in equity the debtor, and the land is to be considered but as an additional security; and so decreed it according to the judgment in the House of Peers, in the case of Lord and Lady *Huntington*. (2)

(2) Ante p. 437. S. C. Et vide *Tate v. Austin*, 1 P. Wms. 264.

### HANCOCK *versus* HANCOCK.

[ 605 ]  
CASE 543.

**LEONARD HANCOCK** on the marriage of the defendant his wife, in consideration of 2000*l.* portion covenanted to purchase 400*l.* *per ann.* and settle it on himself and his wife for their lives, and the life of the survivor, remainder to the heirs of their *two* bodies begotten; and if he should happen to die before such purchase and settlement should be made, that then the wife might elect either to have the 400*l.* *per ann.* purchased and settled, or to have 3000*l.* paid her in lieu of dower and thirds.

A man on his marriage, covenants to purchase and settle lands of 400*l.* a year to the use of himself for life, then to his wife for life, remainder to the heirs of their two bodies; and if he died

before a settlement made, the wife might elect either to have the 400*l.* a year, or 3000*l.* in money in lieu of dower and thirds. The husband dies before a settlement made. On a bill by the creditors, the wife by answer elects the 3000*l.* and the children insist on having a settlement made according to the articles expectant on their mother's death, by which means all the assets would be exhausted. Decreed a settlement to be made on the wife and children, notwithstanding the election.

There being several children of the marriage, and the husband dying before any purchase and settlement made, a bill was brought by the creditors against the defendant, the wife and administratrix of her husband, for a discovery and account of assets.

The wife by answer set forth the articles, and that no purchase or settlement having been made, she claimed and elected to have 3000*l.* paid to her according to the articles: and the children by their answer insisted to have 400*l.* *per ann.* purchased, and settled according to the articles expectant on the mother's decease; and by that means the mother and children would have exhausted all the assets.

*Per Cur.* Notwithstanding the election, decree a settlement of 400*l.* *per ann.* on the wife for life, remainder to the children *nunc pro tunc*. (1)

(1) The decree in the principal case is, it may be presumed, conformable with the principle of *Harvey v. Ashley*, 3 Atk. 607, 640, where wife's father agreed to give a portion, and husband's father to make a settlement; though

the portion was not paid, yet held the children might compel a settlement; for the children, considered as purchasers, are intitled to all the benefit

of the uses under the settlement, notwithstanding there has been a failure on one side.

[ 606 ]

Case 544.

April 22.

Eq. Ca. Ab.

262. pl. 3. S.C.

Guardian not compellable

to apply the profits of the lands, de-

scended on the

infant heir, to

pay off the

head debts of

the ancestor.

### WATERS *versus* EBRALL.

PLAINTIFF, the widow of *Ebrall* her *first* husband, and as guardian to her son, received the rents and profits of his estate, and paid off debts by specialty, but took assignments of the bonds; the son dying in his minority without issue, she brought her bill against the defendant the heir, for a discovery of assets by descent to satisfy the money due by bond, she claiming the profits, as administratrix to her son.

*Per Cur.* The guardian not compellable to apply the profits of the estate of the infant heir, to pay off the bond debts. (1)

(1) The decree directed an account before the Master of the debts by bond of the intestate, the plaintiff's late husband, paid by her; and what she had received of the said intestate's personal estate, and of the rents and profits of the real estate during the infancy of her son, and then after allowing for the maintenance of the son, and all other just allowances, it was ordered, " that the plaintiff should stand in the place of the obligees of her said late husband, whose debts the said master shall certify she hath paid, to receive a satisfaction thereof from the defen-

" dant out of the real estate of her said husband, in his the said defendant's possession, she first deducting what the said Master shall certify she or any for her hath received out of the said personal estate, or the rents and profits of the real estate during the infancy of her son, after such allowances made as aforesaid." Reg. Lib. 1707. B. fol. 567. entered as of *Easter Term*, 1708. Vide *March v. Bennett*, ante 1 vol. 428. *Earl of Winchelsea v. Norcliff*, *ibid.* 434, 437, and cases cited in not. there respectively.

CASE 545.

April 23.

Eq. Ca. Ab. 147.

pl. 2. S. C.

A. indebted by

specialty, and

also on simple

contract, pays

several sums,

and enters

them in his book

as paid on account

of what was due

by specialty.

This entry not sufficient

to make the application.

### MANNING *versus* WESTERNE.

DEFENDANT being indebted to the plaintiff on specialty, viz. on articles under hand and seal, and also on simple contract, on a running account, made several payments of sums in gross, and entered them in his own book, as paid upon account of what was due upon articles.

Question was, Whether these sums should be applied towards satisfaction of what was due on the articles, which carried interest, or in satisfaction of the debts by simple contract.

*Per Lord Chancellor.* Although the rule of law is, that *quicquid solvitur, solvitur secundum modum solventis*: yet that is to be understood, when at the time of payment he that pays the money declares upon what account he pays it; but if the payment is general, the application is in the party, who receives the money, and the entries in the defendant's books, are not sufficient to make the application. (1)

ment declares on what account he pays the money; but if the payment is general, the application is in the person receiving.

MANNING v. WESTERNE.  
*Quicquid solvitur, solvitur secundum modum solventis.*  
But this rule is to be understood, when the person paying at the time of pay-

(1) By the decree in the Register's Book, the defendant's books of account are stated to have been read. The plaintiff was an iron manufacturer and the defendant an ironmonger, and the debts arose upon two different sets of articles or contracts for iron hoops, to be made by the plaintiff for the defendant, the first *without* and the second *with interest*, and the principle of the position stated in the printed report is upheld by the decree, by which it is referred to the Master to take accounts between the parties; "and on the taking such accounts the said Master is to see what was due to the plaintiff on the slitting account, being the first contract, on the first of May, 1703, when the said 600*l.* was paid," (which 600*l.* the defendant by his answer stated he had entered in his books, he having kept a particular account, as paid to the second account) "and in case so much was due on such slitting account, the same is to be applied

" in discharge thereof; but if there was not so much as the said 600*l.* then due on the said slitting account, then only so much as shall appear to be then due is to be applied in discharge thereof, and the residue of the said 600*l.* is to go and be applied in discharge of the monies that became due on the second contract; and it is further ordered and decreed that the other payments which have been made generally by the defendant be in the first place applied to satisfy what was due on the slitting account, being the first contract at the respective times of such payments, and then to satisfy what was due on the second contract, and particularly the 1600*l.* which by the receipt is distinguished to go in discharge of the second contract, is to be so applied." Reg. Lib. 1707. B. fol. 328. Vide on this head, *Heyward v. Lamar*, ante 1 vol. p. 24. and cases cited in not. there.

DE  
**TERMINO PASCHÆ, 1708.**  
 IN CURIA CANCELLARIÆ.

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CASE 546.

April 28.

Eq. Ca. Ab.  
 93. pl. 4. S. C.  
 The principal  
 in a bond  
 being arrested  
 gave bail, and  
 judgment is  
 had against  
 the bail. On  
 a bill by the  
 sureties, who  
 had been sued  
 on the original  
 bond, and paid  
 the money, decreed the judgment against the bail to be assigned to them, in order to reimburse them what they had paid with interest and costs.

PARSONS and COLE *versus* Dr. BRIDDOCK & A<sup>r</sup>.

PLAINTIFFS in 1694 were bound as sureties for Mr. *Briddock*, and had counter-bonds. *Briddock* the principal was afterwards arrested, and the defendant his brother became his bail, and judgment was obtained against the bail. The plaintiffs being sued on the original bond were forced to pay the money, and now brought their bill to have the judgment obtained against the bail assigned unto them, in order to be reimbursed what they had paid.

[ 609 ]

*Per Lord Chancellor.* The bail stand in the place of the principal, and cannot be relieved on other terms than on payment of principal, interest and costs, and the sureties in the original bond are not to be contributory; (1) and therefore decreed the judgment against the bail to be assigned to the plaintiffs, in order to reimburse them what they had paid, with interest and costs.

And although the plaintiffs by their bill had unadvisedly charged that they had agreed to pay an equal proportion of the debt; yet the defendants having by answer denied they made any such agreement, *that* set the plaintiffs at large, and left them at liberty to demand the whole against the defendants; and decreed it accordingly. (2)

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(1) For a surety only engages to make good the deficiency, per *Loughborough*, Chancellor. *Rees v. Berrington*, 2 Ves. jun. 543. Et vide further as to principal and surety, where time given or contract altered as between principal and creditor, *Sheffield v. Lord Castleton*, ante p. 393.

(2) So in case of bankruptcy of original debtor, surety may compel the

creditor to prove the debt under the commission, who thereupon becomes in equity a trustee for the surety, *Beardmore v. Cruttenden*, Cooke Bank. Law, 1 vol. 211. [But now by st. G. IV. c. 16. s. 52, if the creditor has not proved, the surety himself may prove his demand as a debt under the commission.]

JENNINGS, Executor of CAREW GUIDOTT, *versus*  
ADRIAN MOORE, BLINCORNE, & A<sup>r</sup>.

CASE 547.

May 7.

LORD

CHANCELLOR  
Eq. Ca. Ab.  
122 pl. 4.  
S. C.

A defective surrender of copyhold land for securing a sum of money, which was become void for want of being presented in due time, made good against a subsequent purchaser with notice.

**CAREW GUIDOTT**, the plaintiff's testator, in 1699, lent to *Carleton Whitlock* 200*l.* on a surrender of some copyhold lands in *Walton*, in the county of *Surry*; but neglected to get the surrender presented at the next court, as he ought to have done; and for want thereof the surrender was void according to the custom of the manor. In 1703, *Blincorne* agrees with *Whitlock* to purchase for 400*l.* and took a surrender in the name of the defendant *Moore*, who agreed to become the purchaser, and paid the consideration-money; and pleaded himself to be a purchaser, without notice of the plaintiff's demand, and that his surrender was presented, and he admitted tenant without notice of *Guidott's* surrender, which was kept in his pocket, and not presented till long after his purchase, surrender, admittance, and payment of his consideration-money.

But it being proved, that *Blincorne*, whilst he was treating with *Whitlock*, had notice, and therefore declined to purchase in his own name, and took the surrender in *Moore's* name, and procured him to become the purchaser, that he \*might be paid a debt, which *Whitlock* owed him, out of the consideration-money; that notice was adjudged sufficient to affect *Moore*; and he was decreed to pay the 400*l.* and interest, (1) or to surrender to the plaintiff; and although he did not employ *Blincorne* to purchase for him, or knew any thing of it, until after *Blincorne* had agreed, and taken the surrender in his name; yet he approving of it afterwards, made *Blincorne* his agent *ab initio*. (2)

*A.* having notice of an incumbrance purchases in the name of *B.* and then agrees that *B.* shall be the purchaser, and he accordingly pays the purchase-money without notice of the incumbrance.

Though *B.* did not employ *A.* nor knew any

thing of the purchase till after it was made; yet *B.* approving of it afterwards, made *A.* his agent *ab initio*, and therefore shall be affected with the notice to *A.* Ant. Case 519.

This decree was first made at the *Rolls*, and was afterwards [\*610] affirmed on an appeal to the *Lord Chancellor*. (3)

(1) And costs. R. L.

(2) The words of the original decree are,—“ That the defendant *Blincorne* was the agent of the defendant *Moore*, touching the said purchase of the said estate, and that the defendant *Moore* is bound by the fraud of the defendant *Blincorne*.” R. L.

(3) But no costs, as against defendant *Moore*, “ in regard plaintiff's testator did not take care to see his surrender presented at the next general court held for the said manor after

“ the making thereof, which he ought  
“ to have done, and then the defendant  
“ *Moore* had not been defeated in his  
“ purchase; and what money the de-  
“ fendant *Moore* shall so pay unto the  
“ plaintiffs, the said defendant *Blin-*  
“ *corne* is hereby also decreed to pay  
“ him the same with interest from the  
“ time of payment unto the said plain-  
“ tiffs, and in order to the said defen-  
“ dant *Moore* recovering of what he  
“ shall so pay unto the said plaintiffs  
“ as aforesaid, the said defendant

JENNINGS v.  
MOORE & AL'.

In this cause was cited the case of *Taylor and Wheeler*, (4) where the plaintiff lent 400*l.* on the surrender of a copyhold estate, and took no care to have it presented at the next court, nor in *four* years time, by which it became void by the custom of the manor; and before it was presented, the surrender became a bankrupt.

Question was, Whether he should be relieved against the creditors of the bankrupt; and although the *Lord Chancellor* at first doubted, yet afterwards decreed for the plaintiff.

" *Moore* is at liberty, at his own costs,  
" to prosecute this decree against the  
" said defendant *Blincorne* in the plain-  
" tiffs' name, saving the plaintiffs  
" harmless; and the said defendant  
" *Blincorne* is to pay unto the plain-  
" tiffs their costs of this suit." Reg.  
Lib. 1707. A. fol. 351, and this decree

was affirmed in dom. proc. on appeal,  
1 Bro. P. C. 244. Jour. Ho. Lords, 18  
vol. p. 656.

(4) Ante p. 564. quod vide and cases  
cited in not. p. 566, there. As to no-  
tice to agent being notice to the party,  
vide *Brotherton v. Hatt*, ante p. 574,  
and cases cited in not. there.

[ 611 ]

DE

## TERM. S. TRINITATIS, 1708.

IN CURIA CANCELLARIÆ.

CASE 548.  
June 5.

LED SOME *versus* HICKMAN.

Eq. Ca. Ab.  
297. pl. 5. S.P.  
*J. S.* devised  
300*l.* a-piece to  
his three  
daughters *A.*  
*B.* and *C.* at

DEFENDANT'S testator devised 300*l.* a-piece to his *three* daughters *A. B.* and *C.* at *twenty-one* or marriage; if any died before, (1) to go to the survivor. (2) *B.* one of the daughters died in the life-time of the testator.  
twenty-one or marriage. If any died before, to go to the survivors. *B.* died in the life of the testator, her legacy shall go to the surviving daughters. Post Case 581.

Question was, whether the 300*l.* a lapsed legacy, or should accrue to the *two* surviving sisters. Decreed for the plaintiff.

(1) Their legacies should so become due. R. L.

(2) And the testator by his will directed the said legacies to be paid to one *John Strode*, for the said children's use, and his receipt was to be a good

discharge for the same; and he was to apply the profit and produce thereof for the maintenance of the said children, and increase of their legacies during their minority, as he should see convenient. R. L.



*Lord Chancellor.* Devise over as an executory devise.—*Sed* **LEDSOME v. HICKMAN.**  
*quære tamen.* (3)

(3) The plaintiff was one of the three legatees; and decreed as above with interest, at 5 *per cent.* from one year after the death of the said testator, Reg. Lib. 1707. B. fol. 412. The cases on this head seem to depend on a joint tenancy being created by the will, or on the clear intention appearing that the legatee shall take an interest in the legacy, although he die in the life-time of the testator, which may be, *Elliot v. Davenport*, 1 P. Wms. 83. for if there be a joint tenancy created by the will, and it happens, by whatever cause, that one of the joint tenants is prevented from taking, the whole will vest in the survivor after the testator's death, *Pring v. Clay*, 2 Ch. Rep. 187. *Page v. Page*, 2 P. Wms. 489, *Humphrey v. Tayleur*, Amb. 136. *Dowset v. Sweet*, *ibid.* 175. *Buffar v. Bradford*, 2 Atk. 220. *Frewen v. Relfe*, 2 Bro. Ch. Rep. 220. but, except in these two cases, it is apprehended the death of legatee in the life-time of the testator is an extinction of the legacy, et vide *Willing v. Baine*, 3 P. Wms. 113.

### TURNER & Ux' versus JENNINGS & Al'.

[ 612 ]

CASE 549.

June 16.

Eq. Ca. Ab.

152. pl. 6. post

p. 685. S.C.

A freeman of London assigns the greatest part of his personal estate in trust for himself for life, and then for his grandchildren:

This deed not good against the custom of London, as to the Moiety belonging to the children; but binding as to the other moiety, which he had power to dispose of, he having no wife.

Ant. Case 91.

A FREEMAN of the City of *London*, by deed executed in his life-time, grants and assigns over the greatest part of his personal estate, in trust for himself for life, and then for the benefit of his grandchildren; (1) his son dying in his life-time; the plaintiff, who married the freeman's daughter, brought his bill to set aside the deed, and to have his wife's orphanage part in her right, according to the custom of the City of *London*. And although it was admitted that if the father had made an actual gift of any part of his personal estate to his grandchildren in his life time, or had actually given all to one child in his life-time, *that* would have held good against the custom; or if he had turned all his personal estate into a purchase of lands, he might have disposed of it as he thought fit; yet it was decreed for the plaintiff, and the deed set aside; for that the freeman had not entirely dismiss himself of the estate in his life-time; and the deed being made when he was languishing, and but a little before his death, it ought to be looked upon as a *donatio causa mortis*: *Lord Chancellor* declaring that either the custom must be entirely given up, or this deed must be looked upon, as made in fraud of the custom; but will stand good as to a moiety, which he, having no wife, might dispose of.

(1) The children of his son then deceased, R. L.

CASE 550.

June 21.

LORD

CHANCELLOR.

Eq. Ca. Ab.

32. pl. 5. S.C.

*A.* is tenant

in tail subject

to a rent-

charge to *B.*for life; *A.*

dies, the rent-

charge being in arrear.

The issue in tail not liable by the statute of 32 H. 8. cap. 37. to the arrears incurred in the life of his ancestor. 5 Co. 118 a.

LORD FAIRFAX *versus* LORD DERBY, & A<sup>r</sup>.

A QUESTION arising on the statute of 32 H. 8. (1) how far the issue in tail should be liable for the \* arrears of a rent-charge granted to the late Countess of *Derby* for her life, and which incurred and became due in the life-time of his ancestor; the plaintiff the Lord *Fairfax* being the executor of the late Countess of *Derby*.

The issue in tail not liable by the statute of 32 H. 8. cap. 37. to the arrears incurred in the life of his ancestor. 5 Co. 118 a.

[\*613] The *Lord Chancellor* was of opinion, that the statute only provided what was just and equitable; that he who should have paid, should still be liable to action of debt or distress of the executor or administrator of the grantee of the rent-charge; and so against any claiming under him by purchase, gift, or descent; but extends not to the issue in tail, who claim not under, but *Paramount*. (2)

The tenant ought to have paid the rent-charge. It is true, whilst the rent-charge was continuing, the issue in tail was liable to be distrained for the whole arrear which was incurred in the life-time of his ancestor; but *that* was *summum jus*, and the new remedy given by the statute doth not carry it so far.

Had this case been within the statute, yet the plaintiff's remedy was at law, and not to be aided in equity, or the remedy altered or changed from a distress to a receiver or possession. (3)]

(1) Cap. 37.

(2) The words of the statute (after giving remedy by action of debt and distress for the arrears of rent-charge against the tenant or tenants that ought to have paid, his or their executors and administrators) are "or in the seisin "or possession of any other person or "persons claiming the said lands, tenements, or hereditaments, only by "and from the same tenant by purchase, gift, or descent."

(3) There had arisen, previous to the 11th Aug. 13 Car. 1, divers disputes between *William*, Earl of *Derby*, and Lady *Elizabeth Stanley*, about the tenure of certain lands in *Cheshire* and *Lancashire*, and two annuities granted thereout by the Earl, which were referred to *King Charles* the first, who

made his award the 11th *July*, 1635; and thereby ordered and decreed that the said Earl and Lord *Strange* should convey, out of manors and lands of good value, a rent-charge of 600*l.* per ann. payable quarterly to the said Lady *Elizabeth Stanley* and her children as therein mentioned; and in pursuance of that award an indenture of three parts, bearing date the 11th *Aug.* 1637, and made between the said Earl and Lord *Strange* his heir apparent, of the first part, the said Lady *Elizabeth Stanley*, and *Charles Stanley* her son, of the second part, and *Henry Croft* and Sir *Theobald Gorges*, trustees therein named, of the third part, was duly executed, whereby the said Earl and Lord *Strange* covenanted to convey lands therein mentioned within

two years, to the trustees and their heirs, for securing the said annuity of 600*l.* to the said Lady *Elizabeth Stanley* and her children as therein mentioned, and the annuity was received under such deed;—Afterwards, in *Michaelmas* Term, 1684, great arrears of the annuity having become due, a bill was filed by the person intitled thereto, against *William George Richard Earl of Derby*, to whom the premises charged with the annuity had descended, and one *Skipwith* his trustee, to be paid the arrears and growing payments of the said annuity of 600*l.* and a decree was obtained 26th *June*, 1688, whereby it was decreed that the said Earl should pay the arrears and growing payments of the said 600*l. per ann.* to the said *William Stanley*; and that it should be referred to the Master to compute such arrears; and that the said *Skipwith* should assign the premises, charged therewith, as the said Master should appoint: the bill then states, that the said Earl afterwards insisting on his privilege, the said *William Stanley* could not reap any fruit of the said decree: *William Stanley* then died, without issue, (whereby the annuity ceased,) having made his will and thereof appointed *William Lord Widdrington* sole executor, who revived the suit and obtained the Master's report of arrears and day of payment, which was confirmed; but before any part thereof was paid, the said Lord *Widdrington* died; having first made his will, and the plaintiff executor thereof; *William George Richard Earl of Derby* then died, and the premises, charged with the said annuity, descended to *James Earl of Derby*, one of the above defendants; and he by his answer insisted that long before the indenture of the 11th *Aug.* 1637, the premises so charged with the said annuity were by several letters patent under the great seal of England and seal of the *Dutchy of Lancaster*, and by several acts of parliament and settlements, granted and limited to the Earls of *Derby*, and the heirs males of their bodies, and to others of the said defendant's ancestors in tail male,

which settlements were then still in force; and that the premises being legally descended to and vested in him the said defendant as heir male of the family, he claimed all the said premises by virtue thereof; and insisted that the plaintiff had no title thereto, or that, if he had, his right was at law: The decree then states that the letters patent, deeds, &c. and the statute 32 Henry 8, were read, and declares that the plaintiff was at liberty to carry the former decree into execution as against the personal estate of the said late Earl of *Derby*; “but as to the question “upon the statute 32d Henry 8, his “Lordship conceived the statute to be “founded upon equity; that a rent “payable by one who enjoyed the “estate during his life by virtue of an “entail should not be lost but be re- “covered out of the estate in possession of those claiming from him by “descent or purchase: but the defendant the Earl of *Derby* not “claiming the premises in question “by descent from the late Earl of “*Derby*, who was liable to pay the “rent-charge in question, his Lordship doth not therefore think fit in “equity to charge the arrears thereof “on the said premises, but doth leave “the plaintiffs at liberty to recover the “same at law, either by distress or “otherwise as they shall be advised; “and for that purpose doth order and “decree that the defendant Sir *Thomas Skipwith*, the trustee, do suffer “the plaintiffs to make use of his name “in any action at law to be brought “by the plaintiffs, he being indemnified by them in respect thereof; but “the trials at law are not to wait the “event of the account of the personal “estate under the aforesaid decree, “but the plaintiffs are to be at liberty “to carry on such account at the same “time and concurrent with the said “trials.” The costs to be paid out of the surplus of the personal estate of the said late Earl, after payment of plaintiff's demands, but if not sufficient, then consideration of costs reserved till after the trials at law had, and accounts taken. Reg. Lib. 1707. A. fol. 607.

## CASE 551.

July 14.

Eq. Ca. Ab.  
65. pl. 7. S. C.  
If a bill is brought against Baron and Feme for a demand out of the separate estate of the feme; and the husband is beyond sea, and not amenable by the process of the Court; yet, if the wife is served with a Subpœna, she must appear, and answer the plaintiff's Bill.

DUBOIS *versus* HOLE & Ux'.

**DUBOIS**, the defendant's first husband, in case of the death of his son without issue, devised his real estate, and great part of his personal, to the plaintiffs his nephews, who were then, and yet, infants; and dies in *Barbadoes*.—The defendant his widow possessed the estate, and afterwards married Mr. *Hole*, her second husband; but before marriage, assigned and conveyed \* over her first husband's estate to trustees, so as the second husband might not intermeddle therewith. She comes over to *England*, and was served with a *Subpœna* to answer the plaintiff's bill and afterwards arrested upon an *attachment*; but her husband Mr. *Hole* was beyond sea, and not to be reached by the process of the Court. The bill was brought against *Hole* and his wife, and Mrs. *Hole* appeared to the bill, and had moved for and obtained an order for leave to put in a separate answer without her husband; but was afterwards advised by her counsel, that she being a *Feme Covert* could not be compelled to appear or answer, her husband being never served with any process, and obtained an order to refer the proceedings against her as irregular.

[ \*614 ]

But *per Lord Chancellor*. If the case is as laid by the bill, the wife has a separate capacity, and the husband has nothing to do with the estate; and rather than there should be a failure of justice, he held the process regular against her alone, her husband being beyond sea, and not amenable by the process of the Court. (1)

(1) She was committed to the Fleet, and stood out to a sequestration; and then, after orders obtained for *Habeas Corpus & plur. Habeas Corpus*, she, in *Michaelmas Term*. 1708. 4th *December*, was brought to the bar of the Court on an *Al. plur. Habeas Corpus*, and the bill taken *pro confesso* against her, and decree accordingly with costs, *Reg. Lib.* 1708. *A.* fol. 104. And it seems clearly the doctrine of this Court, that the wife may be considered as a separate person from her husband, so as to appear and answer without him, vide *Bell v. Commissary Hyde's wife*, *Pre. Ch.* 328. *Gilb. Eq. Rep.* 183. *S. C.* cited also in not. (A.) to *Newsome v. Bowyer*, 3 *P. Wms.* 38. *Ex parte Halsam*, 2 *Atk.* 50. *Travers v. Buckly*, 1 *Vez.* 384. and in *M. S.* note

of a case *Stansbury v. Watkins*, 6 *July*, 1772, at the *Rolls*, on a bill of foreclosure, Sir *Thomas Sewell* made an order that plaintiff should be at liberty to sue out attachment against the wife alone; and in another case of *Casson v. Tucker*, 4th *Aug.* 1778, at the *Rolls*, bill was exhibited that the wife might be declared a trustee for plaintiff, and an order was made on petition, against the wife alone in that cause, on affidavit of service: and Sir *Thomas Sewell* said these orders were according to the course of the Court, and perfectly agreeable to justice. So at law, a wife may appear and may be compelled to appear without her husband: vide cases cited by *Hardwicke*, *Chan.* in his judgment in *Travers v. Buckly*, 1 *Vez.* 386. where *Lord Chan.* observes on the

principal case, that it has always been put upon the ground of the wife having appeared, not of her separate property. So writ *ne creat regno* may issue against a feme coverte executrix, whose husband is out of the jurisdiction, *Jerningham v. Glass*, 3 Atk. 409. Amb. 62. S. C. doubted at first, but granted on the authority of *Moore v. Meynell*, May 8, 1719, therein cited. In this case, the plaintiff filed his bill against Sarah, the wife of Richard Meynell alone, which Sarah was the widow and administratrix of one Lawrence Crabb, deceased, for an account of the real and personal estate of the said Lawrence Crabb; and it appears, that having been arrested on a writ of *ne creat regno*, and given security

thereon, she on the 24th Aug. 1716, preferred her petition to have the said writ and security discharged; and it was ordered, that on the said Sarah Meynell giving the like security which she had given on the writ, that she would put in a full and perfect answer, her former answer having been insufficient, she should be at liberty to depart the kingdom before she put in her said further answer, Reg. Lib. 1715. B. fol. 355. Afterwards, 8th May, 1719, the cause came on to be heard against her alone, her husband not being named as a party to the suit, and a decree for an account made against her, Reg. Lib. 1718. B. fol. 398. [But see *Pannell v. Tayler*, 1 Turner, 96.]

DE

[ 615 ]

TERM S. MICHAELIS, 1708.

IN CURIA CANCELLARIÆ.

WILLIAM HEDGES, Esq., and ROBERT  
HEDGES, Gent. . . . . } Plaintiffs.

DAME ANN HEDGES, Widow, and JOHN  
HEDGES, and CHARLES HEDGES,  
Infants, by the said DAME ANN  
HEDGES, their Mother and Guardian,  
and JOHN EDMONDS and SUSANNA  
his Wife . . . . . } Defendants.

CASE 552.  
November 26.  
Pre. Ch. 269.  
7. Vin. Ab.  
138. 215.  
Gilb. Eq. Rep.  
12. S. C.

CANNOT pass as a devise, because not in the will; nor can be a *donatio causa mortis*, because he gave it in his life-time, in contradistinction to a devise.

But it is a gift *bona fide*, not in fraud of the custom, and in lieu of what he had given out of his legatory part, which he had power to do.



HEDGES v.  
HEDGES.

An advancement at a certainty, if the party will have the benefit of the orphanage, must be brought into Hotch-pot.

Where a deliberate act is done, although it attains not the end designed, and should in consequence prove quite contrary, not relievable in equity. (1)

(1) The bill in this case was filed by two of the children of the testator Sir *William Hedges* citizen deceased, by a former marriage, against the widow and two children of the second marriage, and *Edmonds* and his wife, a daughter of the first marriage, for an account and their orphanage-part of the testator Sir *William Hedges*' personal estate; as against *Edmonds* and his wife, no question arose; the question that did arise was on the following circumstance:—The testator having (*int. al'*) a debt of 3000*l.* due to him from the Mercer's Company, secured by their bond, on the 15th *July*, 1698, made his will, and thereby gave the said debt of 3000*l.* and the bond securing the same, to the defendants *John Hedges* and *Charles Hedges*, and the survivor of them: It then appears that some time afterwards, (but when in particular is not stated,) the said Sir *William Hedges* delivered the afore-said Mercers' Company's bond for 3000*l.* to one Sir *James Bateman*, with a note under his, Sir *William*'s hand, to the clerk of the said Company, desiring that the old bond might be cancelled, and a new bond in Sir *James Bateman*'s name, for the said 3000*l.* given, which was accordingly done in Sir *William Hedges*' life-time; and the new bond was delivered, (as it should seem, though it is not stated in words,) by the testator to Sir *James Bateman*, for the use of the said defendants *John* and *Charles Hedges*. After this, viz. on the 25th *Aug.* 1701, two days before the death of the said testator, one *John Nicoll*, the defendant Dame *Ann*'s brother, came to visit the testator, and was desired by him to peruse the said will, and to insert a legacy to one of the plaintiffs therein; which he did, and then the said *John Nicoll*, being informed that the testator had given the 3000*l.* debt and the bond securing the same, to the defendants *John* and

*Charles Hedges*, rased out of the will the bequest of the said 3000*l.* to the said last-named defendants, saying it was best to be so; and then he made the following indorsement on the will, " memorandum, that the within written will and codicil was on the 5th *Aug.* 1701, republished by the said Sir *William Hedges*, after the several obliterations and interlineations were, by his directions, made in the 2d, 5th, 8th, and 9th paragraphs of the said will." The said *John Nicoll* then read over the said will so altered and rased, to the testator, and told him that he having given to the defendants, *John* and *Charles Hedges*, the said 3000*l.* in his life-time, and intending it above what their share of his personal estate might be, it would be more security for them that the said 3000*l.* was struck out of the will; and thereupon the said testator republished his will, so altered and rased; and then died. The defendant Dame *Ann*, after his death, proved the will as executrix, and possessed herself of the personal estate of the testator, (after several deductions, and amongst them of the said 3000*l.*.) to the amount of 10,346*l.* 8*s.* 11*d.* and paid the plaintiffs a quarter part thereof, and they took the same and gave receipts respectively to the said defendant Dame *Ann* as such executrix for such respective quarter parts, in full of all accounts respecting the personal estate of the said testator; and such receipts were insisted upon by the defendants, as concluding the plaintiffs in respect of the said 3000*l.* of which they claimed respectively a share: and the decree was, " whereupon, &c. the Court declared that the receipts in full given by the plaintiffs to the defendant Dame *Ann Hedges*, ought not to bind the said plaintiffs or to bar them of any right to the said Sir *William Hedges*' personal estate, the said receipts ap-



“ pearing to be by them given through  
 “ inadvertency; and that as to the  
 “ 3000*l.* secured by bond from the Mer-  
 “ cers’ Company, it appears that the  
 “ said bond was by Sir *William*  
 “ *Hedges*’ direction, taken in Sir *James*  
 “ *Bateman*’s name, in trust for the de-  
 “ fendants *John* and *Charles Hedges*  
 “ the two younger children; and the  
 “ same being an act done in the life of  
 “ the said testator, it ought to be taken  
 “ as an advancement of his said two  
 “ younger children; and that in case  
 “ the said defendants *John* and *Charles*  
 “ *Hedges* will insist to have any share  
 “ of the orphanage-part of their said  
 “ late father’s personal estate, they  
 “ ought to bring the said 3000*l.* into  
 “ Hotch-pot; and in their default of

“ so doing, that the whole orphan-  
 “ age-part of the said Sir *William*’s  
 “ personal estate be paid to the plain-  
 “ tiffs;” and then the decree proceeds  
 to direct an account in the usual way;  
 and in case the parties differed as to  
 what should be reckoned the orphan-  
 age-part of the personal estate, then  
 they were directed to apply to the *Lord*  
*Mayor* and Court of *Aldermen* of the  
 City of *London* for their certificate of  
 the custom of the said City in cases of  
 the like nature, Reg. Lib. 1708. A. fol.  
 78. This decree reversed on appeal to  
 Dom. Proc. 1 Bro. P. C. 254. Vide on  
 the general doctrine of the custom of  
*London* on the above head, *Fouke v.*  
*Lewen*, ante 1 vol. 88. and cases cited  
 in not. there.

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CRANE *versus* DRAKE, & Al’.

[ 616 ]

CASE 553.

Nov. 3.

Eq. Ca. Ab.  
240. pl. 9. S.C.A. purchases  
a leasehold  
estate of an  
executor, hav-  
ing notice a  
debt of the  
testator’s was  
unpaid, and  
out of the  
purchase-mo-

*FRANCIS HOOPER* being indebted to the plaintiff 100*l.*  
 on bond, died possessed of a great personal estate, and made  
 his brother *William* executor and devisee, who wasted the es-  
 tate: the defendant *Drake*, having notice of the plaintiff’s debt,  
 buys of *William* the executor a leasehold estate by discounting  
 200*l.* due from the testator, 550*l.* due from the executor, and  
 by payment of 150*l.* in money.

ney has an allowance of a debt of 200*l.* due to him from the testator, and a debt of 550*l.* due  
 to him from the executor; the remainder being 150*l.* was paid in money. This Sale not good  
 against an unsatisfied creditor.

Plaintiff’s bill was to have satisfaction for his debt out of the  
 leasehold estate, being part of the testator’s assets.

Question was, whether this was a good sale to bind a  
 creditor.

For the defendant it was insisted, that an executor may sell,  
 and with the money, when he has it, may pay his own debts;  
 and for the same reason he may upon sale discount and allow  
 the purchaser the debt he owes him; and the rather in this  
 case, because he paid 150*l.* in money with which the executor  
 might have paid the plaintiff’s debt; yet decreed for the plain-  
 tiff at the *Rolls*, and affirmed on an appeal to the *Lord Chan-*  
*cellor*, he saying the defendant was a party, and consenting to  
 and contriving a *Devastavit*. (1)

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(1) For observation on the report of 3 Atk. 240. *Jacomb v. Harwood*, 2 Vez.  
 this case, vide *Mead v. Lord Orrery*, 269. The bill was exhibited against

*Thomas Hooper* the executor, and *William Drake* the purchaser; who both by their answers admitted notice of the plaintiff's debt; and the decree at the Rolls as above, 15th *June*, 1707, and "that defendant *Drake* do, out of the "purchase-money so resting in his "hands, and not actually paid to the "said *Philip Hooper*, pay the plaintiff "his said debt of 100*l.* together with "interest for the same, together with "his costs of this suit, to be computed "by the Master; and in default of the "said *Drake's* payment of what the "said Master shall certify due to the "plaintiff for principal, interest, and "costs, at such time and place as the "said Master shall appoint, it is further ordered and decreed, that the "said premises conveyed to the defendant *Drake* as aforesaid, be sold to the "best purchaser that can be got for the "same, to be allowed of by the said "Master; and it is hereby referred to "the Master, in such case, to see what "was due from the testator *Francis Hooper* to the defendant *Drake*, or "actually paid by the defendant *Drake* "to the defendant *Philip Hooper*, or "any other person on account of "the said purchase, and to compute "interest for the same, and to tax the "said defendant *Drake* his costs; and "it is further ordered, that the money "arising by sale of the said premises "be applied in the first place, to pay "the defendant *Drake* what the said "Master shall certify to be due to him "for principal, interest, and costs as "aforesaid from the said testator; "and that then the plaintiff do come "in and be paid what the said Master "shall certify to be due to him for "principal, interest, and costs, out of

"the residue of the said purchase-money." Reg. Lib. 1707. *A.* fol. 456. and in Mich. Term following the decree affirmed as above, Reg. Lib. 1708. *A.* fol. 22. entered *Crane v. Hooper*. Vide *Mead v. Lord Orrery*, 3 Atk. 235. *Ewer v. Corbet*, 2 P. Wms. 148. *Burting v. Stonard*, *ibid.* 150. *Farr v. Newman*, 4 Term Rep. 621. *Andrew v. Wrigley*, 4 Bro. Ch. Rep. 125. *Hill v. Simpson*, 7 Ves. 152. *Taylor v. Hawkins*, 8 Ves. 209, and the cases there respectively cited, in which the principle of dealing with executors (and particularly in *Farr v. Newman*, of testator's goods being liable for debt of executor and of husband of executrix) is canvassed and explained; and note observation on the case of *Mead v. Lord Orrery*, in *Andrew v. Wrigley*, *ub. sup.* p. 130. From these cases three things appear, 1st, that the cases must in general be judged of by their particular circumstances; 2dly, (as a general principle) that in purchase from executor, the purchaser is not bound to see to the application of the purchase-money; and, 3dly, that if fraud or collusion between executor and purchaser, then, upon the known principle of the Court, the purchaser is bound. [See also *Bonney v. Ridgard*, 1 Cox, 145. *Macleod v. Drummond*, 14 Ves. 353, 17 Ves. 152. *Drohan v. Drohan*, 1 Ba. & Be. 185. *Ray v. Ray*, Cooper, 264. *Keane v. Roberts*, 4 Madd. 332. So in sales by trustees of real estates, *Watkins v. Cheek*, 2 S. & S. 199.] Note, in the statement in the decree in the principal case, no mention is made of fraud or collusion between the defendant the executor, and the defendant *Drake* the purchaser, nor is it charged by the bill.

[ 617 ]

## CARTER versus BLETSOE.

CASE 554.

Nov. 26.

Pre. Ch. 267.

S. C. rather more fully reported.

A. devises lands to B. his son and his heirs, and declares that out of the lands he shall pay 200*l.* to his daughter at her age of twenty-one. She marries and dies under age. Legacy not vested.

*MATH, BLETSOE* seised in fee, in 1692 made his will, and thereby devised to his eldest son, *Saterthwaite Bletsoe*, and his heirs, all his messuages, &c. But it is my will nevertheless, that my son shall pay out of the said lands so devised to him, the sum of six hundred pounds; to my daughter *Mary*, she shall pay 200*l.* to his daughter at her age of twenty-one. She marries and dies under age. Legacy not vested.

*two hundred pounds* at her age of *twenty-one*; to son *John* *two hundred pounds* at his age of *twenty-one*; to son *Math.* *two hundred pounds* at his age of *twenty-one*; and *four pounds per ann.* for maintenance, until they come to *twenty-one* and their portions paid.

CARTER v.  
BLETSOE.

*Mary* the daughter married and died before *twenty-one*; her husband came as administrator to his wife for the *two hundred pounds*, and also for *two hundred* more, which was to accrue to her upon the death of her brother.

*Per Cur.* There is no vesting clause in the will; the direction that the son pays to *Mary* at her age of *twenty-one*, vests nothing until she attains *twenty-one*, and she dying before, it never arises. (1).

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(1) On this point, vide *Jackson v. Farrand.* ante 424. and cases cited in note there.

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HALES *versus* VAN BERCHEM & Ux'. and COLE,  
& è contra.

CASE 555.  
Nov. 13.

Agreements since the statute of frauds, &c. are not to be part parol, and part in writing; yet a deposit for performance of a written agreement, though there is no writing declaring such deposit to be a security, is not within the purview of the statute.

[\*618]

*VAN BERCHEM* upon the marriage of his wife in 1704, by articles in writing, in consideration of *six thousand pounds*, mentioned to have been by him received as a\* portion with his wife, covenanted that if he and his wife lived *seven years*, in *three months* afterwards to lay out *ten thousand pounds* in a purchase, and settle it on himself for life, and his wife for her jointure, &c. and if he died before a settlement was made, to leave her *ten thousand pounds*, and confessed a judgment to *Brown* and *Cole* for performance of covenants. *One thousand five hundred pounds* of the wife's portion was laid out in the purchase of an annuity of *one hundred pounds per ann.* in the Exchequer, in the name of *Cole*: and he gave a declaration of trust to *Van Berchem*, that his name was used in trust for him, his executors and administrators.

The plaintiff *Hales* was prevailed upon to lend *Van Berchem* *one thousand pounds*, on his assignment of the annuity, and depositing the tallies and order with him; and the wife attempting to take out execution against the husband in the name of the trustees, before the time was lapsed for making the purchase; *Brown* one of the trustees was prevailed upon to acknowledge satisfaction on the judgment.

*Hales's* bill was to compel *Cole* to assign the trust for securing his *one thousand pounds*; and the cross bill was, that

HALES v.  
VAN BER-  
CHEM.

the wife might have the benefit of the *one hundred pounds per ann.* and that *Brown* might be charged with a breach of trust, and compelled to stand in the place of *Van Berchem*, and make good the marriage agreement; she insisting that the annuity purchased in *Cole's* name in trust, was to remain as a pledge until the marriage-agreement was performed; and that the tallies and order were deposited in *Cole's* hands for that purpose; but that her husband persuaded her to take them out of his hands, on pretence they were not safe there; and she having so done, he afterwards took them out of her cabinet, and delivered them to *Hales*.

[ 619 ] For Mr. *Hales* it was insisted, that whatever private agreement might be between *Van Berchem* and his wife, as he had not heard of it, so it could not bind him, being only by parol and void by the statute of *frauds and perjuries*, and was no part of the agreement in writing, but inconsistent with it; (1) the whole *six thousand pounds* being thereby recited to have been paid to *Van Berchem*; and also inconsistent with the declaration of trust given by *Cole*; and even before the statute of *frauds and perjuries* it was never allowed, that any thing of a parol agreement should be added or tacked to an agreement in writing, for that would render writings of little effect, and reduce all things to uncertainty. (2)

Yet the *Lord Chancellor* dismissed Mr. *Hales's* bill; (3) and decreed the *one hundred pounds per ann.* to the wife, *Van Berchem* the husband being broke, saying, although parol agreements are bound by the statute, and agreements are not to be part parol and part in writing; yet a deposit or collateral security for the performance of the written agreement is not within the purview of the statute. And the defendant, who was married in her infancy, and her trustees who had made an improvident agreement in writing, did well afterwards upon

(1) Vide *Gascoigne v. Thwing & Al'*. ante 1 vol. 366. *Mumma v. Mumma*, ante p. 19. and cases cited in not. there respectively.

(2) So, before the statute of frauds, a will in writing not supplied by parol proof, per *Holt*, Chief Justice. *Cary v. Bertie*, ante 339. vide *Countess of Rutland's* case, 5 Co. Rep. 26. *Kaines v. Nightley*, Skin. 54.

(3) With costs. "The interest of the plaintiff *Sarah Van Berchem* in the annuity tally being precedent to

"the interest of the defendant *Hales* therein, whether the debt pretended to be due to him from the said *Henry Van Berchem* be just or not; for that it appears the said *Hales* had notice of such her interest, and did not originally lend his money on security of the said annuity, nor continue the same on such security, but that such security was intruded on him by the said *Henry Van Berchem*." R. L.

recollection to get that deposit for the performance of the agreement.

HALES v.  
VAN BER-  
CHEM.

And as to *Brown*, who had unadvisedly been persuaded to acknowledge satisfaction on the judgment, he having some colour for so doing, because a *scire facias* had been brought in his name without his privity, and execution taken out before the agreement was broken, or the time lapsed for making the purchase; and it also appearing by the time the *scire facias* was sued out, that execution could not have been had before such time as *Van Berchem* failed, and became a bankrupt; and he had no lands that could be affected with the judgment; (1) therefore only condemned him in costs, and to answer damages in case the wife should think it worth her while to bring a *quantum damnificatus* by the acknowledging satisfaction on the judgment; but withal declared, that if he had done it designedly and corruptly, as for a reward, &c. he should have been decreed to stand in the place of *Van Berchem*, and to have made good the marriage-agreement. (2)

[ 620 ]

(1) By this answer, *Brown* confessed that after acknowledging satisfaction, *Van Berchem* the husband executed and delivered to him a bond of indemnity in 30,000*l.* penalty. R. L.

(2) Nothing in the decree as against *Brown* in the Register's book as to the *quantum damnificatus* appears; it is, "that he the said defendant *Brown* do procure the satisfaction acknowledged on the said judgment to be vacated, and the judgment to be set up again in the same condition it was at the time of acknowledging such satisfaction; and if the said defendant *Brown* shall not procure the said satisfaction to be vacated, then it is ordered and decreed, that he do give a new judgment against himself, defazanced for the performance of the said marriage-articles: and it is further ordered, that the said defendant *Brown* do pay unto the plaintiff *Sarah* her costs at law, and of these suits, to be taxed by the Master, so far as the same relate to him the said *Brown*." Reg. Lib. 1708. B. fol. 121. entered *Van Berchem v. Van Berchem*. Note,

the defendant *Hales* had taken the goods of defendant *Van Berchem* the husband in execution on account of his said debt; and as to this, the decree declared "that as to the judgment given by the said *Henry Van Berchem* for performance of the said marriage-articles, and on which the said defendant *Brown* had acknowledged satisfaction, the same ought, in equity, to be looked upon as subsisting, so far as to let the plaintiff *Sarah Van Berchem* in to have an account from the defendant *Hales*, of the goods so by him taken in execution as aforesaid; and the Master is to see what was really lent to the said *Henry Van Berchem* by the said defendant *Hales*; and what the said Master shall certify the said defendant *Hales* to be a real creditor for, he is to receive a satisfaction for the same out of the said goods so by him taken in execution; and the remainder of the said goods, or the value thereof, (if any,) is to go and be paid to the plaintiff *Sarah*, towards satisfaction of her marriage-articles."



## CASE 556.

MOORE *versus* GODFREY.

Nov. 26.

Legacies are given to *A. B.* and *C.* to be paid at their respective marriages, and if any of

*SIR William Coventry* devised 1500*l.* to his three co-heiresses to be paid at their respective marriages, as well principal as interest; and if any of them died unmarried, her legacy to go to the survivor or survivors. One of them dies unmarried, the survivors shall not receive her legacy before their respective marriages.

One of the *three*, who was the plaintiff, married and received her share; the *second* niece died unmarried.

Question was, whether the 500*l.* that accrued to the plaintiff and defendant, by the death of the unmarried sister, was subject to the condition of marrying, the condition not being again repeated.

*Per Lord Chancellor.* The condition shall go to the whole, as well to what accrued by survivorship, as to the original devise. (1)

(1) Vide *Woodward v. Glasbrook*, ante p. 388, and note there. No entry of this case in the Register's book appears; but by a MS. note of the late Mr. Core; the following statement is made, "Decree 27th Nov. 1708. decreed a moiety of the dead sister's third part if she had married, should be paid to the married plaintiff and her husband. The will of Sir William Coventry devised the 1500*l.* to trustees in trust for his three nieces, *Elizabeth*, *Margaret* and *Dorothy Godfrey* equally, and directed that it should be put out at interest, and that when either of the three nieces married, her share of the principal and interest, should be paid to her; and that in case any of them died unmarried, her share of the principal and interest should go to the survivors and survivor of them; they were all infants, and unmarried, at the time of the death of the testator. *Elizabeth* married the plaintiff *Moore*, and received her share. *Margaret* died in the year 1704, unmarried, and by her will appointed *Dorothy* her sole executrix, and residuary legatee; but the plaintiffs, notwithstanding the will of *Margaret*, brought their bill for a moiety of *Margaret's* share in the 1500*l.* and interest, and prayed further, that the

remainder of the money and its interest might be improved at interest subject to the trust for the plaintiff *Elizabeth* in case *Dorothy* should die unmarried; and the cause was heard the 27th day of Nov. 1708, before Lord Chancellor Cowper, when his Lordship declared that Sir William Coventry's intention was to limit the 1500*l.* so as it might be as beneficial as possibly it could to the plaintiff *Elizabeth* and her sisters *Margaret* and *Dorothy*, and that while they were in being so as there was a possibility of cross remainders, he intended a survivorship, and that no fourth person should have any benefit thereof till after their deaths; and therefore, *Margaret* dying before she was married, her share of principal and interest survived to the plaintiff *Elizabeth*, and the defendant *Dorothy*; and that the plaintiff *Elizabeth* was not excluded from her share thereof by being married at the said *Margaret's* death; and his Lordship also declared that, if the said *Dorothy* should die unmarried, the plaintiff *Elizabeth* would not only be intitled to the said *Dorothy's* share of the said 1500*l.* but also to the other moiety of *Margaret's* share thereof; and therefore his Lordship decreed that an account should be taken of the 1500*l.*



and interest; and decreed that if the trustees had paid any interest of the trust-money to *Margaret*, that it was a breach of trust in them, and that they ought to be answerable to the plaintiffs for a portion thereof, but inasmuch as Lord *Weymouth*, who was the surviving trustee, was, by *Margaret's* will, to be indemnified for what interest he had paid to her; that therefore, the defendant *Dorothy*, as *Margaret's* executrix, should answer a moiety of such interest to the plaintiffs, and decreed that the plaintiffs should be paid a moiety of the said *Margaret's* share in the said 1500*l.* and interest." Vide *Perkins v. Micklethwaite*, 1 P. Wms. 274. and cases cited in note there.

Sir LITTON STRODE *versus* DOMINAM RUSSEL,  
DOMINAM FALKLAND, &c.

[ 621 ]

CASE 557.

Eq. Ca. Ab.  
210. pl. 18. 3.  
Ch. Rep. 169.  
S. C.

SIR *William Litton* being seised of several manors and lands in *Hertfordshire*, &c. the ancient estate of the family, of about 3000*l.* per ann. and also of lands of his own purchase, freehold and copyhold, of about 600*l.* per ann. and possessed of a great personal estate, and having no issue, but two sisters of the whole blood, viz. the Lady *Russell*, who by Sir *Francis* her husband, had issue several daughters, and the Lady *Strode*, who died in his life-time, and left issue by Sir *George Strode* her husband, the plaintiff Sir *Litton Strode*, and the Lady *Falkland*, a sister of the half-blood; made his will, and after a devise of part to his wife for life, and other legacies, devised to the plaintiff his nephew, all other his lands, tenements and hereditaments out of settlement; provided he took upon him the surname of *Litton*, and subject to raise 4000*l.* in case the testator left a daughter. (1)

A. by virtue of several settlements, being tenant in tail after possibility of issue extinct of some lands, remainder in fee to trustees in trust for him and his heirs; and as to some other lands being tenant for life, remainder to his first, &c. sons, remainder to trustees in fee, in trust for the right heirs of

B. whose heir he was; and as to other lands being tenant in tail, remainder to the right heirs of his father; and having no issue, by will devised to his nephew all his lands, tenements and hereditaments out of settlement. Decreed all the lands so settled to pass by his devise.

The chief point in this case was, what should pass by the devise of lands, tenements and hereditaments out of settlement.

Upon the several settlements that had been made in the family,

As to the manors of *Half-hide* and *Homerly*, Sir *William* was tenant in tail after possibility of issue extinct by *Mary* his first wife, with a remainder in fee in trustees in trust for him and his heirs.

As to the manor of *Knebworth*, he was tenant for life, with contingent remainders to his first and other sons, remainder to trustees in fee, in trust for the right heirs of Sir *William Rowland Litton*.

[ 622 ]

(1) To be paid her at the age of eighteen, or day of marriage, with interest. R. L.

STRODE v.  
RUSSEL.

As to the manors of *Austy* and *Stolford*, and several houses in *London*, Sir *William* was tenant in tail, remainder in fee to the right heirs of Sir *Rowland Litton*, which Sir *William* then was.

And it fell out that Sir *William* after making of his will, and before the codicils, purchased some lands, and foreclosed, and had releases of the equity of redemption of some mortgages in fee.

As to the *first* point it was insisted by the defendants, that the words *out of settlement* must not be rejected, but must be of some force and operation, being plainly restrictive words; and the rather, because they come not accidentally, as the phrase or expression of the penner or drawer of the will, but industriously, and more than once repeated in the will: and therefore it was insisted, that either all the family-estate comprised in any of the settlements should be excluded, and only the new purchased lands to pass; or at least-wise such lands whereof the settlements were in force, and the uses of the settlements not so spent, but that the lands, if not devised, would go according to the limitations in the settlements, and not to Sir *William's* heir; as the manor of *Knebworth*, &c. where the last limitation was to the right heirs of Sir *Rowland*; there those lands would by virtue of the settlement descend to all the *three* sisters, viz. to the Lady *Falkland* the sister of the half blood, as well as to the sisters of the whole blood. So plainly the settlement did influence those lands, and they might be said properly enough, to be under settlement. And it was proved by witnesses in the cause, that Sir *William* expressed great kindness for the Lady *Falkland*, and said his ancestors were wiser than he, and he would not disturb what settlements they had made, or to that effect.

[ 623 ]

But the *Lord Chancellor*, assisted with the *Master of the Rolls*, Lord Chief Justice *Trevor*, and Justice *Tracy*, concurred in opinion:

That the whole family-estate was well devised, and that the words *out of settlement*, as the case fell out, would have no effect.

*First*, because, beyond all question, he had a power to devise the whole, as being intitled either in possession, or as right heir to Sir *Rowland* to the last remainder in fee; and as he had power to devise, so the words were sufficient to pass the whole; for the remainder, or reversion in fee, is an hereditament.

And as authorities, cited the cases of *Cook* and *Gerrard*, 1

*Lev. 212.* (1) where a man having devised to his wife a house for one year after his death ; and having before settled *Spain's Hall* on his daughter for life ; then devises all his lands not settled, or devised, to *Thomas Kemp* and his heirs ; and adjudged the reversion of both well devised. And 2 *Vent. 285.* the case of *Willowes* and *Lidcott* ; and a reversion is an hereditament out of settlement. (2)

STRODE v.  
RUSSEL.

Although the words *out of settlement* seemed to be used in contradistinction to lands in or under settlement, and properly lands under settlement, is where the whole inheritance is settled and disposed of ; as if the testator had been tenant in tail, remainder in fee to another ; there the whole had been under settlement, though he might have barred the remainder by a common recovery. If the whole inheritance had been settled, but there had been a power of revocation ; although the testator might have revoked it, it should not have passed by this devise, because the whole is properly under settlement, though liable to be revoked.

[ 624 ]  
Lands settled with a power of revocation, will not pass by a devise of lands out of settlement.

Had the testator only intended the new-purchased lands should have passed, he would have said so ; but his chief design seems to be to keep up his name, and preserve the ancient estate in his name and family ; and therefore he obligeth his nephew *Strode* to change his name.

*Secondly*, if the testator had intended only the new-purchased lands should pass, and all the ancient estate to have gone to his daughter, he would not have charged those lands with 4000*l.* for a daughter.

*Thirdly*, The testator has devised to his wife part of his lands in settlement, and then subjoins, and all other my lands out of settlement, I give to my nephew *Strode*, &c. which shews that he intended to pass lands comprised, or within that settlement.

*Fourthly*, Although by some of the settlements the half blood might be entitled to come in for the reversion, as right heir of Sir *Rowland* ; yet there is no reason to think, the testator intended to exempt lands for the sake of a sister of the half blood, and devise away that which would have gone intirely to his sisters of the whole blood ; and cited the case in *Hob. 51.* Some loose words shall not control the main design of a will.

And Mr. Justice *Tracy* was clear of opinion, that no parol

(1) [S. C. 1 Saund. 180.]

(2) Vide *Lee v. Sir Robert Henley*,

ante 1 vol. 37. *Rooke v. Rooke*, ante 461, and cases cited in not. there respectively.

**STRODE v.  
RUSSEL.**  
No parol proof  
ought to sup-  
ply the words  
of a will.  
Ant. Ca. 531.  
[ \*625 ]

proof ought to have been received, according to the rule given in *Cheyney's* case, 5 Rep. No proof ought to supply the words of a will. (1) If a devise be to one of the sons of \*J.S. who hath several sons, the devise is void, and shall not be supplied by any parol proof; nor is any regard to be had as to expressions, before or after making of the will, which possibly might be used by the testator on purpose to control or disguise what he was doing, or to keep the family quiet, or for other secret motives and inducements: but the will, that must pass the land, must be in writing, and must be determined only by what is contained in the written will.

As to the other points it was also unanimously agreed,

**Mortgages in  
fee, though  
forfeited, will  
not pass by a**

*First*, That mortgages in fee, although forfeited when the will was made, did not pass by the general words.  
general devise of all my lands, tenements and hereditaments.

**Nor will they  
pass by such  
a general de-  
vise, though  
the equity of  
redemption is**

*Secondly*, Although he afterwards foreclosed those mortgages, or obtained a release of the equity of redemption, they should not pass by the will, but go to the heir at law. (2)  
afterwards foreclosed, or released.

*Thirdly*, No pretence that copyhold lands should pass, which were not surrendered to the use of the will: In *Kettle* and *Townshend's* case, by the judgment in the House of Lords, want of a surrender not to be supplied for the sake of a grandson; much less for a nephew. (3)

**A codicil,  
which con-  
cerns only  
personal lega-  
cies, will not  
amount to a  
republication  
of the will, so  
as to pass lands**

*Fourthly*, As to lands purchased after the making of the will, but before the codicils, those lands could not pass: The codicils concerning only some personal legacies, could not amount to a republication of the will, (4) as in the case of *Beckford* and *Parnecot*, 3 Crook. (5)  
purchased after the making of the will. (6)

(1) Vide on the present state of the doctrine of parol evidence, *Fane v. Fane*, ante 1 vol. 30, and cases cited in not. there.

(2) Vide on this point, *Winn v. Littleton*, ante 1 vol. 4. and cases cited in not. there. [*Casburne v. Scarfe*, 1 Atk. 603. 2 J. & W. 194. *Cholmondeley v. Clinton*, 2 J. & W. 178.]

(3) Vide note to *Watts v. Bullas*, 1 P. Wms. 60. *Hardham v. Roberts*, ante 1 vol. 132. and cases cited in not. there, and for Lord Cowper's observa-

tion on *Kettle* and *Townshend*, *Fursaker v. Robinson*, Pre. Ch. 477.

(4) Reg. Lib. 1707. B. fol. 510. and the decree affirmed on appeal to Dom. Proc. 1 Bro. P. C. 229, et vide Mr. Saunders's observation on the statement of the above case in the Register's Book, in his note to *Casburne v. Scarfe*, 1 Atk. 606. at the bottom.

(5) P. 493. *Moor*, 404. 1 Rol. Ab. 618. S. C.

(6) Vide *Attorney General v. Barnes & Ux'*. ante 597.

LUPTON & Ux' *versus* TEMPEST & Al'.

**PROTHONOTARY TEMPEST** having by his will devised some fee-farm rents to trustees, to be conveyed to his daughters at their respective ages of *twenty-one*, or marriage, the plaintiff married one of the daughters without the consent or privity of her relations, and without having made any settlement upon her; and now they brought their bill to have a conveyance pursuant to the trust.

decreed according to the will: but where the husband comes for a personal demand in right of his wife, the Court may impose terms on him.

The defendants confessed the will, and admitted the trust, but hoped the husband, having made no settlement on his wife, should be obliged so to do; or that otherwise the fee-farm rents should be settled, as a provision for the wife and children.

*Per Lord Chancellor*: Where husband and wife join, and demand an execution of the trust of a real estate, it must be decreed according to the will, because the wife demands it; and it cannot be denied, but she may require an execution of a trust.

But where a husband comes for a personal demand in the right of his wife, or for raising a sum of money, there the Court may impose terms on the husband, as being in diminution of the husband's right. (1) But here the wife is the *cestuy que trust*, and demands an execution of it; and when she has it, may choose whether she will convey it to her husband or not.

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(1) Vide *Oxenden v. Oxenden*, ante p. 493. and cases cited in not. there.

LAMAS *versus* BAYLY.

PLAINTIFF being about to purchase from the co-heirs of Mr. *Guifford* an old house and toft of ground in *Horton*, adjoining to his own house, designing thereby principally to secure his lights, and to add a small part of it to his own house; and the defendant being also in treaty to purchase; the plaintiff and defendant met together; and it was proposed and agreed unto, that the plaintiff *Lamas* should desist, and permit the defendant to purchase; and thereupon the defendant should permit the plaintiff to have at a proportionable price the slip of *A.* have part of the ground, which he wanted, at a proportionable price. *B.* purchases, and refuses to perform the agreement. This agreement is within the provision of the statute of frauds.

[ 627 ]

CASE 559.

Nov. 6.

Eq. Ca. Ab.

22. pl. 14.

*A.* and *B.*

being several-

ly in treaty to

purchase a

house and toft

of land of *J. S.*

they agree by

parol, that *A.*

shall desist,

and that *B.*

shall pur-

chase, and let

*B.* purchases, and

the statute of

LAMAS v.  
BAYLY.

ground he desired for a convenience to his house, and to prevent the stopping up of his lights. The plaintiff desisted accordingly, and the defendant purchased; but afterwards refused to perform the agreement.

The plaintiff brought his bill, (1) and obtained a decree at the *Rolls*; it being insisted, that although it was an agreement *parol*; yet it was in part executed by the plaintiff's desisting from prosecuting his purchase, who otherwise might have purchased for himself; or at least have enhanced the price the defendant was to pay, so that the defendant had a benefit by it; and besides it was a fraud, and like the case where a man agreed to purchase as agent for another; and would afterwards retain the purchase to himself. (2)

But upon an appeal to the *Lord Chancellor*, the decree was reversed, as being a *parol* agreement, within the provision of the statute against *frauds*. (3)

(1) The answer insisted that defendant was the first purchaser, but admitted that, after the purchase was completed, there was a meeting between plaintiff and defendant touching the slip of ground, and that at such meeting, the defendant did say, that the plaintiff might have the slip of ground if he desired it: but denied there was any agreement for the purchase thereof for any certain price, or that defendant agreed that the plaintiff should have the same at a rate proportionable to what the whole should cost; and then insisted on the statute of *frauds*: and the decree at the *Rolls* as

above with costs. Reg. Lib. 1707. B. fol. 327. the ground of the reversal as stated in the Register's Book is, "His Lordship declared, that the circumstances in this case appeared to be too slight to ground a decree for performance of the said agreement," and dismissed the bill without costs, Reg. Lib. 1708. B. fol. 32.

(2) And it should seem the Court has relieved on the fraud or misconduct, where, otherwise, the statute of *frauds* appeared to lie in the parties' way, *Halfpenny v. Ballet*, ante 373.

(3) Vide *Atkins v. Rowe*, Mose. 39.



DE  
TERM. S. HILLARII, 1708.

IN CURIA CANCELLARIÆ.

DEAN & Ux' *versus* Lord DELAWARE.

CASE 560.

LORD

CHANCELLOR.

Eq. Ca. Ab.

155. pl. 7. S.P.

An only child of a freeman of London not fully advanced, is to have a full third of the personal estate, without regard to what has been paid for her portion.

THE Lord *Delaware* having married the sole daughter and heiress of Mr. *Freeman*, a merchant and freeman of *London*, he in his life-time had entered in his book several sums of money, as paid to the Lord *Delaware* in part of his wife's portion, and in part of a greater sum due for her portion, yet unpaid; and afterwards in his own books retracted what had been before done, and made the Lord *Delaware* debtor for all the monies so paid: and having so done made his will, and thereby mentioned to devise one *third* part of his estate to his wife; another *third* part to his daughter, according to the custom of the City of *London*, and gave great legacies out of, and to the amount of, the other *third* of his personal estate, and dies. After his death, the plaintiff *Dean* having married Mr. *Freeman's* widow, they brought their bill for an account, and a discovery of the estate, (the Lord *Delaware* being made executor of the will, and having possessed the estate,) and to have a *third* paid them according to the custom of the City of *London*.

Defendant by answer did not mention any thing, as to what portion he had or expected, nor was it insisted on at the hearing; but the Court decreed the estate to be divided into *thirds*, one *third* part thereof to be paid to the plaintiffs.

Upon the account before the Master, the plaintiffs insisted the Lord *Delaware* ought to be made debtor for the sums mentioned to have been paid him in the testator's books. On the other hand, the defendant insisted, that what he had received in part of his wife's portion, he ought to retain, and to have it made up 10,000*l.* which he pretended was the sum agreed upon; and to have a *third* by the custom, or by the will, over and besides.

[ 629 ]

DEAN v.  
DELAWARE.

And this matter coming now before the Court on the Master's special report,

The *Lord Chancellor* was of opinion, *first*, that there was no sufficient proof that the portion was to be 10,000*l.* but what had been once entered down by the testator as paid upon the account of the portion, he could not afterwards retract; nor make the Lord *Delaware* debtor for it; and therefore what had been so paid, ought not to be brought into the personal estate.

And it being further insisted, that the defendant, as being the only child, was intitled to the *third* part by the custom of the City of *London*, without regard had to what had been so paid; and for that purpose cited the case of *Wood and Fettiplace*, 17 *Jac.* 1. where an orphan, who was advanced with a sum of 200*l.* she being the only child, was not to bring it into hotch-pot. And in all cases where a child is to bring into hotch-pot, it is only into the children's part, and not into the \*general estate; and the entries in the books shew, that but part of the portion was paid, and *that* amounts unto a declaration that the child was not fully advanced; and also is a writing under the testator's hand, which states the *quantum* of the advancement; and if they were not entitled by the custom, yet they were by the will entitled to a *third* part of the estate.

In all cases where a child is to bring into hotch-pot it is only into the children's part, and not into the estate in general.  
Vol. 1. Ca. 339.  
[ \*630 ]

Vol. 1. Case 213.

To which it was answered, that by the custom, if a child is advanced in marriage, *that* bars any claim by the custom, unless it does appear by writing under the father's hand what that advancement was. That the father's declaring, that the child was fully advanced or not advanced, was of no avail, unless it appeared what the advancement was in certainty; to the intent it might be known, whether such advancement did amount unto as much as would have belonged to the child by the custom: and therefore in the case of *Turner and Longland*, (1) decreed lately by the *Lord Chancellor*, where the father by his will, on purpose, and to the intent to exclude his daughter, declared she was fully advanced; but happened to over do it, and mentioned that he had fully advanced her with the sum of 500*l.* *that* not being as much as her customary part amounted to, and the certainty thus appearing, let her into her share by the custom. (2)

Where a child is advanced in the father's life-time, and it appears by writing under his hand, what that advancement was, this will let her into her share by the custom.

(1) Ante 612. S. C.

(2) So where testator, a freeman, by his will in writing declared that he had given 1000*l.* to one and 1000*l.*

to another, and so to others of his children, in full of their orphanage-part; yet this very declaration let them in, bringing those sums into

DEAN v.  
DELAWARE.

But in this case, the certainty of the advancement, doth not appear. In the book several sums are entered as paid in part of the portion; but it is not declared under the testator's hand, that *that* was or was not the sum, wherewith he had advanced his daughter; so that the certainty of the advancement did not sufficiently appear.

*Secondly*, If it was to be taken, that the sums entered into the book to be paid in part of the portion, was the whole advancement; yet if *that* did amount to as much as her orphanage-share, that would exclude her from claiming any thing by the custom; for a child is to be let into the share by the custom only, where the child has not right done her, and has not received as much as her share by the custom: and in this case it was insisted, that even what appeared by the books to have been paid in part of the portion, amounted to a *third* of the personal estate and more; and therefore she was excluded, although the certainty of the advancement had sufficiently appeared.

[ 631 ]

And as to claiming a *third* by the will, it is plain the testator once intended to have given a portion, and expected a settlement, and had paid several sums in part of the portion; but finding no settlement could be made, wrote off what before he had paid in part of the portion, and made the Lord *Delaware* debtor for it; and having so done made his will, and devised a *third* to his daughter, according to the custom; but then she must take it as intended by the will, and not have a *third*, and what was paid in his life-time over and besides; but must either account for what the Lord *Delaware* is made debtor in the testator's books, or renounce the will, and only have what he has received already, made up a full *third* of the estate.

*Lord Chancellor.* What is paid in part of the portion, and so entered by the testator in his books, he could not recal or write off again, or make the Lord *Delaware* debtor for it.

If a freeman of London enters in his books several sums of money, as paid on account of

his daughter's portion, he cannot afterwards write off those sums, and make the husband debtor for them.

And the matter as to the custom, whether the defendant is advanced, the wife will be intitled by the custom to a moiety of the

Wherean only child is fully personal estate.

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hotch-pot, to their full customary shares of the whole; and the Court seemed inclined to let the parties into proof, whether the sum mentioned in the will should be taken to be the whole of what testator had given them, or whether more had been given or paid, *Northey v. Burbage*, Pre. Ch. 470.

DEAN v.  
DELAWARE.

excluded or not, is not before the Court; (1) the decree being only that the plaintiff shall have a *third* part: whereas if the daughter is barred, the widow would claim a moiety, and that matter not being proper upon the report.

[ 632 ]

At the present only declared, that what had been paid the Lord *Delaware* in part of the portion, was not to be brought into the estate; and left it to the Master, with this direction, to take the account, and certify whether what the defendant had received in part of the portion, did amount unto a *third* of the whole estate.

(1) A certificate of the custom of *London* was ordered, whether where a freeman dies, leaving a wife and one daughter married in his life-time, and it appears by the books of such freeman, that he had paid several sums of money, in part of such daughter's portion, unto the husband; and afterwards several other sums, which ought to be taken as paid on account of the portion, but not expressly entered in such freeman's books as paid in part of advancement, or in part of the portion; all which entries are of the testator's own hand writing; such daughter ought to be taken as fully advanced or in part advanced only, although such sums taken altogether should not amount to a *third* of such freeman's estate put together with what he left at his death; and if in part only advanced, then whether, by the custom of the said city, such child and her husband are to have a *third* of what the testator

left at his death, without regard to what was received in the father's life-time; or only a third of the whole estate, putting what had been so received to the estate left at his death. Reg. Lib. 1709. A. fol. 101. And the certificate was afterwards made, that in the case specified in the above reference, the daughter ought not to be taken as fully advanced, but in part advanced only; and that in such case by the custom of the city of *London*, the child and her husband ought to have a *third* part of what the testator left at his death, without regard had to what was received in the father's life-time; and without putting what had been so received to the estate left at his death, Reg. Lib. 1710. A. fol. 219. As to the general doctrine of advancement in case of children of freemen of the city of *London*, vide *Fouke v. Lewen*, ante 1 vol. 88 and *Civil v. Rich*, ibid. p. 216. and cases cited in not. there respectively.

CASE 561.  
Eq. Ca. Ab. 18.  
pl. 12. S. C.

### GREEN versus WOOD & Ux'. & è contra.

An agreement for a purchase obtained from a woman of *ninety* years of age, and several suspicious circumstances appearing, the Court would neither decree it to be carried into execution against the heir at law, nor to be delivered up.

IN 1694, *Leonard Robinson*, an attorney, obtained a writing from *Elizabeth Read*, then *ninety* years of age, purporting that she being entitled to an estate in *Essex*, as sister and heiress of *John Green*, in case one *Jermin Green* died without issue, in consideration of 400*l.* mentioned to be paid and secured to her, she bargains, sells, and conveys all her right and title, remainder and expectancy to the same, to the said *Leonard Robinson*. No part of the money was paid, and

*Robinson* pretended he made the contract in trust for *Jermin Green*; but made no declaration of trust, or assignment to *Green*: but *Green*, in 1695, paid 100*l.* to *Robinson* to be paid over to Mrs. *Read* on executing conveyances, and gave him 20*l.* for his pains; but afterwards took bond for repayment, with interest from *Robinson*.

GREEN v.  
WOOD.

In 1696, a bill was brought by *Green* to compel an execution, but no proceedings therein. Then in 1704, Mrs. *Read* being dead, a bill was brought against the now defendant, as the daughter and heiress of Mrs. *Read*. Then *Jermin Green* dying, the now plaintiff brought his bill of revivor against the defendant.

It was objected, the agreement was obtained by an attorney from an old woman of *ninety* years of age, weak in body and mind; could not distinguish a *six-pence* from a *shilling*, no counsel, no friend to assist her.

[ 633 ]

*Secondly*, The agreement not fairly drawn; she bound; and it was not only as an agreement to convey, but imported to be a conveyance; and yet the 400*l.* neither paid nor secured.

*Thirdly*, Surreptitious and a surprise; it mentions lands in *York* as well as *Essex*, when none such.

*Fourthly*, Not pursued or prosecuted recently, as it ought to have been; nothing more than an attachment; from 1699 to 1704 no proceedings.

*Fifthly*, Plaintiff had sued *Robinson*, and recovered back the 120*l.* as despairing that the agreement would be performed.

*Sixthly*, The estate is now fallen in possession, and worth 5000*l.* to be sold, and now the plaintiff would have it for 400*l.*

*Lord Chancellor*. Upon these circumstances, too hard to be decreed in equity, and dismissed the bill without costs; but would not decree the writing to be delivered up on the cross bill. (1)

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(1) Vide *Phillips v. Duke of Bucks*, ante 1 vol. 229, and cases cited in not. (2) there.

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### BALL versus SMITH.

CASE 562.

**THOMAS SMITH** on his *first* marriage, settled a term of *five hundred* years, in trust to raise 2000*l.* for the daughters leaving his second wife *enseint*, having first devised part of a trust estate to his wife for life, and if the child she went with proved a daughter, then the trustees to convey to his daughters, and to pay them the profits in the mean time; the child the testator's second wife went with proved a daughter, what estate shall the wife take by this devise?

A man having daughters by his first marriage, died,

**BALL v.  
SMITH.**

[ 634 ]

of that marriage, payable by rents, profits, leasing or otherwise, at *eighteen* or marriage; and married a *second* wife, the defendant *Smith*; and on that marriage made the like settlement, and provision for daughters in like manner. He having only the plaintiff Mrs. *Ball* by the *first* venter, and leaving his wife *enseint*, by his will in 1684, devised part of the premises to the defendant Mrs. *Smith* for life; and in case the child she went with proved a daughter, (as it did,) he devised the estate to trustees, and directed them to convey forthwith to his daughters, and pay them the profits equally in the mean time.

Mr. *Smith*, the testator, died in 1684, and the plaintiff having in 1693, attained her age of *eighteen*, brought her bill (*inter alia*) to have the 2000*l.* raised and paid. And the decree by the Lord *Somers*, as drawn up, directed an account, and decreed the profits from the death of the father.

In the defendant's petition for a re-hearing she complained, that by this means the profits were taken from her, though devised to her for her life, and the profits intended for the maintenance of his *posthumous* daughter *Fowler Smith*.

*Lord Chancellor.* The wife ought not to quit what was devised to her for life; but as to the daughter, the will is not plain and express; and therefore the wife shall not hold over for the whole, but shall deduct a reasonable allowance for maintenance.

*A. makes a will and his son executor, but makes no disposition of the surplus. The son dies without proving the will. The surplus shall be distributed amongst the next of kin, at the death of the testator.*

*Smith*, the father, made his son executor, but made no disposition of the surplus; the son dies without proving the will. The surplus shall be distributed amongst the next of kin, at the death of the testator.

Question was, when and to whom distribution shall be made; whether to the widow and son of old *Smith*; or whether the son dying without probate, the distribution shall be amongst the next of kin at that time.

[ 635 ]

*Lord Chancellor.* *Smith* is dead intestate, *ab initio*. (1)

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(1) Post, p. 675. S. C.



COLLINS & Ux'. *versus* PLUMMER & A'.

CASE 563.

Feb. 4.

A SETTLEMENT to husband for life, to his intended wife for life, remainder to the heirs of the body of the husband, on the body of the wife, remainder to his own right heirs. *A. on his marriage settles lands to the use of himself for life, then to the wife for life, remainder to the heirs of his body begotten on the wife, remainder to his own right heirs; and covenants in the settlement not to bar the intail, nor suffer a recovery; and having one daughter, to whom on her marriage he had given a good portion; he suffers a recovery, and by will devises the estate to his daughter for life, and to her first, &c. sons in tail, with remainders over. On a bill for a specific performance of the covenant, the Court would not decree it, but leave the party to recover damages at law, for breach of the covenant.*

With a covenant that he would not dock the intail, nor suffer a common recovery. (2)

There being only a daughter of that marriage, her father married her to the plaintiff *Collins*, and gave her a good portion. (3)

And afterwards suffered a common recovery and devised the estate to his daughter for life, and to her first and other sons in tail, remainder to the defendants his nephews; provided if she survived her husband, that she should have it in fee to her and her heirs. (4)

(2) The settlement, (as stated in the Register's book, probably by mistake,) was "of lands, &c. of which the plaintiff's father was seized in fee tail, with the reversion expectant in fee simple; and also of other lands, of which the plaintiff's mother was seised in fee tail, with the reversion expectant in fee simple. To the use of the plaintiff's father for life, remainder to the plaintiff's mother for life, for her jointure, remainder to the heirs of the plaintiff's father for ever." And the covenant with the trustees named in the settlement, was by the plaintiff's father, "for himself and his heirs, that he had full power to convey his own lands to the use of the plaintiff's mother, and the heirs of his body on her to be begotten; and that after the fine therein mentioned should be levied, he would not at any time, by any fine or recovery, or otherwise, bar, discontinue, or impeach the use of the premises to the plaintiff's mother, and the heirs of the plaintiff's father on her to be begotten; but that from and after his death, they should

"quietly enjoy the premises without any claim or demand of any person whatsoever under him, the said plaintiff's father." R. L. For discussion on the ancient law on this point, vide *Corbet's Case*, 1 Co. Rep. 83. *Sir Anthony Mildmay's Case*, 6 Co. Rep. 40. *Sonday's Case*, 9 Co. Rep. 137.

(3) There were several other children of the marriage, but they all died in the life-time of the plaintiff's father, without issue. R. L.

(4) The devise of the lands in question was to defendant's trustees, "in trust that they, and the heirs of the survivor of them, should, during the plaintiff *Mary's* life, if she so long continued the wife of the plaintiff *Henry*, receive the rents and profits thereof, and dispose of the same to such uses, and in such manner, as she, during her coverture, should direct," and if she died in the life-time of the plaintiff *Henry*, then to her first and other sons in tail, and remainder over, with such proviso as in the printed report. R. L.

COLLINS v.  
PLUMMER.

Bill for specific execution of the covenant. For the plaintiff: the agreement is executory, and like a covenant that a man would not execute a power; as in the Lord *Peterborough's* case, the *fifteen* leases set aside.

*Lord Chancellor.* This case differs; for there was an agreement, subsequent to the raising of the power, to extinguish it; but here all is in the same deed: so you knew he had power to bar, and therefore agree to accept of a covenant, by which to have damages, and not the thing in *specie*; that would be to make it beyond the agreement. (1)

(1) The words of the decree as to the covenant are, "Whereupon, &c. his Lordship declared, that he conceived the meaning of the said parties to the said settlement to be such, that the lands and premises thereby settled, or agreed to be settled, should be settled and vested in such manner that it might be in the power of the plaintiff's father to dispose of the same as he should see occasion, and that his covenant contained in such settlement not to do any act to bar, discontinue, or impeach the uses therein limited of the said premises, was to amount to no more than to restrain the plaintiff *Mary's* father, from making any other than a prudent use of such disposing power; and his Lordship further declared, that the devise made by the said

plaintiff *Mary's* father's will of the said premises limited by the said marriage-settlement, is a prudent provision for her and her family, and that he saw no cause to carry the said covenant in the said marriage-settlement into execution in equity." The decree then proceeds to direct a trial at law on a *quantum damnificatus*, as in the printed report in *Peere Williams*, Reg. Lib. 1708. A. fol. 627. Vide 1 P. Wms. 104. S. C. and cases cited in not. there. And the principle of this case discussed by *Thurlow*, Lord Chan. in *Legard v. Hodges*, 3 Bro. Ch. Rep. 531. 4 Bro. Ch. Rep. 421. S. C. in which case vide also observation of Mr. *Mansfield*, arg. on *Flight v. Cooke*, 2 Vez. 619. cited by Mr. *Cox* in his note.

CASE 564.

Feb. 5.

LORD

CHANCELLOR.  
Gilb. Eq. Rep.  
13. S. C.

### OXWITH *versus* PLUMMER.

PLAINTIFF was a mortgagee, and afterwards had an absolute conveyance of all that messuage called *Bishops*, with all the lands therewith used and enjoyed, or reputed part or parcel thereof, or whereof any in trust for the mortgagor were seised. The trust of a copyhold shall not pass by a grant of all the grantor's lands, where the grant is only for securing a sum of money.

*Elizabeth Wiseman*, the mortgagor, had a right to eight acres of copyhold; but the legal estate was in Sir *Richard*, her father; and although the eight acres were copyhold, yet there being no surrender made of the copyhold, Sir *Walter Plummer*, who had lent the money to *Richard* and *Elizabeth*

*Wiseman*, got a surrender of the *eight* acres, and brought an ejectment. (2)

OXWITH v.  
PLUMMER.

Bill to be relieved.

*Lord Chancellor*. Here is no specific agreement for the copyhold.

*Secondly*, a debt before due, the same, if longer credit is given for it, as if the money was then lent.

*Thirdly*, possession of the under-tenant not sufficient to affect him with notice.

*Fourthly*, I take it nothing intended to pass but the freehold, and affirmed the decree. (3)

(2) The surrender was from Sir *Richard Wiseman* to Sir *Walter Plummer*, at the request of *Elizabeth Wiseman*, his daughter, for security of what was, and should be due, from the said *Elizabeth Wiseman*, to the said Sir *Walter Plummer*, and the said Sir *Walter* was admitted 10th *July*, 1696. Reg. Lib. 1707. B. fol. 289.

(3) Reg. Lib. 1708, B. fol. 202. The cause is mentioned to have been originally heard at the Rolls, 3d Feb. 1707, and 27th April, 1707, when his Honor dismissed the bill with costs. Reg. Lib. 1707, B. fol. 289. But the editor has not been able to find any entry of the pleadings, nor of the hearing, on the 3d February, 1707.

### PHILLIPS & A<sup>r</sup>. versus WILLCOX & A<sup>r</sup>.

[ 637 ]

CASE 565.

Feb. 8.

PLAINTIFFS were assignees of a statute of bankrupt against *Blunt*. The question was, whether *Blunt* should be allowed a witness: they produced a release from the bankrupt of all goods, chattels, debts, and credits in a schedule to the assignment mentioned, and a bargain and sale of all the estate he was intitled unto.

Bankrupt having released and assigned all his estate to the assignees may be examined as a witness for them.

*Secondly*. As a bankrupt is intitled to the surplus, and intitled to a share by the late Act of Parliament, he is not to be received as a witness to disprove the sale of goods, and receipts under his hand. *Sed non allocatur*. (1)

(1) The bill in this case was filed by the assignees against *Willcox*, and sundry other persons and the bankrupt, for a discovery of goods and monies come to their hands, belonging to the bankrupt's estate; the bankrupt, as well as the other defendants, appeared, and put in his answer, whereby he swore that *Willcox* had been employed by him as an attorney at law, and that what monies the said *Willcox* had received of him would far surmount what he could justly claim on that account; and that one *Blake*, the testator of another of the defendants, was indebted to him in

the sum of 186*l*. for which he, the bankrupt, had never received any satisfaction: but no question on the above point appears in the statement in the Register's Book. Reg. Lib. 1708. B. fol. 254. Note. It appears by the bankrupt's answer, that he had obtained his certificate, but no notice of that, or of the bankrupt's answer is taken in the decree. In what cases the bankrupt may, and may not, be a witness, vide the cases collected and referred to, *Cooke Bank. Law*, 562, et seq. *Cullen*. 424, et seq.

PHILLIPS v.  
WILCOX.

*Thirdly.* They may produce a release and bill of sale in Court, but cannot examine him to the time of the execution of it. *Sed non allocatur.*

*Lord Chancellor.* Creditors are to have reasonable assistance. Bankrupts agree and consent to make fraudulent assignments and sales, that sap the foundation of the statutes of bankrupt. Sworn by *Blunt*, that it was a fraudulent sale; but 70*l.* paid, the other 100*l.* to be paid to the bankrupt with interest, and since paid to him, and yet prime cost 390*l.*

Issue, What was the value of the goods at that time?

[ 638 ]

CASE 566.

Feb. 21.

LORD  
CHANCELLOR.

Eq. Ca. Ab.

370. pl. 3. S. C.

*A.* employs *B.*

as his factor

to sell cloth.

*B.* sells the

cloth on credit

and before the

money is paid,

dies indebted

by specialty

more than his

assets will

pay. This

money shall be

paid to *A.* and

not to the admini-

strator of *B.* as

part of his assets;

but there-

out must be

deducted what

was due to *B.*

for commission.

### BURDETT *versus* WILLETT & A<sup>r</sup>.

THE plaintiff having made Mr. *Willett* his factor, to sell some coarse linen called *Croins*; he took them up at the custom-house, &c. and sold them to the defendants *Wingfield* and *Bowater* for 115*l.* and before payment died, indebted by *specialty*, more than his assets will pay; and (*inter alia*) on his marriage by articles covenanted, if his wife survived him, to leave her 3000*l.* His widow had now taken administration, and insisted that the 115*l.* in the hands of *Wingfield* and *Bowater* should be liable, not only to reimburse what was due to *Willett*, as factor; but should come into the assets, and be liable to her articles and debts by *specialty*.

Decree the money to be paid to the plaintiff, discounting thereout what was due to *Willett* as factor, and that with costs, as having made an ill defence, to satisfy her articles out of the plaintiff's estate. (1) The factor is in nature of a trustee only; and although he has the right at law, yet he is in equity but a trustee. (2)

(1) But if goods be consigned to a factor for sale, and he sell, and receive the money, and then become bankrupt and do not purchase any specific thing capable of being distinguished from the rest of his property, the consignors cannot recover the whole money from his assignees, but must come in under the commission, *Scott v. Surman*, Willes 400. But in such case of factor's bankruptcy where the merchant's goods are not mixed with the factor's, they shall go to the merchant, *Paul v. Birch*, 2 Atk. 623. Or if sold, and notes are taken by the factor in payment, the

principal shall have the notes, and not the assignees of the factor, *ex parte Dumas*, 1 Atk. 234. And the general principle to be extracted from the class of cases on this point, seems to be, that in whatever case the property of the principal can be distinguished from that of the insolvent factor, there he shall have it as against the general creditors of the factor. And further on the relation of principal and factor, vide *Molloy, de jure maritimo*, p. 493, sec. 1, et seq.

(2) An action had been brought at law by the defendant in equity, and a

verdict obtained, (*Holt*, Chief Justice, after consideration,) and the bill in this case was for an injunction against *Wingfield* and *Bowater*, from paying the money. Plaintiff was ordered to pay the costs at law, and also their costs to *Wingfield* and *Bowater*; but these latter costs were to be repaid, together with his own costs in equity to the plaintiff. Reg. Lib. 1708, A. fol. 277. And note, in this case the goods had been sent in the first instance to the plaintiff's regular factors, but by some mistake got into the hands of *Willett*, who had formerly had transactions with the plaintiff in trade, who disposed of them, and then informed the plaintiff, who agreed to abide by such disposition of them. A factor acting for his principal is never held to be liable

in his own capacity, sic dict. per *Talbot*, Chan. *Johnson v. Ogilby*, 3 P. Wms. 277. Secus, where the agreement actually made, or, as it should seem, where it is of such a nature as that it could not but have been made on the account of the factor himself, though the principal be in some measure mingled in the transaction, *Paul v. Birch*, 2 Atk. 621. Nor will an action at law lie against the factor, but must be brought against the principal, where he is declared at the time of making the bargain, although he may, on an action brought by or against the principal whether declared or not, be examined, if he were the factor at the very time of the contract, sic dict. per *Hardwicke*, Lord Chan. *Dixon v. Parker*, 2 Vez. 220, 222.

### LILLCOTT *versus* COMPTON.

CASE 567.  
Eq. Ca. Ab.  
200. pl. 5. S.C.

PLATE shall pass by a devise of household goods. (3)

(3) Vide *Franklyn & Al'. v. Countess of Burlington*, ante p. 512, and cases cited in not. there.

### PHINEY *versus* PHINEY.

CASE 568.  
Eq. Ca. Ab.  
249. pl. 9. S. C.  
The son and heir intitled to 500l. under a marriage-agreement, decreed to a purchaser.

PLAINTIFF's father, on the marriage of the daughter of *Buck*, covenanted in case of a *second* marriage\* to pay the *first* son by the *first* wife 500l. There was a son and several other children of the *first* marriage; the father died intestate.

bring it into hotch-pot upon the statute of distributions, though in nature of a

*Per Cur.* The heir must bring the 500l. into hotch-pot, [\*639] although in nature of a purchaser under marriage-settlement. (1)

(1) "He not being, by the statute of distributions, distinguished from the other children of intestate." Reg. Lib. 1708. B. fol. 473. entered as of Trin. Term, *nomine Phenny v. Phenny*. So it is apprehended a gift of any personalty, by way of portion or settlement, [as to which see *Weyland v. Weyland*, 2 Atk. 635,] in the lifetime of the intestate, to his heir at law, must be brought by the heir in all similar cases into hotch-pot; but where money laid out by intestate on repairs

of houses, which descended to his eldest son, as heir, that is no advancement to be brought into hotch-pot under the statute, *Smith v. Smith*, 5 Ves. 721. And it is settled that a descent of lands in Borough English to the youngest son, will not prevent his having a full distributive share of his father's personal estate, *Pratt v. Pratt*, on appeal from the Rolls. Fitzgibbon Rep. 284, cited *Lutwyche v. Lutwyche*, Forr. 276. [*Twisden v. Twisden*, 9 Ves. 425.]

DE  
TERM. S. MICHAELIS, 1709.

IN CURIA CANCELLARIÆ.

CASE 569.

Dec. 6.

Eq. Ca. Ab.

337. pl. 5.

3 Ch. Rep. 191.

1 Salk. 159.

S. C.

A term is limited in remainder after the father's death, in trust, if he died without issue male, and there should be one or more

CORBETT & Ux'. *versus* MAYDWELL.

daughters unmarried, or unprovided for at his death, the trustees were to raise 2000*l.* for their portions, to be paid at *eighteen* or marriage. The mother being dead, and there being one daughter who was married and no issue male; the Court would not decree the portion to be raised in the life of the father, it not vesting till his death. Post Case 583.

AN estate limited to the father for life, to the wife for life, remainder to trustees for *five hundred* years, in trust, if *Maydwell* died without issue male by *Margaret*, or if his issue male died without issue male before *twenty-one*; and if there should be one or more daughters unmarried, or not provided for, at the time of his decease, as therein after is mentioned; the trustees were to raise 2000*l.* to be paid at *eighteen* or marriage, or as soon after as could be conveniently raised, by lease, mortgage, or sale.

The wife died; the father survived; the daughter attained *eighteen* in 1700, and in 1708 married.

[ 641 ]

Question was, Whether she could have any portion or maintenance in the life-time of the father.

Ante Case 420.

Ante Case 419.

The cases of *Staniforth* and *Staniforth*, and *Gerrard* and *Gerrard*, 29th Feb. 1703, cited for the plaintiff.

For the defendant it was insisted, *first*, that the words were, if the father die without issue male by *Margaret* his wife: so there must be, not only a failure of issue male, but he must be also dead; as was resolved in the case of the Duke of *Southampton*.

*Secondly*. It is only for such daughter, as at the death of the father should be left unprovided for.

*Lord Keeper*. I must adjudge by what appears on the settlement, no foreign proof to be admitted; as yet it appears to me harder to raise the portion in this case, than in any that have yet been adjudged. This case differs from *Staniforth's*, because there the question was, whether the term was vested; and it was taken *pro concessio* the portion was vested.



Upon the wording of the trust; if in case it shall happen the father shall die without issue male, and shall leave a daughter unmarried, or not provided for at his death.

CORBETT v.  
MAYDWELL.

In case of a son, the daughter was not to have a portion until failure of issue male, although she might be then *forty* or *fifty*; when there happened to be a failure of issue male.

Nothing irrational, that a father should insist, that a portion should not be raised in his life-time.

If in cases *similar* the Court has gone so far. (1)

(1) Reg. Lib. 1709. A. fol. 109. 25th November. There appears an entry of an order that the plaintiff should be at liberty to set down the cause some time in Hill. Term following; and in the same book, fol. 304, 26th May, 1710, an order that the cause should stand for judgment on the 12th June, then next; but the editor has not been able to find any further entries.

Vide on this subject *Gerrard v. Gerrard*, ante p. 458. *Staniforth v. Staniforth*, ante p. 460, and cases cited in not. there. And in addition Powell Law Mort. 1 vol. p. 99, et seq. where the subject and cases are a good deal considered. *Note.* The principal case much more fully reported in Salk. and Eq. Ca. Ab. ub. sup.

### BRICE *versus* WHITEING.

[ 642 ]

CASE 570.

Dec. 12.

Eq. Ca. Ab.

248. pl. 1. S. C.

A man dies intestate before the statute of distributions takes place, but administration is

ALTHOUGH the intestate died before the year 1670, yet administration being granted after the making of the statute, his personal estate is liable to a distribution. The words of the act being, that it shall be lawful for the *Ordinary* upon granting administration of persons dying intestate after *June*, 1670, (2) to take a bond for distribution.

granted after. His personal estate shall be distributed according to the statute.

(2) The 1st day of *June*, 1671. Stat. 22 and 23 Car. II, cap. 10. sect. 1.—*Note*, A creditor has a right *ex debito justitiæ*, as well as the next of kin, to sue upon an administration bond in the name of the archbishop or the ordinary,

he being most materially and principally interested in the administrator's delivering in a true inventory, and in the due administration of the effects, *Archbishop of Canterbury v. House*, Cowp. 140.

DE

## TERM. S. HILLARII, 1709.

IN CURIA CANCELLARIÆ.

**CASE 571.** **SPEERMAN & Al'. versus DEGRAVE, GALLWAY, & Al'.**  
 Eq. Ca. Ab. 308. pl. 1. S. C. **GALLWAY**, as master of the ship of which other defendants were part owners, bought several goods of the plaintiffs; as beef, biscuit, sails, cordage; *Gallway* the master failed. The bill was to compel the defendants, the part-owners, to pay; who insisted, that *Gallway* only was liable; and besides that he had money from the owners to pay the plaintiffs.  
 Master of a ship buys provisions for the ship, and has money from the owners to pay for the provisions, but fails without paying the money. The owners are liable to pay in proportion to their respective shares in the ship.

Master of a ship is but a servant to the owners.  
*Per. Cur.* *Gallway* the master was but a servant to the owners; and where a servant buys, the master is liable. If the owners paid their servant, yet if he paid not the creditors, they must stand liable: (1) and decreed the owners to pay the plaintiffs their debts in proportion to their respective shares and interests in the ship. (2)

(1) Whatsoever comes within the compass of a servant's business, the master shall be chargeable therewith as of his command, and shall likewise have advantage of the same, against others; but if a servant borrows money in his master's name, or takes it up of a creditor of his master's without order, that does not bind the master, Noy. Max. 93, 94. Doct. and Stud. Dial. 2, cap. 42. And so where money borrowed by Captain for necessities on letters of credit given to him by a freighter of the ship, to his correspondents abroad, *Cary v. White*, 1 Bro. P. C. 284, and the principle clearly recognised, that a captain of a ship is at law the servant only of the own-

ers, and that his right to hypothecate the ship is derived from the civil law, [as to which see *Watkinson v. Bernadiston*, 2 P. Wms. 367, and cases cited in notes there,] and that where he does not personally contract he is not liable for the ship's necessities, *Boson v. Sandford*, 2 Salk. 440. 3 Lev. 268. 3 Mod. 321. S. C. So *Farmer v. Davis*, 1 T. Rep. 108. So of a ship's husband, *Tolson v. Hallett*, Amb. 269. Et vide stat. 7. Geo. II. cap. 15

(2) With costs. The goods being delivered on board, and the work done on account of the said ship, and the original contracts not being made on the credit of the defendant *Gallway*, Reg. Lib. 1709. B. fol. 200.

HOBART Bar. *versus* COMITISS. SUFFOLK, MAYNARD,  
COLCHESTER, & Al'.

CASE 572.  
Eq. Ca. Ab.  
272. pl. 7. S.C.  
Lands are  
devised to  
three persons  
and their heirs  
to the use of  
them and  
their heirs,  
upon the  
trusts after  
mentioned,  
and then the  
testator  
directs them  
to convey part  
to A. for life,  
and other part  
to B. in tail;  
but gives no  
direction as  
to the remain-  
der in fee.

SERJEANT *Maynard* by will (1) devised to the Countess of *Suffolk*, the Lord *Gorge*, and the defendant *Colchester* and their heirs, to the use of them and their heirs, all his several manors and lands upon the trusts after mentioned; and then directs that after the death of the Countess his wife, they should convey part of the estate to *Hobart* for *ninety-nine* years, if he so long lived; remainder to his wife as to part for life, remainder to the *first* son for life; and other part of his estate in like manner to his grand-daughter the Countess of *Suffolk*, and her issue male for life, with a cross remainder, on failure of issue male of either of them; the will saying nothing more as to the remainder in fee.

Though two of the trustees were related to the testator; yet the remainder in fee will not belong to them, but be a resulting trust for the testator's heir.

A question was now made by Mr. *Colchester*, and insisted upon, that on failure of issue male, both of *Hobart* and *Stamford*, the remainder of the estate was to go to the trustees, and could not be a resulting trust for the heir; the devise being to them and their heirs upon the trusts after mentioned, which imports only that they should be trustees for the purposes after mentioned, and when those estates were spent, it was to remain with them and their heirs, to the use of them and their heirs, which excludes any trust for the heir at law.

Lord Chancellor. This is not fully within the reason of the case; where a devise or grant is in trust for payment of debts, there the whole estate is affected with the trust; (2) but here the remainder is not affected with any trust declared; but considering the devise to *three* persons, and the Lord *Gorge* no relation to the testator, (3) it could not be intended a provision or bounty, as it might have been, if the devise had been to *Colchester* alone; and decreed the remainder in fee to the testator's right heir. (4)

[ 645 ]

(1) 21st March, 1689. Private Act of Parliament, 5 and 6 William and Mary, cap. 16, for settling Sir *John Maynard's* estate.

(2) So *Cunningham v. Mellish*, ante 246. Vide decree in not. there.

(3) No counsel appeared on the hearing for Lord *Gorge*.

(4) The Court being of opinion that the testator did not intend that the trustees, in case Lady *Stamford* and Sir *John Hobart* should die without issue male, should have the estate in fee against the testator's own right heirs at law, and therefore that the same should be limited to them as a result-

ing trust. Reg. Lib. 1709. A. fol. 190, entered *Hobart v. Trevor*.—The principal case upon the construction laid down by the Court is evidently decreed upon the principle of *Ackroyd v. Smithson*, 1 Bro. Ch. Rep. 503. quod vide.

## CASE 573.

COUNTESS of BRISTOL *versus* HUNGERFORD.

Pre. Cha. 81.

A. devises his real estate to his executors to be sold for payment of debts; the

surplus, if any, to be deemed personal estate, and go to his executors, to whom he gives 20l. a-piece. Surplus decreed to the heir at law.

DEVISE of real estate to executors to be sold for payment of debts, the surplus, if any be, to be deemed personal estate, and go to his executors, to whom he gave 20l. a-piece.

Decreed the surplus a trust for the heirs at law, and affirmed in parliament. (1)

A term for 500 years limited in trust to pay debts, and four years after to attend the inheritance.

*Cook and Guavas*. A term for *five hundred* years in trust to pay debts, and *four* years afterwards to attend the inheritance. As soon as debts paid, a trust for the heir.

200l. a year for sixteen years to pay debts and legacies. Surplus a trust for the heir.

*Sir Cyril Wich and Packington*, (2) 200l. *per ann.* for *sixteen* years to pay debts and legacies; yet surplus adjudged a trust for the heir.

*North versus Crompton*, 1 Chanc. Reports. (3)

(1) Sed vide 3 P. Wms. 194, note [C], by which it appears from Reg. Lib. that the surplus was decreed to be a trust in the executors, subject to distribution [among the next of kin.] Reg. Lib. 1696. A. fol. 966. Et vide *Ackroyd v. Smithson*, 1 Bro. Ch. Rep. 503.

As to the subject of the appeal to Dom. Proc. vide ante p. 525. and not. there.

(2) 11 Vin. Ab. 172. Ca. 47. 21 Vin. Ab. 499. Ca. 18. 9 Mod. 187. 1 Bro. P. C. 372. S. C.

(3) 1 Ch. Ca. 196. S. C.

## [ 646 ]

CHERRINGTON *versus* ABNEY Mil'.

CASE 574.

Jan. 27.

Where an old house is pulled down, wherein were ancient lights, and a new one is built; the

lights in the new house must be in the same place, and of the same dimensions, and not more in number than the lights in the old house.

BILL for an injunction to prevent stopping of lights: there being *six* lights in an old house; it was insisted, that in the new they should have but the same number of lights, and of the same dimensions, and in the same place, or else may stop up and blind them.

So must not make more stories, more lights, nor in other places.

It is certain they cannot alter the same to the prejudice of the owner of the soil; as if before so high, as they could not

ook out of them into the yard, shall not make them lower and the like ; for privacy is valuable. (1) CHERRINGTON v. ABNEY.

One trial had, another directed. (2)

(1) [See *Chandler v. Thompson*, 3 Campb. 80. *Cross v. Lewis*, 2 B. & C. 689.]

(2) The plaintiff in this case was lessee of the ancient messuage and ground in question from the *Carpenters' Company*, and the defendant was lessee of ground abutting close upon the north side of the said ancient messuage from the *Fishmongers' Company*, and the plaintiff had pulled down the old messuage which had six small lights in the north wall looking upon the defendant's ground, and built a new one with eight sash-windows in the north wall, and the defendant thereupon proceeded to build a coach house and stable close to some of the said sash-windows, insisting by his answer that the lights in the ancient messuage had subsisted only by leave of the persons who had been from time to time tenants of the ground he then held, and that the plaintiff had in fact no right to any

lights whatever in the north wall of his said house. The bill was filed for an injunction to stop the building of the coach-house, &c. and the defendant *Abney* filed a cross bill to ascertain the number and nature of the lights in the ancient messuage, &c. and an action was ordered to be brought by the plaintiff in equity, to try the right, and if on the trial any difference should appear between the lights in the old and those in the new house, the same was to be indorsed specially on the postea. The trial was accordingly had, and a verdict obtained by the plaintiff, who thereupon prayed a decree to be quieted in possession ; but the defendant objecting that the order for the trial was obtained on motion before the hearing, another trial was ordered, with directions as to the comparative distances of the windows in the old and new house from the ground, &c. Reg. Lib. 1709. A. fol. 196.

### CHAPMAN *versus* SALT.

[ 646 ]

CASE 575.

Jan. 27.

In Court.

Legacy to a  
feme covert,  
and after-

Mrs. Salt devised 50*l.* to *Mary* the wife of *Leonard Chapman*.

This will was made in 1700 ; afterwards the testator gave a note to *Leonard Chapman*, for 50*l.* payable at demand.

wards a note given to the husband for the same amount, and proof admitted that the note was intended in lieu of the legacy, and thereupon decreed to be taken in satisfaction.

By proofs it appeared, it was intended the note should be in lieu and satisfaction of the legacy. (3)

Objected the note was to one, and the legacy to another : the legacy to the wife ; the note to her husband.

If the wife had survived, she would have had the legacy, and the executors of the husband the note.

[ 647 ]

(3) On the head of satisfaction of legacy, vide *Husbands v. Husbands*, ante 1 vol. 95. *Goodfellow v. Burchett*,

ante p. 298, and cases cited in not. there respectively.

CHAPMAN v.  
SALT.

*Master of the Rolls.* A testamentary-question. Evidence may be received. (1)  
Dismissed the bill. (2)

(1) On the head of evidence in testamentary questions, vide *Fane v. Fane*, ante 1 vol. 30, and cases cited in not. there. [And on the admissibility of parol evidence to rebut or fortify presumptions of the satisfaction of portions, legacies, &c. by payment, which approaches more nearly to the question in the principal case, see *Debeze v. Mann*, 2 Bro. Cha. Rep. 165, 519. 1 Cox, 346. *Ellison v. Cookson*, 2 Bro. Cha. Rep. 307. 3 Bro. Cha. Rep. 61. 1 Ves. jun. 100. *Freemantle v. Bankes*, 5 Ves.

84. *Pole v. Somers*, 6 Ves. 309. *Druce v. Denison*, ib. 385. *Trimmer v. Bayne*, 7 Ves. 508. *Robinson v. Whitley*, 9 Ves. 577. *Hartopp v. Hartopp*, 17 Ves. 184. *Monck v. Monck*, 1 Ba. & Be. 305. *Dwyer v. Lysaght*, 2 Ba. & Be. 156. *Thellusson v. Woodford*, 4 Madd. 420. *Bell v. Coleman*, 5 Madd. 22.]

(2) With costs. Reg. Lib. 1709, A. fol. 146. No statement of the case; but it appears proof was admitted.

CASE 576.  
Jan. 27.

GIBSON *versus* CROMWELL, & è contra.

*OLIVER CROMWELL* devised a term for *ninety-nine* years, to trustees for debts and legacies, and subject thereunto devised to *Richard Cromwell* his father for life, remainder to the plaintiffs his sisters. The debts and legacies were paid by sale of timber and wood; yet a lease decreed to be made by the trustee to a tenant of part of the capital messuage and demesnes at 170*l.* per ann. for nine years certain, although opposed by the reversioners. (3)

(3) The entry of this date in the Register's Book (Reg. Lib. 1709, A. fol. 325) contains the over-ruling and allowing divers exceptions taken to the Master's report, as to the terms of a lease which had been allowed by the

Master; but the editor has not been able to find the particular circumstances, although there are many previous entries relating to a decree made in the cause.

CASE 577.  
Feb. 10.

STRISH *versus* PELHAM.

LORD  
CHANCELLOR.

Person who drew instructions in writing for will which testator died without executing, examined as a witness.

*JOHN STRISH* in 1686, sent for one *Holland* to make his will, who took it in characters from his mouth, and read it to him, and he approved thereof; the next day *Holland* brought the will drawn up in four sheets of paper; but the testator was not then sensible, and died.



After the testator's death, *Holland* who drew the will, examined as a witness. (4)

STRISH v.  
PELHAM.

(4) Vide *Hodgson v. Hodgson*, ante p. 593. *Cuthbert v. Peacock*, ibid. *Nourse v. Finch*, 1 Ves. jun. 344. *Hornsby v. Finch*, 2 Ves. jun. 78, S. C. disposing of it, but with blanks for names, &c. not filled up and unexecuted, found with the will, parol evidence admitted. where residue unbequeathed; codicil

LADY GRANVILL & AL'. *versus* DUTCHESS of  
BEAUFORT.

[ 648 ]  
CASE 578.  
Feb. 24.  
Post Ca. 601.

THE Duke by will devised the use of his table plate to the defendant, the Duchess, for life, and after her death to the present Duke his grandson; and his *George*, and *jewel* which he wore in his hat, &c. to be delivered to him, and made the Duchess executrix, and left it to her as to the funeral; and made no disposition by his will of the surplus of his estate.

The bill was for a distribution of the surplus.

*First.* Question arose, Whether it should be admitted to prove the Duke intended to give the surplus to the executrix; and that he gave such instructions to Mr. *Price*, who drew the will, and was since dead.

Surplus not being disposed of by the will, proofs were allowed to be read, that the testator intended to give the surplus to his executor, it being to oust an implication, or rule in equity. Ante Case 532. Post Ca. 602.

Ordered on debate, that the proofs should be read to oust an implication or rule in equity, that the surplus of the personal estate should be taken from the executors and be distributed. (1)

Mr. *Price* the drawer of the will was dead, having lived about *six* years after the Duke.

Proofs came short of what they were in the Lady *Gainsborough's* case; there at the very time of the execution of the will, the testator objected, that the devise of the personal estate was not inserted in the will; Mr. *Millner* who drew the will insisted, and affirmed it was not necessary, and persisted in it. Here only what was said, not at the time of execution of the will; but what was said before or after the making of it.

[ 649 ]

*First.* Not a devise, but in nature of an exception,

*Secondly.* Objected, not an absolute devise of the general property, but a special property.

(1) [See *Fane v. Fane*, ante 1 vol. 30.]

GRANVILL v.  
BEAUFORT.

*Thirdly.* By a devise to the Duke of the table-plate, after the death of the Duchess, the testator would have the special property left in the Duchess for her life ; but would not exclude her from the surplus.

Vol. 1. Case  
462.

*Lord Chancellor.* I take it for granted my determination will not be final. The case in some measure is determined by the rule in the two cases, of Lady *Gainsborough*, and *Foster* and *Mount* ; both which were settled in the House of *Peers*, which must bind inferior jurisdictions, although an innovation of the law.

The proof of what *Price* said in his life-time is evidence ; but the slenderest sort of evidence.

Another witness speaks less and incertainly, that she should have it as executrix, or to that effect.

Third witness, that the Duke gave directions the Duchess should have the estate to dispose of as executrix.

So that the proof is to be laid out of the case.

Next point, how it stands on the face of the will ; and that is to be directed by the case of *Foster* and *Mount*. Executors were strangers. Answer. It has been so adjudged where a relation is made executor.

*Secondly.* The devise of the use of any part is as strong an implication that the devisee should not have the whole ; and rather stronger, because more restrictive and more minute.

*Thirdly.* That it is only in nature of an exception, which is the strongest objection, and like the case of giving books to *J. S.* except *six* to my wife, which was rightly adjudged ; but the will is not so worded. If the words of the will had been, I give plate to the duke, except the use of it to the duchess, it would have been within the reason of that case.

But all wills depend upon the nicety of the wording of them, as a devise at *twenty-one*, or when *twenty-one* ; and a devise of 100*l.* payable at *twenty-one*.

Objection. That the duke did not make his will with intent to die intestate, goes to all cases of like nature.

As to the smallness of the legacy, the *major* and *minor* not material.

*Hoskins* and *Hoskins*. After the decease of my wife, my son to be executor of all my personal estate.

Decreed a distribution, and the duchess to have her *paraphernalia* over and above a *third*. (1)

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(1) 1 P. Wms. 114. S. C. Et vide *pal* case reversed in Dom. Proc. 1 Bro. *Foster* and *Munt*, ante 1 vol. 473. and P. C. 305.]  
cases cited in not. there. [The princi-

DE  
TERMINO PASCHÆ, 1710.

IN CURIA CANCELLARIÆ.

HOLT *versus* BURLEY.

A SETTLEMENT made on the marriage of *Willam Bullock* with *Sarah Gill*, of an estate of the wife's, called *Haylehurst*, limited to the husband and wife for life, remainder to their issue, remainder to the right heirs of *William Bullock*, the husband. A proviso that in case the said *Sarah* survive the said *William Bullock*, *they not having issue between them lawfully begotten*, that then the said *Sarah* might revoke the former, and limit new uses. *William Bullock* died, *Sarah* survived him, and they had issue *John*, who died in the life of his mother.

CASE 579.  
Eq. Ca. Ab.  
341. pl. 5. Pre.  
Ch. 293. S. C.  
A proviso in a settlement, if the wife survive her husband, they not having issue between them, then she may revoke the settlement. Husband dies leaving a son, who dies in the life of his mother. She may revoke the settlement.

The question was, whether in regard there was issue living at the death of the husband, the power of revocation did arise.

The plaintiffs, being heirs at law to *William Bullock*, insisted, *Sarah* had no right to revoke; and cited the case of *Brett and Partridge*, to refund 500*l.* of the portion, if the wife died without issue in *two* years after the marriage. There was issue of the marriage, who died within *two* years: yet adjudged, there being once issue, no refunding; *è contra*, *Vincent and Lee*, in 1 *Leonard*, 285. if my son departs this world not having issue. 3 *Leonard*, 106. 1 *Lev.* 35. *Goodwin and Clarke*.

[ 652 ]

*Lord Chancellor.* No room for any doubt in the exposition of the words and meaning. If the wife survives her husband, they having no issue, *that* is not to be confined to the moment of his dying, but takes in the whole time of her life, that she survives.

CASE 580. D. HAMILTON & Ux'. *versus* DOMINUM MOHUN & Al'.  
 Eq. Ca. Ab.  
 90. pl. 6.  
 Salk. 158.  
 Gilb. Eq. Rep. 297. S. C.  
 A. B. on the marriage of her daughter insists on a bond from the husband to give her a release within two years after marriage. Bond set aside. No difference between such bond and a brokerage-bond.

ON the marriage of the plaintiff the Duchess; the Lady *Gerrard*, her mother, insisted to have a covenant from the Duke, in the penalty of 10,000*l.* to give a release within two years (1) after marriage. (2).

This case comes under the head of extortion or compulsion; but in truth is in the nature and reason of marriage brokerage-bonds. No difference between giving a bond for procuring a marriage, and a bond to release part of what became due. Decreed for the plaintiff. (3)

(1) *Two days*. Vide 1 P. Wms. 118. 1 Bro. P. C. 54, and Reg. Lib. ub. inf.

(2) The release was of all accounts of the meane profits of the Duchess's estate, Lady *Gerrard* being her mother and guardian, 1 P. Wms 118. S. C. The bill (which in this case was a bill of revivor) stated several other acts of imposition or extortion, on the part of Lady *Gerrard* and the Earl of *Macclesfield*, the uncle of the Duchess, as to which the answer was, in many instances, evasive, but admitted that no account had ever been stated by Lady *Gerrard*. On the 27th Jan. 1702, a decree was made in another branch of this cause, by Lord Keeper *Wright*, from which decree defendant appealed to the Lords, and the decree was reversed. And the Lords ordered, that the plaintiffs should release to defendant all right to the personal estate of Lady *Gerrard*, and in default of giving such release, if they should sue for any of the demands to be released within the time limited, then their bill to stand absolutely dismissed, and they were to be debarred from all benefit of the legacy given to them, 1 Bro. P. C. 54. Journ. Ho. Lords, 17 vol. p. 388. But Mr. *Brown* surmises, that the condition of their Lordships order was not complied with, for in the above cause Lord *Cowper* set the deeds aside, as being in the nature of a marriage brokerage-bond, and ordered them to be delivered up, from which decree there does not appear to have been any appeal.

(3) The words of the decree are,  
 "Whereupon, &c. his Lordship conceived, that the plaintiff's equity did not arise upon the heads of concealment, surprize, or circumvention, for that although the plaintiff, the Duke, had not an account in particular, yet he had an account in general, and was informed how matters stood between the plaintiff the Duchess, and her mother the Lady *Gerrard*, neither was there want of deliberation in the Duke, or any circumvention or surprize upon him, but he well knew what he was doing, which appears by his having, for some time, withstood the demands of the Lady *Gerrard*, but his Lordship conceived that the plaintiff was well intitled to the justice of the court, to be relieved upon the head of extortion, this case not only coming near, but being much stronger than the common cases of brokerage-contracts made with strangers, for making or procuring of matches to be made, against which this court has always relieved, this covenant being made with the mother and guardian, who had the sole care and influence of her daughter; and although by this covenant there was no money actually to be paid to the mother for making or consenting to this match, yet that the giving a bond or covenant to remit or forgive a sum of money which was really due, and ought to have been paid, or to release an account in general is the

“ same thing, in effect, as giving a  
 “ bond or covenant for the payment of  
 “ a sum of money, and that should  
 “ contracts of such a dangerous na-  
 “ ture receive any judicial allowance  
 “ of a Court of Equity, it would be  
 “ directing or approving a way, where-  
 “ by mothers might betray or defraud  
 “ their children; and as where a father  
 “ has upon the marriage of a son,  
 “ taken a bond from such son for the  
 “ payment of a sum of money, this  
 “ court has looked upon such bond as  
 “ obtained by fraud and extortion, so  
 “ this being a covenant to release an  
 “ account, and executed as a considera-  
 “ tion of marriage, is an imposition  
 “ against which this court ought to

“ give relief; and that therefore the  
 “ said deed of covenant, and the judg-  
 “ ment at law obtained thereon, ought  
 “ to be set aside, and satisfaction ac-  
 “ knowledged on the record of the said  
 “ judgment, so as to open the Lady  
 “ *Gerrard's* account of what she any  
 “ way received or possessed belonging  
 “ to the plaintiff, the Duchess, or her  
 “ father's real estate, and doth order  
 “ and decree the same accordingly.”  
 Reg. Lib. 1709. A. fol. 340. Vide 1 P.  
 Wms. 118. S. C. and on the doctrine of  
 interference of this court, in respect of  
 bonds and engagements in fraud of  
 marriage, *Redman v. Redman*, ante 1  
 vol. 348. *Gale v. Lindo*, ibid. 475,  
 and cases cited in not. there respectively.

### BRETTON & Ux'. & Al'. versus LETHULIER.

CASE 581.

*SAMUEL LETHULIER* devised the surplus of his estate to his brothers Sir *John*, *William*, and *Abraham Lethulier*, and the children of his brother Sir *Christopher*, and of his sister *Birkin*, equally to be divided; and if any of my brothers die before the estate is got in and divided, his or their share to go to his or their children.

Surplus de-  
 vised to the  
 testator's four  
 brothers, and  
 if any of them  
 died before the  
 estate was got  
 in and divided,  
 his share to go  
 to his children.  
 One of them

died in the life of the testator, leaving children. Whether they shall take their father's share.

*Abraham*, one of his brothers, died in the testator's life-time, leaving several children. Sir *Christopher*, his brother, left five children. Mrs. *Birkin* had four living at the testator's death.

The first question was, whether *Abraham* dying in the testator's life-time, that lapsed legacy should go to his children. (1)

Secondly. Whether the children of Sir *Christopher* should be considered as one person, and take a fifth amongst them, or whether an equal share with the brothers; and so as to *Birkin's* children. (2)

(1) Vide on this point, *Darrel v. Molesworth*, ante p. 378, and cases cited in not. there.

(2) It has long been settled as the law, that where the parties are all equally of kin to an intestate, they shall

take *per capita*, and not *per stirpes*, Secus, if brother or sister of intestate living, *Davers v. Dewes*, 3 P. Wms. 40, and cases cited in not. p. 50, there. *Lady Lincoln v. Pelham*, 10 Ves. jun. 166, 176.

BRETTON v.  
LETHULIER.

*Lord Chancellor.* *Abraham* died before the estate was got in and divided, but he died before the testator; yet still he died before the estate was gotten in and divided: but then it is objected, that his share is to go to his children, when he had no share ever vested in him. But that is to be understood the share intended him.

[ 654 ]

A debt is devised to two, and if either died, to the survivor. One died before the debt was got in. The survivor shall have the whole debt.

A will speaks not until the death of the party; but the construction is to be made as matters stood at the time of making the will. (1) The case of *Ledsome* and *Hickman*, (2) 300*l.* to three at twenty-one, if any die, to go to the survivors; one died in the life of the testator. *Davies* and Lord *Bindon*. Devise of a debt to two, if either died to the survivor; one died before the debt got in. *Lord Chancellor* was of opinion, that *Davis* having survived the testator, though he died before the debt was got in, was intitled to his share of the debt. But the Lords reversed it.

(1) 2d May. An order for examining one of the defendants in the cause as a witness for the other defendants, he having no interest. Reg. Lib. 1709.

*A.* fol. 263, but no further entry appears.

(2) Ante p. 611. S. C.

DE

TERM. S. TRINITATIS, 1710.

IN CURIA CANCELLARIÆ.

CASE 582.  
June 10.

HICKMAN *versus* ANDERSON.

A term is limited to raise portions for daughters, if no sons; provided such daughters survive their father. A daughter dies in the life of her father. Her portion shall not be raised.

ON the marriage of *Anderson* with *Mary Glynn*, a term is limited after the death of father and mother to raise portions, if no sons, for daughters, payable at eighteen or marriage. Proviso such daughter survive the father. The daughter married the plaintiff Sir *Willoughby Hickman*, and died in the life-time of the father. Bill dismissed. (3) A strain even to sell the term in the life-time of the father.

(3) With costs. No case stated, Reg. Lib. 1709. *A.* fol. 391.



CORBETT *versus* MAYDWELL.

CASE 583.  
 June 13.  
 LORD  
 CHANCELLOR.  
 Eq. Ca. Ab.  
 337. pl. 5.  
 Salk. 159.  
 3 Ch. Rep. 190.  
 S. C.  
 Ant. Ca. 569.

CASE arises on the settlement of Mr. *Maydwell*, an ill-penned settlement, where the difficulty arises from a too great multiplicity of words. The question is, whether the portion is to be raised in the life-time of the father. From the blundering expressions which it is hard to construe consonant to reason, and agreeable to former precedents. The opinion I shall give, is from throwing out all the impertinent words and taking in the material words only.

[ 656 ]

The uses are, first to *Thomas Maydwell* for life, remainder to trustees, during the life of *Thomas Maydwell*, to support contingent remainders; remainder to trustees for *five hundred* years; remainder to *Thomas Maydwell* in tail male special: then comes the declaration of the trust of the term, which does not affect the vesting of the term, for that is absolute; but the trust of the term is declared, that in case *Thomas Maydwell* shall die without issue male, and there shall be one or more daughters, that shall be unmarried or unpreferred at his death; such daughter, if but one, to have 2000*l.* for her portion, and for her maintenance 30*l.* per ann. out of the profits, till her portion becomes due; the portion to be paid at *eighteen* or marriage. Proviso, that the term shall be void, if the said *Thomas Maydwell* pay or secure to the daughter, that shall be unmarried at his death, the said portion of 2000*l.* *Thomas Maydwell* survives his wife, and by her had one daughter, who attained her age of *twenty-one*, and married the plaintiff *Corbett*; and they bring this bill for her portion of 2000*l.*

*Lord Chancellor.* None of the precedents come up to the case. Question is not concerning the term, but concerning the trust.

If a portion is directed to be paid at *eighteen*, or day of marriage, and the term is absolutely vested; there the daughter shall not expect during the life of the father, but it may be sold in the father's life, although a term in remainder and not in possession.

*Secondly*, If the trust of the term had been on a condition precedent, as to commence if the father die without issue male by his wife, in trust to raise portions for daughters; there if the wife be dead, without issue male, leaving a daughter; though the father is living, the term has been decreed to be sold; (but if *res integra* I should not decree it). But in equity

[ 657 ]

CORBETT v  
MAYDWELL

the father is taken as dead without issue, when the wife is dead, by whom he was to have issue. All that is contingent there has happened, by the death of the wife without issue male; and the husband must also one time or other die, as all men must; and whenever he dies, he must die without issue male by that marriage, his wife being dead before. This is in truth a remainder, and depends no longer upon a contingency.

This Court, as in some cases they do prolong time, so here have shortened it.

But if the agreement is, that the portion should be paid after his death, it is hard to make it payable in his life-time.

But in the present case the condition is precedent, in case *Thomas Maydwell* die without issue male on the body of *Margaret*: so far the Court has gone; but which shall be unmarried, or unpreferred, as therein is mentioned, at the death of the father: it must be for such daughter as shall be unprovided for at the death of the father. So here I must say, he is dead without issue male in his life-time; and also, that the plaintiff is a daughter unpreferred at her father's death.

Maintenance to be raised in the mean time only out of the profits. (1) If *Maydwell* pay or secure the portion to the daughter, which shall be unmarried at the time of his death, or unprovided for, the term is to be void and determined.

[ 658 ]

So the case stronger than any of the cases adjudged, or any of the precedents.

The precedents, *Hellier* and *Jones*: there the question only was, when interest should commence of a portion payable at *eighteen* or marriage, and no contingency; and there no doubt, interest payable in the life-time of the father.

*Elizabeth Gerrard's* case (2); which if considered, the condition precedent to the term is only in failure of issue male of the wife; the death of the father no part of the condition.

The trust to pay at *eighteen* or marriage, next after the death of the father and mother, which first happened.

(1) Note, by the report of this case in Salk. ub. sup. it appears that *Lord Chancellor* held as to the 30*l.* per ann. for the maintenance, that must be intended in case the father died without issue male, leaving a daughter under the age of *eighteen*, or unmarried, be-

cause otherwise this absurdity must follow, that the daughter must have been paid maintenance-money, in the life-time of the father, out of the profits of a term that was not to commence till after the father's death.

(2) Ante p. 458.

*Staniforth's* case. (3) There a condition precedent to the vesting of the term, if they two shall die without issue male, and there should be daughters; there the term vested, although the mother living.

CURBETT v.  
MAYDWELL.

*Greaves* and *Mattison*, *T. Jones's* reports 201. Question, if portions vested. There were two daughters. Three of the judges were of opinion the portions were vested, although the father was then living; and that the term might be sold. (4)

(3) Ante p. 460.

(4) [See *Butler v. Duncombe*, post, 760, and 1 P. Wms. 448, and the notes there.]

### HONOUR *ver sus* HONOUR.

CASE 584.  
June 13.

ARTICLES to settle on the father for life, the mother for life, remainder to the heirs of the body of the mother by the father.

LORD  
CHANCELLOR.  
Articles and  
settlement  
mentioned to  
be made in

pursuance thereof were both made before the marriage; but the settlement varied from the uses in the articles. Decreed to go according to the articles.

Settlement was to the father for life, to the mother for life, remainder to the heirs of their two bodies; and the settlement is mentioned to be according to and in performance of the marriage-articles. [ 659 ]

*Lord Chancellor.* It appears not that the parties intended to vary the uses from the articles, but seems to be only an accident; and by proof it appears a strict settlement was intended. Neither party understood the limitations of the settlement or articles; but the articles happen to agree with the intention of the parties, and the settlement doth not.

Therefore decreed to go according to the articles, although the settlement was made before the marriage (1).

(1) Reg. Lib. 1709. A. fol. 437. vide 1 P. Wms. 123. S. C. and cases cited in not. there. and in addition, the cases cited in not. to *Beachinall v. Beachin-*

*nall*, ante 1 vol. p. 246. et vide note to *White & Ux.' v. Thornburgh*, post. p. 702. 705.

## CASE 585.

June 16.

*A.* devises the surplus of his personal estate to his daughter, the wife of *B.* for her separate use, and makes her executrix. Surplus being devised to the wife, and not to trustees, when it comes to the wife, by law it belongs

HARVEY *versus* HARVEY.

*Mr. Pocklington* had a mortgage from *Quince*, and bonds from the defendant *Mr. Harvey*, and other personal estate; and by a codicil did devise to his daughter, the wife of *Harvey*, the residue and surplus of his personal estate for her sole and separate use, and made her executrix; she proved the will, and *Mr. Harvey* her husband gave her a note under his hand, that she should have the benefit of the mortgage, *Quince* having by will devised the mortgaged premises, and other his real estate to *Mr. Harvey*, and *Mr. Cowper* for the payment of his debts.

to the husband: but whether equity will not interpose.

In this case it was admitted, that the wife by the note had a good right to the mortgage: but as to the surplus of the estate, the *Lord Chancellor* was of opinion, *that* being devised to the wife, and not to trustees, when it comes to the wife, by law it belongs to the husband.

[ 660 ]

What the husband has possessed by the consent of the wife, there is to be no account for that.

As to the mortgage, the wife is intitled as well to the interest, as the principal due on the mortgage; because he gave a note for that; and although voluntary, yet it was grounded on natural Justice, and in performance of the will; by which it is plain the testator intended it for the separate use of the wife, as far as by law it might.

Reserve the consideration as to the surplus of the estate, whether it belongs to the husband, or to the wife for her own separate use and benefit. (1)

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(1) As to this point, it seems clearly settled that in such case, the husband would be holden a trustee to the separate use of the wife, vide 1 P. Wms. 125. S. C. and cases cited in not. there.

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## CASE 586.

Eq. Ca. Ab. 213. pl. 8. S.C.

*A.* devises to trustees in trust for his daughter for life, remainder to the second son of her body, in tail male, and so to every younger son, with remainders over. There were two sons, *B.* and *C.* *B.* died, and after his death *C.* was born. *C.* though an only son, shall take, he being the second son in order of birth, and as the will is worded, not to be excluded.

TRAFFORD & Ux' *versus* SIR RALPH ASHTON & Al'.

*Mr. Vavasor* having an only daughter, articles to pay 3,000*l.* portion, and *Sir Ralph* was to make a settlement. After this *Mr. Vavasor* makes his will, and devises all his estate to trus-

tees, to pay 3,000*l.* to his daughter for life, and so to every younger son, with remainders over. There were two sons, *B.* and *C.* *B.* died, and after his death *C.* was born. *C.* though an only son, shall take, he being the second son in order of birth, and as the will is worded, not to be excluded.

tees, in trust, that his daughter might receive the profits for her life; remainder to the *second* son of her body to be begotten, in tail male; and so to every younger son. In default of such issue male, to her eldest daughter, and to the *first* son of her body, taking on him the name and arms of *Vavasor*. And adds, that he did not by his will devise the estate to the eldest son, because he expected his daughter would marry so prudently, as that the eldest son would be provided for. Sir *Ralph Ashton*, after having notice of Mr. *Vavasor's* will, marries the said daughter of *Vavasor*, and makes a settlement on her pursuant to the said articles, by which he was to have a portion of 3000*l*.

It fell out *Edmund*, the *first* son of the Lady *Ashton*, died in *twelve* months after his birth; *Richard* the *second* son lived till *eighteen*, and died without issue, and was not born until after the death of *Edmund*. (2)

Question *first*, whether *Richard* not being born till after the death of *Edmund*, was a *second* son within the intent of the will.

*Secondly*, whether he was not to take on him the name of *Vavasor*.

*Thirdly*, whether the articles ought to be performed?

*Lord Chancellor*. *First*, *Richard* was a *second* son, and must take, although not according to the testator's design; but as the will is worded, not to be excluded; the *second* son is the *second* in order of birth. (3)

*Secondly*, *Richard* the *second* son dying in minority not hindered from claiming, it was a condition subsequent to defeat the estate, and not precedent.

*Thirdly*, as to the articles, Sir *Ralph Ashton* is entitled to the 3000*l*. although he had notice of the will of *Vavasor*. (4)

(2) *Lomax v. Holmeden*, 3 P. Wms. 176. [*Coleman v. Seymour*, 1 Vez. 210.]

(3) The bill was by *Humphrey Trafford*, who married *Anne*, the other plaintiff, the grand-daughter of old *Vavasor* the testator, and the sister of *Edmund* and *Richard*, against her father for an account of rents and profits, and for possession of the premises devised by the will, insisting that *Richard* by the death of *Edmund* was become an eldest son, and had therefore no right to the premises in question. R. L.

VOL. II. PART II.

(4) With interest, according to the articles, after the debts charged on *Vavasor's* real estate should be paid and satisfied, R. L. The decree directed an account of the personal estate of old *Vavasor*, and of the rents and profits of the premises in question from the time of the testator's death; and as to so much of the rents and profits as had been received up to the time of the death of *Richard*, they were to be applied, *first*, in discharge of testator's debts, *secondly*, of the 3000*l*. and interest to Sir *Ralph Ashton*, and *thirdly*, in payment of legacies as therein men-

TRAFFORD v.  
ASHTON.

The negative words in *Vavasor's* will, that he had not provided for the eldest son, &c. not sufficient to exclude *Richard*, who was the *second* son by birth, though afterwards he became the eldest. *Chadwick and Doleman.* (1)

tioned; and as to the said rents and profits received since the death of *Richard*, and then in the tenants' hands, his Lordship declared, "that the same do belong to the plaintiff *Trafford* and his wife, and doth therefore order that the same be paid to them accordingly, and that the said defendant, Sir *Ralph Ashton*, do forthwith deliver up to the plaintiff *Trafford* and his wife, upon oath, all deeds, papers, and writings, in his custody or power, relating to the title of the said testator's real estates; and on a day therein named the defendant, Sir *Ralph Ashton*, was to deliver up possession of the same estates to the

"said plaintiffs, or to whom they should appoint, subject to the order of the Court; and the plaintiffs and the heirs male of the body of the said plaintiff *Anne*, are to hold and enjoy the said real estates for the future against the defendants, and all claiming under them, subject nevertheless to the further order of this Court, as aforesaid," and the plaintiffs to have their costs paid by defendant Sir *Ralph Ashton* to that time: and the future costs to wait the taking the account. Reg. Lib. 1709. B. fol. 491.

(1) Ante, 528.

[ 662 ]

### HOLLAND versus CALLIFORD.

CASE 587.

July 10.

Eq. Ca. Ab.

54. pl. 2. S. C.

*A.* on his marriage gives

bond to leave

his wife 500*l.*

or a third of his personal estate at her election.

*A.* becomes bankrupt.

Decreed the wife to

come in as creditor on her bond, and what shall be paid in respect thereof, to be put out at

interest, which is to be received by the creditors during the bankrupt's life, and the principal

to be paid to the wife, if she survives him.

ONE *Blanchard*, a cabinet-maker, married the sister of *Calliford*, who had 500*l.* portion secured by land. (2) *Blanchard* on his marriage, gives a bond to leave his intended wife, if she survived him, 500*l.* or a *third* of his estate at her election.

*A.* becomes bankrupt. Decreed the wife to come in as creditor on her bond, and what shall be paid in respect thereof, to be put out at interest, which is to be received by the creditors during the bankrupt's life, and the principal to be paid to the wife, if she survives him.

*Blanchard* became a bankrupt. Bill by the assignees to have the 500*l.* raised by a sale, and decreed accordingly; but with this, that the wife should come in as a creditor upon the 500*l.* bond, and what should be paid in respect thereof, to be put out at interest, and received by the creditors during the

(2) This 500*l.* was secured as follows. The land in question was, by indentures of lease and release, 18th and 19th Sept. 1696, conveyed to trustees, to the use of the trustees, their executors, &c. for a term of 500 years, upon trust, *int. al.* to raise 500*l.* to be paid by them to such person or persons as *Richard Calliford*, by his will,

should appoint. *Richard Calliford*, 29th August, 1697, by his will "appointed the said 500*l.* to be paid to his daughter *Mary*," (the wife of *Blanchard*, the bankrupt,) "for her portion, and 25*l.* per ann. for her maintenance, till the said 500*l.* should be raised and paid to her." R. L.



life of the husband ; and if the wife survived, then the money to be paid to her. (3) HOLLAND v. CALLIFORD.

(3) “ And if she died in the life-time of the said *Samuel Blanchard*, then the principal money is to be paid to the plaintiffs, but inasmuch as the present case appears to be somewhat hard on the defendant, *Mary Blanchard*, his Lordship doth recommend it to the plaintiffs to make a reasonable agreement with her.” Reg. Lib. 1709, A. fol. 577. Vide *ex parte Caswell*, 2 P. Wms. 497, where decreed in a similar case contrary by King, Lord Chan. The distinction seems to be, that where the debt is wholly contingent, and may never become due, (except in cases of bottomry and respondentia bonds, which are provided for by stat. 19 Geo. II. cap. 32. sect. 2, [6 G. 4 c. 16. s. 53.]) there the creditor, though a wife, cannot be admitted to prove, but where the debt, although wholly contingent in its origin, is secured by a security become forfeited before the bankruptcy, there the creditor may prove. Vide the cases on this subject collected in Co. Bk. Law. 100, 226, 236, 282. Cullen 120. And in *ex parte Caswell*, ub. sup. it is said by the Court that if the contingency happen before distribution made, the creditor may come in for his debt, or if before a second dividend, he may come in for his proportion thereof ; but the

above distinction drawing the line at the time of bankruptcy, appears to be established in *ex parte Groome*, 1 Atk. 115, 118. And note the principal case was produced in *ex parte Caswell*, as a precedent, but said to be doubted by Lord Macclesfield, in *ex parte Bailey*, Hil. Vac. 1720, and denied by Lord King, a circumstance not noticed by those who have cited the case of *Holland v. Calliford*. As to the authority of *ex parte Caswell*, it is said by Hardwicke, Lord Chan. in *ex parte Groome*, ub. sup. to be barely an *obiter* opinion of Lord King ; but this clearly relates only to the above point of the contingency happening after the bankruptcy, but before distribution or a second dividend. [By stat. 6 G. 4. c. 16. s. 56, a creditor in respect of a debt payable upon a contingency which has not happened before the issuing of the commission, may have the debt valued by the commissioners, and prove such value, and receive dividends thereon ; or if the value is not ascertained before the contingency happens, then the creditor may, after the contingency has happened, prove in respect of such debt, and receive dividend with the other creditors, not disturbing any former dividends.]

### DRAPERS' COMPANY *versus* YARDLEY & A<sup>r</sup>.

SIR *William Boreman* devised to *John Boreman* in tail male, and if he died without issue male, to *Yardley* in tail male, but to pay to the plaintiffs 500*l.* and 1000*l.*

to the payment of legacies. C. levies a fine and five years non-claim pass, and mortgages the lands. Fine and non-claim no bar of the legacies. C. having no title but under the will, the mortgagee must be supposed to have notice of the legacies.

CASE 589.  
Eq. Ca. Ab.  
257. pl. 2. S.C.  
A. devises  
lands to B. in  
tail, remain-  
der to C. in  
tail, subject

*Yardley* afterwards levied a fine, (on which was five years non-claim,) (4) to the use of him and his heirs ; and grants a rent-charge of 100*l.* per ann. to the defendant *Smith*, and mortgages to *Norcliffe*.

(4) And suffered a recovery. R. L.

DRAPERS'  
COMPANY v.  
YARDLEY.

*Lord Chancellor.* The fine and non-claim no bar to the plaintiffs, the legatees under the will; *Yardley* having no title, but under the will, is implicit notice: and all other purchasers, if any, to be brought in and contribute. (1)

(1) And the incumbrancers, who had, by themselves or others, received rents and profits of the said estate, were to account for the same, the said *William Yardley* claiming under the will only, and being but in the nature of a trustee, and they have either actual or constructive notice, and the legacies to carry interest from the time they ought to have been paid. The costs to

be paid out of the personal estate of testator, if sufficient, if not, then out of the real estate, subject to the aforesaid several demands. Reg. Lib. 1709, B. fol. 466. Et vide the principle of the above case recognised in *Dunch v. Kent*, ante 1 vol. 319. where purchasers claiming under one who claimed under letters patent, in which there was a trust, affected with notice of that trust.

CASE 589.

July 15.

Eq. Ca. Ab.

164 pl. 7. S. C.

Subsequent

incum-

brancers may

redeem the

first mortgagee, though the mortgagor is foreclosed by a decree; and the account taken in the suit where such decree was obtained will not bind the subsequent incumbrancers.

### MORRET & Al'. versus WESTERNE.

THE defendant *Westerne* after ten years' suit, four several reports, and two trials at law, obtained a decree to foreclose Mrs. *Bennett* upon a mortgage.

Plaintiffs had judgments and other incumbrances on *Bennett's* estate, subsequent to the defendant's mortgage, and now brought a bill against the defendant *Westerne* for an account of profits, and to redeem.

Defendant pleaded all the former proceedings, the taking the account in an adversary way, reports and references, and trials at law, and decree signed and inrolled, in bar of any new account to be taken; and denied he had any notice of the plaintiffs' incumbrances.

The plea over-ruled. (2)

(2) So *Godfrey v. Chadwell*, ante p. 601. Et vide, as to costs allowed to the first mortgagee, *Lomax v. Hide*, ante p. 185, where Court ordered such mortgagee his costs, as between solicitor and client, and that the profits of

the estate in question should be applied, in the first place, to pay what was due to him for costs, charges, and disbursements, and that it should not wait for the account.

DE  
TERM S. MICHAELIS, 1710.  
IN CURIA CANCELLARIÆ.

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COX *versus* HIGFORD.

CASE 590.  
October 27.  
Eq. Ca. Ab.  
121. pl. 20.  
S. C. better  
stated.  
A copyhold is  
forfeited for  
not repairing;  
whether  
equity will  
relieve.

PLAINTIFF, a *Quaker*, amerced for not coming to the Lord's Court, and taking the oath of fealty; and after, the copyhold estate is presented for being out of repair, and then a forfeiture for not repairing. In 1679 the Lord entered, and prevailed on the tenant to attorn. An ejectment is brought by the plaintiff, the copyholder, and then a rule of court, that upon paying costs, and repairing, the copyholder should have an account of profits and repairs.

The want of repairing was only of an ox-house, set up by the tenant for 40s. and a wain-house.

*Porter* and *Thomas* cited. Issue, whether waste with intent to commit a forfeiture.

*Cudmore* and *Raven*, the court relieved the defendant, a *Quaker*, against a forfeiture for not doing suit and service.

*Morley versus Earl of Derby*. The plaintiff relieved against a forfeiture in felling of timber.

[ 665 ]

Bill dismissed, because the plaintiff's neglect was not once or twice, but for *twenty* years together he refused or neglected to do suit and service, and repair.

The Lord might lawfully enter, and having so done, the tenant attorned.

A bill afterwards brought, and he elected to go to law; then a rule of court to pay costs and to repair, but failed in repairing.

Bill dismissed. (1)

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(1) Without costs. Reg. Lib. 1710, *Earl of Derby*, ante 537, and cases A. fol. 4. there is merely an entry of in not. there. dismissal. Vide, on this point, *Nash v.*

CASE 591.

Nov. 17.

Eq. Ca. Ab.

336. pl. 6. 344.

pl. 9. S.C.

2500*l.* is pro-

vided by

settlement for  
the issue of

the marriage, in such proportion as the husband shall appoint. He dies, leaving a daughter only, and makes no appointment. She shall have the 2500*l.*

DAVY & Al'. *versus* HOOPER & Al'.

*TWO thousand five hundred pounds* to be for the issue of the marriage, in such proportion as *William Davy* shall appoint. He died leaving only one daughter, and made no appointment; yet the daughter well intitled.

Decreed the 2500*l.* to be raised. (1)

(1) By articles, 1 April, 1687, made on his marriage with the defendant *Mary Hooper's* mother, Sir *Wm. Davy* agreed that he would, within one year after the marriage, settle, in what manner or out of what lands does not appear, 2500*l.* part of 5000*l.* therein mentioned, to the use of such child or children as he should have by *Mary*, his intended wife, in such manner as he, the said Sir *William*, should by writing appoint. The defendant *Mary Hooper* was the only child; no settlement or appointment appears to have been made, and the decree as to this point is, "As to the 2500*l.* his Lordship conceived that the neglect of the trustees in not calling to have the same settled according to the said marriage-articles ought not to turn to the prejudice of the said *Mary*; and as to the objection that Sir *William* not having appointed or apportioned the said 2500*l.* therefore the same did not arise, such objection was of no force or weight, it going to vest a power in him to defeat the very intent of the articles, and therefore upon the whole his Lordship declared the said plaintiff," (in a cross bill by *Hooper* and his wife,) "*Mary Hooper*, to be well intitled to the said 2500*l.* and that she ought to be taken and looked upon to be

" a creditor for the same, with interest  
" at the rate of 5*l.* per cent. from the  
" death of Sir *William Davy*, her fa-  
" ther." Note, Sir *William Davy* had, on a second marriage with the mother of the infant plaintiffs, by indentures of lease and release, 2nd October, 1706, conveyed his lands in *Devonshire* and *elsewhere*, to trustees for 500 years, to commence at his death, upon trust (*int. al.*) out of the profits, or by lease, mortgage, or sale, to raise 5000*l.* a-piece for each of the plaintiffs, the infants, for their portions, payable at eighteen, and maintenance in the mean time; and the decree was made *ut supra*, upon the question raised between these parties as to the raising the 2500*l.* for the defendant *Mary Hooper*, the daughter, and only child of the first marriage. Reg. Lib. 1710, A. fol. 185. Entered *Davy v. Pollexfen*, affirmed in Dom. Proc. 1 Bro. P. C. 351. and the principle recognised in *Crook v. Brooking*, ante p. 50. *Witts v. Boddington*, 3 Bro. Ch. Rep. 95, where jewels, &c. given to the wife for life, and then to such grandchildren as she shall appoint, no appointment made, decreed to go equally. For the general doctrine on powers of appointment, vide *Gibson v. Kinven*, ante 1 vol. p. 66, and cases cited in not. there.

CASE 592.

Nov. 18.

LORD

KEEPER.

Eq. Ca. Ab.

153. pl. 8. S.C.

Settlement by

a freeman before marriage, though of land, bars the wife of her customary part; and the children, in such case, shall have a moiety of the personal estate.

HANCOCK *versus* HANCOCK.

WHERE the wife of a freeman of *London* is compounded with before marriage, by settling a jointure, although of land, the wife is taken as advanced, and the children by the custom of a freeman before marriage, though of land, bars the wife of her customary part; and the children, in such case, shall have a moiety of the personal estate.

*London* shall have a moiety, as if the wife was dead; and so certified in the case of *Hall & Ux'*. and *Lumley*, 17 Car. 1.

HANCOCK v.  
HANCOCK.

The case of *Clare* and *Acmooty* cited: That when all the children were advanced, there the wife had a moiety.

So if all the children are advanced, the wife shall have a moiety.

*Dee, City Serjeant.* Any jointure binds, and bars the wife. That is called a composition. (1)

(1) This was on a re-hearing on the above point; the settlement appears to have been of land, and the words of the decree are as follow: "Whereupon, &c. his Lordship declared, that according to the custom of the city of *London*, the plaintiff *Anne*, the testator's widow, having been advanced on her marriage, she is not intitled to her thirds of the personal estate by the custom of the said city; but that such thirds ought, by the custom of the said city, to be brought into the whole personal estate, and that, after the testator's debts paid and satisfied, the whole personal

"estate of the testator ought, by the custom of the said city, to be divided into equal moieties; and that one moiety thereof is the testamentary part, to which the defendants are intitled by virtue of the will; and that the other moiety thereof is the orphanage-part, which ought to be divided amongst the plaintiffs, the infants, and the defendants, the children of the said *Leonard Hancock*, the testator." Reg. Lib. 1710, A. fol. 46. Vide on this point the cases cited in not. to *Love v. Chadwick*, ante 1 vol. p. 6.

### COMITISSA DERBY versus Earl of DERBY & A<sup>r</sup>.

CASE 593.  
Nov. 20.

PLAINTIFF a jointress; the defendant claimed under an intail, and had recovered part of the jointure in *Cheshire* and *Lancashire*.

Bill to have recompence on the eviction on the statute of 27 H. 8. c. 10. (2)

*First.* Question, whether shall take it out of County *Palatine*, and direct any trial at law, and until that settled, will remove the impediment of the leases, for cannot try it in the proper county against the Earl of *Derby*. (3)

(2) Sect. 7, the words of which are, "Provided alway that if any such woman be lawfully expelled or evicted from her said jointure, or from any part thereof, without any fraud or covin, by lawful entry, action, or by discontinuance of her husband, then every such woman shall be endowed of as much of the residue of her husband's tenements or hereditaments whereof she was before dowerable, as the same lands and tenements so evicted and expelled shall amount or extend unto."

(3) The bill in this case was filed by

the Countess of *Derby* against the then present Earl of *Derby*, the brother of her late husband, and *Henrietta Maria*, Countess of *Anglesea*, and Lady *Elizabeth Stanley* an infant, his co-heiresses at law, stating the settlement in consideration of 10,000*l.* portion, and that thereby a power was reserved to the late *Earl* during his life, and after his decease to the plaintiff, to lease the settled lands for twenty-one years, or three lives, and that fines were afterwards levied of the lands in *Cheshire* and *Lancashire*, and seeking to be quieted in the possession of the said

jointure lands, and that if any part of her said jointure lands were defective she might be recompensed for such deficiency out of the rest of the lands whereof she was dowable, according to the stat. 27 Hen. VIII. The defendant, the Earl of *Derby*, by his answer insisted that the lands comprised in the said settlement, made by the late Earl of *Derby* upon the plaintiff, in part thereof, were by several grants from the crown, and settlements therein also mentioned, and others, and by Act of Parliament, 4 Jac. 1. granted to the then Earls of *Derby*, and the heirs male of their bodies in tail male, which intails were still in force, and in him, the said defendant, as heir male of his family, and as such he claimed the same, and that the plaintiff's settlement was void as to the manors and lands so intailed, it not being in the late *Earl's* power to bar the same, and that he ought not to make any recompence for any part of the jointure estate which should be defective, for that he was not heir to the late *Earl*, but claimed under the said grants and settlements made by the crown to his ancestors, and intailed on the heirs male, and that he had recovered thereon by several verdicts at law, and that the defendants, the Countess of *Anglesea*, and Lady *Elizabeth Stanley*, were heirs at law to the late *Earl*, and had lands descended to them as such, and that the plaintiff had possessed herself of great part of the late *Earl's* personal estate, which was liable to such recompence. The defendants, the Countess of *Anglesea* and Lady *Eliz. Stanley*, admitted the settlement, and insisted that they and the other defendant, the *Earl*, ought to contribute proportionally to make good the defective jointure to the plaintiff, and the order declared, " That before  
 " the recompence could be considered,  
 " it ought to be seen what of the said  
 " jointure-lands hath been recovered  
 " by the defendant, the Earl of *Derby*,  
 " and wherein the plaintiff acquiesceth;  
 " and also what more may be recovered,  
 " ed, and wherein she will acquiesce;  
 " and as touching such trials as may  
 " be had for the ascertaining thereof,  
 " whether the same shall be in eject-

ment in the County Palatine where  
 " the lands lie, or at the bar, and all  
 " impediments to such trial removed,  
 " or upon proper issues to be directed  
 " for that purpose, his Lordship doth  
 " reserve the consideration until he  
 " shall have been attended with precedents of what hath been done in  
 " cases of the like nature;" and in the mean time ordered all deeds and writings relating to the premises in the custody or power of the parties, to be produced on oath before the Master. Reg. Lib. 1710, A. fol. 109. 20th Nov. Afterwards, 15th January, the cause came on again to be heard, when the Court directed a trial at the bar of the Court of Common Pleas, sometime in Easter Term, then next, in *Middlesex*, on the following issues: " 1st.  
 " What is the yearly value of the  
 " lands limited to the *Countess*, in  
 " *Cheshire*, as have been recovered,  
 " or wherein she acquiesceth. 2ndly.  
 " What other lands, tenements, and  
 " hereditaments of the late *Earl*, of  
 " which the said *Countess* is dowable,  
 " and what part thereof is in possession of the now *Earl*, and what  
 " part is in the possession of the defendants, the co-heirs, and what  
 " are their respective annual values;  
 " and 3dly, whether certain common recoveries which had been suffered  
 " by an ancestor of the late *Earl*,  
 " 5th Hen. VIII. were duly executed  
 " so as to bar the estate tail of the  
 " lands in the county of *Lancaster*,  
 " comprised in those recoveries, and  
 " likewise whether or no the late  
 " Earl of *Derby* had sufficient power  
 " to limit all or any, and what part  
 " of the lands in question in jointure,  
 " wherein the title is now remaining  
 " in dispute, in such manner as the  
 " same are limited in jointure, or for  
 " provision for the said *Countess*, with  
 " power of leasing in such manner as  
 " the same are limited by the said  
 " jointure-deed, and the annual value  
 " of such part, if any, as shall be  
 " found the late *Earl* had not power  
 " so to settle; in which trial the  
 " plaintiff, the Countess of *Derby*, is  
 " to be the plaintiff, and the now  
 " *Earl*, and the co-heirs of the late  
 " *Earl*, are to be the defendants. And



“ whereas it may be necessary for the  
 “ defendants to give the pedigree of  
 “ their family in evidence at the said  
 “ trial, it is therefore, by consent, or-  
 “ dered that the defendants do give  
 “ the said pedigree to the plaintiff in  
 “ a fortnight, and that the plaintiff

“ do admit the same at such trial,  
 “ unless the plaintiff shall, within a  
 “ week after such pedigree shall be so  
 “ delivered, shew unto this court good  
 “ cause to the contrary.” Reg. Lib.  
 1710, A. fol. 108.

JOHN LOCK, and ROBERT LOCK, Executors of JAMES  
 LOCK, deceased, *versus* ELEANOR LOCK, Widow.

Case 594.  
 LORD  
 KEEPER.

**JAMES LOCK** devised a term of *twenty-one* years, held of  
 a college in *Oxon*, to his wife for life, and after her decease to  
 his son *James*; she paying (1) 10*l.* *per ann.* to *James* during  
 her life, and not to alien without the son's consent.

*A.* devises a  
 college lease  
 for twenty-  
 one years to  
 wife for life,  
 remainder to  
 his son, she

paying 10*l.* *per ann.* to his son during her life; the son dies in the life of his mother; the rent  
 continues during the life of the wife, and shall go to the executor of the son, and the wife is  
 compellable to pay her proportion for a renewal of the lease.

*James* the son died, and devised all his interest in the land [ 667 ]  
 to the plaintiffs, and made one of them executrix.

Bill for the remainder of the rent, and to compel the defen-  
 dant to renew the lease.

*Per Cur.* The rent is to have continuance during the life of  
 the defendant, and will go to the executor of the son. (2)

*2ndly.* The devise being to the wife for life, paying 10*l.* *per*  
*ann.* to *James*, her son, during her life, with remainder to  
*James*, is an implication, that the widow should renew and keep  
 the term on foot; and there being but *seven* years of *twenty-*  
*one* to come, she was decreed to renew, and the *Master* to  
 settle the proportion. (3)

(1) As to the effect of this word  
 “ *paying* ” in a will, vide the judgment  
 of *Hardwicke*, Lord Chan. in *Tunstal*  
*v. Bracken*, cited in not. to *Dawson v.*  
*Killet*, 1 Bro. Ch. Rep. p. 124.

(2) Vide the case of *Rawlinson v.*  
*Duchess of Montague*, next case.

(3) It was agreed to be one-third

by the defendant, the widow, and the  
 remaining two-thirds by the plaintiffs.  
 Reg. Lib. 1710. B. fol. 120. On this  
 point, vide [*Nightingale v. Lawson*, 1  
 Bro. Ch. Rep. 440, 1 Cox, 181, and]  
 cases cited in not. to *Clyat v. Batteson*,  
 ante 1 vol. p. 404.

RAWLINSON *versus* Duchess of MONTAGUE.

CASE 595.  
 Dec. 4.

**CHRISTOPHER**, late Duke of *Albemarle*, devised to his  
 executors and their heirs 50*l.* *per ann.* during his wife, the  
 Duchess's life, to be for the separate use of Mrs. *Rawlinson*,

Devise of 50*l.*  
*per ann.* to the  
 wife of *A.* dur-  
 ing the life of  
*B.* for her

separate use. The wife of *A.* dies, the 50*l.* *per ann.* shall be paid to the executor of the wife  
 of *A.* during the life of *B.*

**RAWLINSON v. MONTAGUE.** to be paid to her own hands, and so as her husband should not intermeddle. Mrs. *Rawlinson* dies.

Decreed the 50*l.* per ann. to be paid to the executors of Mrs. *Rawlinson*, during the life of the Duchess. (1)

(1) With costs, Reg. Lib. 1710, B. fol. 98. Note, there was a large sum due in respect of arrears, and the *Duchess of Montague* contended that the personal estate of the *Duke of Albemarle* ought to pay them, but decreed with the growing payments of the annuity, to be paid by the *Duchess of Montague*. The *Duke*, by his will, devised certain lands, &c. in *Middlesex* and *Hertfordshire*, of the yearly value of 1000*l.* to the defendant, the *Duchess of Montague*, and then devised to his

executors and their heirs during the life of the *Duchess*, his wife, a rent-charge of 50*l.* in trust for the separate use of the plaintiff's mother, charged upon the said lands, with power to his executors to distrain. Vide *Lock v. Lock*, next preceding case. And further *Gifford v. Goldsey & Al.* ante p. 35, and cases in note there, and particularly the distinction authorised by the cases cited in the latter part of the note.

[ 668 ]

DE

## TERM. S. HILLARII, 1710.

IN CURIA CANCELLARIÆ.

## WEBB versus WEBB.

CASE 596.  
Eq. Ca. Ab.  
156. pl. 2. 362.  
pl. 15. S. C.  
A. on his marriage assigns a term for 1000 years, in trust for himself for life, remainder to his wife for life, remainder to the heirs of the bodies of the husband and wife. The wife dies, leaving issue. The whole term vests in the husband, and he may assign it.

**EDWARD WEBB**, the defendant's grandfather, possessed of a term of one thousand years, 31st October, 1651, on marriage of his son, and 250*l.* portion, assigned the term to trustees, in trust to permit *Thomas Webb*, the defendant's father, to receive the profits for his life; and after his death, to permit *Anne* his wife to receive the profits for her life; remainder to the heirs of the bodies of *Thomas* and *Anne*, during the residue of the Term. The wife dies leaving issue.

Plaintiff claimed by an assignment made by *Thomas*, the father.

Cause first heard at the *Rolls*, and the bill dismissed upon

the reason of the case of *Peacock* and *Spooner*, (1) that the heirs of the body should take as purchasers; and that the whole term did not vest in the father.

WEBB v.  
WEBB.

Upon an appeal to the *Lord Keeper*, and after search of precedents, decreed for the plaintiff; that the whole term vested in *Thomas Webb*, the father, and that the heirs of the bodies of *Thomas* and *Anne* could not take as purchasers. (2)

[669]

If the legal estate had been so limited, the father must at law have taken the whole, and the trust of a term must be governed by the same rule. (3)

(1) Ante p. 43. 195.

(2) Vide 1 P. Wms. 132, 8. C. and cases cited in not. there. Vide *Papillon v. Voice*, W. Kel. 31. for observation

of *Jekyl*, Master of the Rolls, on the principal case.

(3) So *Duke of Norfolk v. Howard*, ante 1 vol. 163.

DE

[ 670 ]

## TERMINO PASCHÆ, 1711.

IN CURIA CANCELLARIÆ.

### BAILE versus COLEMAN.

*WILLIAM STOWELL* by will devised lands to trustees and their heirs, for payment of debts and legacies; and after debts and legacies paid, willed that one fourth part should be and remain in trust for *Elizabeth Baile*, for and during the term of her natural life, with power of leasing for *ninety-nine* years, determinable on *one, two, or three* lives; and from and after her decease, in trust for her son *Christopher Baile*, for and during the term of his natural life, with like power of leasing; and after his decease, in trust for the heirs males of the body of the said *Christopher*, lawfully to be begotten.

CASE 597.  
April 28.  
The trust of lands is devised to *A.* for life, with power of leasing, remainder to the heirs male of the body of *A.* Decreed the trustees to convey an estate-tail to *A.* and not an

estate for life only, with remainder to his first, &c. son in tail male. Post Ca. 625.

*Lord Chancellor Cowper* decreed the trustees to convey only an estate for life to *Christopher Baile*, and to his first and other sons in tail male.

But upon a rehearing, the *Lord Keeper* reversed that decree, and decreed an estate-tail to be conveyed to *Christopher*; viz. to him and the heirs male of his body.

[ 671 ]

BAILE V.  
COLEMAN.

But otherwise  
it would be, if  
lands were  
agreed to be so  
settled by marriage-articles.

Although he admitted, that upon articles of marriage founded on the agreement of the parties, the husband in such case might be made only tenant for life; but in a will you must take words as you find them. (1)

(1) 1 P. Wms. 142. S. C. Et vide the note there.

CASE 598.

Eq. Ca. Ab. 68.  
pl. 7. S. C.

A wife having  
been used with  
cruelty by her  
husband be-  
comes intitled  
to 3000*l.* as  
her share of  
her mother's  
personal estate  
who died intes-  
tate. Decreed  
the interest of  
this to the wife  
for her sepa-

Sir EDWARD NICHOLLS, and SUSAN DANVERS his  
Sister *versus* JOHN DANVERS & Al'. & è contra.

rate use; and then to her husband if he survived; and afterwards the principal to be paid to the issue; and if no issue, then to the survivor of the husband and wife. Post Case 657.

THE defendant *Danvers* on the marriage of the plaintiff *Susan*, sister of Sir *Edward Nicholls*, received a portion of 2000*l.* and made a suitable settlement on her. After the marriage, the plaintiff *Susan's* mother died intestate, by which one *third* of her personal estate, of the value of 3000*l.* came to her, as her share of the intestate's estate. Defendant *Danvers* having acted with severity and cruelty towards his wife, she parted from him.

Sir *Edward Nicholls* and his sister's bill, was to have the 3000*l.* for her own use for her maintenance.

The cross bill by *Danvers* the husband was, that the administrator might pay it to him.

*Lord Keeper* decreed the principal (1) to be brought before a master, and placed out at interest, and the interest to be paid to the plaintiff *Susan* for life for her maintenance; then to the defendant the husband for life; if any issue, the principal to the issue; if none, to the survivor of *Danvers* and his wife. (2)

The precedent of Sir *James Oxenden* and *Watson* (3) cited.

*Memorandum*, defendant had given a note to his wife, that if he should again use her ill, she should have her share of her mother's estate to her own use. (4)

(1) So much of the principal as should remain after making good the 2000*l.* portion of the plaintiff *Susan Danvers*, in case the same should not appear to have been fully paid to the defendant *John Danvers*, which was stated to be the case, in his answer. R. L.

(2) "He the defendant, being obliged

"to come into equity for the same." Reg. Lib. 1710. B. fol. 570.

(3) *Oxenden v. Oxenden*, ante p. 493. *Micoe v. Powell*, ante 1 vol. p. 39. and cases cited in not. there respectively.

(4) And this is stated to be the nature of the principal case by *Ellenborough*, Lord Chief Justice, in his judgment in the case of *Lord Rodney*

v. *Chambers*, 2 East. Rep. 293, 294. but the state of that point of the case is as follows: the bill charged that the defendant after the marriage, "by a note or writing, all of his own handwriting, owned his bad usage of the plaintiff *Susanna*, and gave (acquitted and discharged of any claim of his) all her fortune to her from her said mother, which note was delivered to the said plaintiff *Susanna*, but he the defendant obliged her to deliver the same to him." The defendant, by his answer, expressly denied he had ever given any such note to his wife; but says, "he signed a writing drawn by himself, upon the back of an old cancelled bond; that if the said plaintiff *Susanna* did lead a more quiet life he would leave her first fortune at his death, in case he

"had no issue by her; and that writing was delivered to the plaintiff *Susanna*, who had it in her custody till she eloped, and then he got the writing and destroyed it." And the decree takes no notice whatever of such note or writing, but appears to proceed upon the ground mentioned in not. (2) ub. sup. [See Foul. Tr. Eq. book 1. ch. 2. § 6. note (n) (second). *Worrall v. Jacob*, 3 Mer. 256. *Elworthy v. Bird*, 2 S. & S. 372. *Westmeath v. Westmeath*, Jacob, 126, 143.] Note as to costs, the costs of all parties, except defendant *Danvers* the husband, were to be paid out of the personal estate of the plaintiff *Susanna's* mother, before division; but as to defendant *Danvers*, the Court did not think fit to allow him any costs.

### MINSHULL *versus* LORD MOHUN.

THE defendant, the Lord *Mohun*, claiming the estate of Sir *Edward Fitton*, as devisee of the Lord *Macclesfield*, against whom Sir *Edward* had obtained a decree for an account of profits, and a partition of a seventh part of a third part, as being one of the seven co-heirs, (the will being void as to a third part of the land which was held *in capite*) the bill was an original bill, in the nature of a bill of revivor.

CASE 599.  
Eq. Ca. Ab. 3.  
pl. 4. S. C.  
Upon a bill in nature of a bill of revivor against a devisee; the devisee cannot dispute the justice or validity of the decree; for then a devisee would be in a better case than an heir.

The question was, whether the defendant should be at liberty to enter into the merits of the cause, and question the justice of the decree; and held that he should not; for had it been a bill of *revivor* the heir could not have been heard; and no reason that a devisee should be in a better condition than the heir. *Hæres natus* is rather to be favoured than *Hæres factus*. (5) And so it was held by the Lord Chancellor *Cowper*, in the case of *Clare and Wordell*, 26 April, 1706. (6)

(5) Reg. Lib. 1710. B. fol. 454. note, no counsel appeared for Lord *Mohun*, who had been duly served with process

to hear judgment.

(6) Ante p. 548. Et. vide the cases cited in not. there.

DE

## TERM S. MICHAELIS, 1711:

IN CURIA CANCELLARIÆ.

STAPLETON *versus* CHEELE.

CASE 600.

Eq. Ca. Ab.

295. pl. 4.

Pre. Ch. 317.

S. C.

A legacy devised to *J. S.* when of the age of *sixteen*, and interest in the meantime.

*J. S.* dies before *sixteen*. The legacy vested, and shall go to the executors of *J. S.*

A LEGACY of 50*l.* devised to *J. S.* when of the age of *sixteen*, and interest in the mean time, to be paid quarterly. *J. S.* died before *sixteen*; yet adjudged it was a legacy vested, because it carried interest; and so it was adjudged in the case of *Clobury* and *Lampen*, reported in 2 *Vent.* 342. (1)

(1) Reg. Lib. 1711, *B.* fol. 115. ante p. 424. and cases cited in not. 2 *Freem.* 24. S. C. On this point, vide there respectively. [*Knight v. Knight*, *Pawlett v. Pawlett*, ante 1 vol. 321. 2 S & S. 490.]  
*Anon.* ante 199. *Jackson v. Farrand*,

CASE 601.

Nov. 30.

WINGFIELD *versus* ALKINSON, & A<sup>r</sup>.

One by his will gives his next of kin, being his nephews, an express legacy, and gives 100*l.* a-piece to his two executors, and makes no disposition of the surplus. Post case 645.

IN 1710 *John Rudder* gave to the plaintiff, his sister's son, and to his nephews, sons of his brother, 100*l.* a-piece, being in truth his next of kin, and makes the defendant *Alkinson* and *Myres* executors, and gave them 100*l.* a-piece, (2) they being not of kindred to the testator.

The question was, whether the executors, or next of kin should have the surplus. (3)

(2) 10*l.* a-piece for mourning, R. L.

(3) Parol evidence was admitted, and the decree was, "Whereupon, &c. and on reading the will and the proofs taken in the cause, his Lordship declared that there is no express or implied trust by the said will in the said ex-

ecutors, and that the 10*l.* given to each of the said executors for mourning, is not a beneficial legacy whereby to exclude them from the benefit of the surplus of the said estate," and the bill was dismissed without costs. Reg. Lib. 1711. *B.* fol. 89.



The cases cited were the Duchess of *Beaufort*, (1) *Smith and Ball*, (2) *Wicket and Jones*, and *Littlebury and Buckley*, (3) which was first heard in the *Mayor's Court*, and the surplus there decreed to the next of kin: and upon an appeal to the *House of Peers*, the executors were admitted to read witnesses, to prove the testator intended them the surplus; (4) and upon that foot the Lords reversed the decree.

WINGFIELD v.  
ALKINSON.

(1) Ante p. 648. 1 P. Wms. 114.

(2) Post next case.

(3) 8 Vin. Ab. 194. 1 Bro. P. C. 340.

(4) [See note to *Fane v. Fane*, ante, 1 vol. 30.]

DE

[ 675 ]

## TERM. S. HILLARII, 1711.

## IN CURIA CANCELLARÆ.

BALL *versus* SMITH.

CASE 602.  
Eq. Ca. Ab.  
245. pl. 11.  
S. C.  
Ant. Ca. 562.  
The wife of the  
testator is  
made executor,  
and no devise  
of the surplus,  
nor any ex-  
press legacy to  
wife, except  
what she had  
as executor of  
her former  
husband, and  
some things  
she had before  
her marriage.

THE defendant Mrs. *Smith* was executrix of Mr. *Atkins* her former husband, and after married Mr. *Smith*, who, by his will in 1686, devised to his wife, the defendant, the plate and goods she brought him in marriage, and two silver salvers in lieu of the plate that had been changed away; and made the defendant his wife executrix, and died, leaving a daughter by a former wife, (who married Mr. *Ball* the plaintiff,) and the defendant his wife *enseint* of a daughter; and there being no devise of the surplus of the personal estate to the wife; the question was, whether she should take it as executrix to her own use, or liable to a distribution.

Decreed the surplus to the wife, and that it should not be distributed among the next of kin.

For the plaintiff it was insisted, that the surplus ought to be distributed according to the rule given in the case of *Foster and Mount*, (1) and many other subsequent cases.

(1) Ante 1 vol. p 473. quod vide, and cases cited in not. there.

BALL v.  
SMITH.

The *Lord Keeper* inclined to decree the surplus to the wife, as well for that this will was made before the case of *Foster and Mount*, as also for that in this case nothing is devised to the wife, but what was her own before; and as she was executrix to Mr. *Atkins* her former husband; but principally because where a wife is made executrix, it is to be presumed she was not made so to have barely an office of trouble, but of benefit to take the surplus.

His Lordship directed to be attended with precedents; and being accordingly attended with precedents; as to the case of *Foster and Mount*, he, having perused the will, pleadings and decree, observed, that although there was a charge in the bill, that the will was unduly obtained; yet the proof failed; no such thing was made out by proof; but the executors having 10*l.* a-piece for their care and trouble, and being strangers, and the surplus of the estate being considerable, the Lord Chancellor *Jefferies* sent it to a Master to certify the value; and it appearing to be 5000*l.* when it came back upon the report he decreed it to be distributed.

*First*, because the devise of 10*l.* a-piece to the executors for care and pains, seemed to imply a trust as to the residue.

And *secondly*, the executors being strangers to the testator, he could not intend them a surplus of 5000*l.* when he had given them legacies of 10*l.* a-piece; but withal observed, that the next of kin were his two daughters, both before that time married, and to which he gave legacies of 200*l.* a-piece; and therefore the precedent comes not up to this case where the wife, and not strangers, is executrix.

Other precedents produced were *Cook and Walker*, where *Penelope Lane* by will 29th May, 1691, made the defendant *Walker* her executor, to whom she gave 20*l.* for mourning, he not of kin, but a stranger, 7 *Annæ*. Distribution decreed.

*Darwell and Bennet*. Mr. *Darwell* by will 3d Dec. 1692, gave 100*l.* legacy, and the interest of 300*l.* to his wife for her life, and made her and the defendants *Bennet* and *Burroughs* executors; to *Williams* he gave 20*l.* for mourning, 19th July, 7 *Annæ Reginae*. Surplus decreed to be distributed.

*Ward and Lane*. Where *Andrew Lane* had made his wife executor, he living twenty years after the will, and acquiring an estate. 10 Jan. 13 Will. 3. Surplus decreed to be distributed.

Ante. Ca. 573.  
nom. *Bristol v.*  
*Hungerford*.

*Hungerford and Reppington*. Lands devised to be sold; surplus, if any, to be deemed part of his personal estate; and the testator having devised 100*l.* a-piece to his executors, sur-

plus decreed a trust. Q. Whether for the next of kin, or for the heirs at law?

BALL v.  
SMITH.

On the other hand were cited the cases of Lady *Granville* Ant. Ca. 578. and Duchess of *Beaufort*. The use of the table-plate to the Duchess for life, and after to his grandson: the Duchess made executrix. Lord Chancellor *Cowper* decreed a distribution; the distribution reversed in the *House of Peers*, (1) and the surplus decreed to the *Duchess* as executrix.

*Littlebury* and *Buckley*. (2) Where one not of kin, but a stranger, made executor, and had considerable legacies given to him: his *two* brothers, plaintiffs in the *Mayor's Court*. Decreed by Sir *Peter King* the *Recorder* that the surplus should be distributed. But upon an appeal to the *House of Peers*, that decree was reversed, not barely as it stood upon the will, but that parol proof ought to be received in favour of the executor's title, consistent with the will: and the proof being in full as to the testator's frequent declarations, that his executor, though a stranger, should have the surplus, and that his brothers should not have it: it was decreed accordingly for the executor.

[ 678 ]

*Lord Keeper*. There being but *that* one single instance of *Ward* and *Lane*, where the wife was executrix, that she hath been excluded from taking the surplus, the case of *Darwell* and *Bennet*, where *two* strangers were made executors with the wife, not coming up to the case; decreed the surplus to the wife, with this declaration, that he hoped the case would not rest here; but for settling of this point, receive the judgment of the *House of Peers*: and withal he was content it should be admitted in this case, that the defendant Mrs. *Smith* was not intitled to the goods and plate, as executrix to Mr. *Atkins* her former husband; but as a legacy given to her by Mr. *Smith* the testator. (3)

(1) [1 Bro. P. C. p. 305.]

(2) 8 Vin. Ab. 194. 1 Bro. P. C. 340. S. C.

(3) Vide preceding case and note there. By entries Reg. Lib. 1698. A.

fol. 241, 1708. A. fol. 243, 1711. A.

fol. 65S. it appears that a decree and rehearing were had in a cause of this

name, but the above-stated point does not appear.

CASE 603.

Jan. 24.

LORD

CHANCELLOR.

Eq. Ca. Ab.

278 pl. 4. S. P.

Sales at great under-value from one that was afterwards a lunatic, set aside; but the conveyances to stand a security for what was really paid.

ADDISON per Committee *versus* DAWSON, MASCALL & Al'.

*ADDISON* by a *first* and *second* inquisition was found a lunatic in 1706, from the year 1689, (1) when he had a fall, without any intervals. The defendant had got a mortgage, and at last an absolute purchase at great undervalue, by deeds, fines, and recoveries, and a considerable sum was paid into *Mascall's* hands, who pretended to have stated an account, but had not made any proof. The defendants insisted on a trial at law; but the Court set aside the purchases and stated account, and the defendant (2) decreed to be allowed, what he should prove he had paid for the use and benefit of the lunatic. (3)

(1) 1697. R. L.

(2) *Mascall*.

(3) *Mascall* had been the lunatic's solicitor, and had gotten him into his power, and kept him from his friends, and, whilst in this situation, *Dawson* obtained the purchase above-mentioned, and then sold to others of the defendants—*Mascall* by his answer stated that *Addison* was not a lunatic, that the first inquisition was set aside, and the second obtained unduly; and that he and *Addison* had come to an account, and that he had paid the balance, but confessed he had not any release. Reg. Lib. 1711. A. fol. 326. Vide in the lunacy of Mr. *Roberts*, 3 Atk. 308, 310, observation at the bar,

and by *Hardwicke*, Lord Chancellor, on the principal case, who is reported to say, "In that case, (*i. e.* the principal case,) there was a fine, and therefore the lunatic was bound, as it must be supposed, when he was examined with regard to the fine by the judge, that he was capable of levying." See vide the decree in the principal case, and the case of *Clerk v. Clerk*, ante p. 412, where it seems upon a settlement by deed and fine, as though the Court meant that settlement to stand, only in case it was executed in a lucid interval, as it directed an issue. As to will made by lunatic, *Sackvill v. Ayleworth*, ante 1 vol. p. 105.

[ 679 ]

GREENHILL *versus* GREENHILL.

CASE 604.

Eq. Ca. Ab.

174. pl. 4. S. C.

Pre. Ch. 320.

S. C.

A. articles to purchase lands in trust for B. and

before any conveyance made, B. by will directed all his freehold estate to be settled on C. and his first son, &c. The lands articted for will pass by the will.

MR. *Greenhill* the testator employed one *Young* to article for the purchase of lands, part whereof lay in *Cornwall*, and are called customary lands, and although they pass by lease and release, yet by the custom of the County *Palatine of Cornwall*, they cannot be devised without a surrender.

The articles were made in *April*, the consideration-money paid, and conveyance to be executed at *Michaelmas* then next following. In *June* the testator made his will, and devised the residue of his personal estate, after debts and legacies paid, to be laid out in land; and the lands so to be purchased, together

with his freehold estate, to be settled on the plaintiff and his first son, &c. GREENHILL v.  
GREENHILL.

The testator afterwards at *Michaelmas* entered, and paid the consideration-money, and in *Michaelmas*, 1707, conveyances were perfected, an Act of Parliament being found necessary, and died, leaving the defendant, and the plaintiff's mother, his daughters and co-heirs.

The question was, whether the land thus contracted for, especially the customary lands, passed by this will.

Decreed for the plaintiffs, and confirmed upon a rehearing. (1)

*First.* That the articles being made in *April*, 1706, and the will in *June* following, although possession was not to be given till *Michaelmas* following, it was such an interest as was devisable, and well passed by the will. That the words were sufficient; all the residue of his personal estate to be invested in land, and together with his freehold estate to be settled. The freehold estate was mentioned only in contradistinction to his personal estate. Whether real or personal, the whole intended for the plaintiff. [ 680 ]

*Objection.—First.* The articles were in *Young's* name; and *Young* made no declaration of trust in writing.

*Secondly.* The estate of feme covert.

*Thirdly.* No surrender of the customary estate.

*Per Cur.* An equitable interest is as well devisable, as a legal estate. A future interest is devisable. No surrender wanting; because he had an equitable, and not the legal estate: (2) and *Young* having owned the trust, and the feme covert not opposing; but having submitted to, and conveyed according to the articles, these objections were not material.

Lands within the county palatine of Cornwall, by the custom cannot be devised without a surrender; yet one, who has an equitable interest only in such lands, may devise them without making a surrender.

The testator after the date of his will, having taken a conveyance to himself and his heirs. *A.* articles to purchase lands, and devises those lands, and afterwards they are conveyed to the testator and his heirs; whether this is a revocation.

*Q.* If it did not amount to a revocation. (3)

(1) And the principle of this case acknowledged in *Langford v. Pitt*, 2 P. Wms. 629.

(2) This seems to be clearly settled, vide *King v. King*, 3 P. Wms. 358, and cases cited in not. p. 360. there.

(3) This question must be decided by the principle on which revocation stands, namely, that the estate must remain in the same plight, and unaltered at the testator's death, as it was

in at the time of executing the will, *Sparrow v. Hardcastle*, 3 Atk. 798, 803. But by the report of the case in Pre. Ch. 320, the conveyance was to *Young*. [A devise of an equitable estate is not revoked by the testator's acquiring the legal estate. *Watts v. Fullarton*, cited in *Doe v. Pott*, Douglas, 718. *Harmood v. Oglander*, 6 Ves. 203, 220. 8 Ves. 126.]

CASE 605.  
Pre. Ch. 151.

S. C.  
Eq. Ca. Ab.  
219. pl. 5. S.P.

Whether a  
dowress shall  
be relieved in  
equity against  
a term for years.

Dame ELLEN WILLIAMS *versus* Sir BOWCHER WRAY.

SIR Griffith Williams by settlement was tenant for life, remainder to his son Sir William Williams in tail, with power to grant a term of ninety-nine years, of lands within five parishes.

[ 681 ]

In a bill by Sir Bowcher Wray to set aside the *ninety-nine* years term, made of the lands in *five* parishes: it was decreed, by the Lord Keeper Wright, that ejectments should be brought upon the term of *ninety-nine* years, and consequently the widow would be evicted of dower.

Now upon a bill of review, the cases cited for the plaintiff were *Ball's* case, (1) where the inheritance was in trustees for payment of debts; yet decreed the husband should be *tenant per courtesy*.

*Worthington* and *Fletcher*. Tenant by courtesy decreed of a trust. (2)

Lady *Dudley's* case at the *Rolls*. (3)

*Sweetapple's* case. (4) The money to be laid out in land.

(1) *Watts v. Ball*, 1 P. Wms. 108, S. C.

(2) So the cases cited in note to *Sweetapple v. Bindon*, ante 536. Note. The case of *Worthington v. Fletcher*, here mentioned, is probably *Robinson v. Fletcher*, cited in Lady *Dudley's* case, Pre. Ch. 250, and more fully from the Register's book by Sir Joseph Jekyl, in *Banks v. Sutton*, 2 P. Wms.

710. This, however, was a case of *Dower* out of trust estate.

(3) *Lord Dudley and Ward v. Lady Dudley*, Pre. Ch. 241.

(4) *Sweetapple v. Bindon*, ante 536. Quod vide, and cases cited in not. there for the doctrine on courtesy. As to the principal case, vide note to *Wray v. Lady Williams*, ante p. 378. 1 P. Wms. 137.

CASE 606.  
Feb. 22.

Eq. Ca. Ab.  
302. pl. 2.  
Gilb. Eq. Rep.  
82. S. C.

One devises  
500*l.* viz. 400*l.*  
due on bond,

and 100*l.* in money; afterwards the testator receives part of the 400*l.* and takes a bond for the other part. This is no ademption of the legacy.

ORM *versus* SMITH.

I GIVE my uncle Orm 500*l.* viz. the bond and judgment about 400*l.* due to me from A. and 100*l.* in money. The testator lived to receive 370*l.* and took a new bond for 80*l.* other part and died.

*Swinburne* 7 part, ch. 20. fol. 447.

*Pawlet's* case, *Raymond's Reports*, 335.



A devise of 500*l.* *J. S.* owed him, the testator lived to receive the 500*l.* ORMV. SMITH.

*Elliot and Davenport.*

Decree for the 500*l.* legacy. (5)

Ant. Case 472.

(5) Together with costs. It appeared that the testator had been under great obligations to the plaintiff, his uncle, for his education, and by the answer that by his will he ordered that if by any casualty the plaintiff should

be reduced to necessity, the defendant should support him like a gentleman. Reg. Lib. 1711. *B.* fol. 212. Vide on this point, note to *Husbands v. Husbands*, ante 1 vol. p. 95.

### BELLASIS & Ux' *versus* CHURCHILL and CASTLE.

[ 682 ]

CASE 607.

Feb. 25.

LORD

KEEPER.

Eq. Ca. Ab. 6.

pl. 8. S. C.

An administrator of a

BILLS by the plaintiff as administratrix to her brother, captain of a company in Colonel *Churchill's* regiment of marines, for an account of his personal pay, and the pay of his servants, and the pay of the company. (1)

captain of a company of marines is intitled to an account, as well of the pay of the company, as of the personal pay of the captain, and of his servants.

The defendant Colonel *Churchill*, and his agent, the defendant *Castle*, insisted, that the plaintiff was only intitled to an account of the Captain's personal pay, and pay of his men, and not for the pay of the company; although they seemed to admit, that a captain for land-service was to recruit his company, but would have it there was a difference, where he was a captain of marines; or if the captain may be intitled, yet his administrator was not. (2) *Sed non allocatur.*

Decreed the defendants to account, as well for pay of the company, as for the captain's personal pay, and pay of his servants. (3)

(1) And of all respite-money and levy-money due to the intestate at the time of his death. R. L.

(2) "Because the men in the marines are dispersed into so many different ships that it is not usual to entrust the captains with their pay without the direction or leave of the colonel." R. L.

(3) And all respite and levy money, together with costs; and the plaintiffs to indemnify the defendants against all demands of the said company, in respect of any pay which became due to the soldiers after the time in the pleadings mentioned. Reg. Lib. 1711. *A.* fol. 319.

DE

## TERM. S. TRINITATIS, 1712.

IN CURIA CANCELLARIÆ.



Case 608.  
May 30.  
Eq. Ca. Ab.  
70. pl. 13. S. C.  
Husband lends  
out money  
in the names  
of himself and  
his wife, upon  
mortgages and  
bonds, and  
dies. The wife  
is intitled to  
this by sur-  
vivorship, if  
there are as-  
sets sufficient  
without this  
money to pay  
debts.

CHRIST'S HOSPITAL *versus* BUDGIN & Ux'.

**THOMAS GARRAWAY'S** personal estate being decreed to be applied to the payment of debts and legacies in case of his real estate, which by his will was made liable thereto; upon the account before the master, his widow and executrix, now the wife of the defendant *Budgin*, insisted, that several mortgages and bonds for money lent by her husband, being taken in the name of the husband and wife, she was entitled thereto as survivor, and the same ought not to be brought into the account, as part of the personal estate; and the master having stated *that* matter specially,

For the heirs it was insisted, that the wife was but in the nature of a trustee, the money being the husband's; and if paid in the life of the husband, it would have fallen into his personal estate again, and he not accountable to the wife; (1) and if this should not be liable to debts, the husband, by joining his wife in the security, might defraud all his creditors; and cited the case of *Gatley and Quarrel*, where Lord *Cowper* adjudged it against the wife, to be assets of the husband, and liable even to legacies.

But the *Lord Keeper* looked upon the wife to be in the nature of a joint purchaser, and decreed it for the defendant against the heirs at law; but admitted in case of creditors it might be fraudulent; but there being sufficient assets, besides the 4000*l.* in question, to pay all the debts and legacies, decreed the 4000*l.* to the defendant *Budgin*, as administrator to his wife. (2)

(1) Vide *Kingdon v. Bridges*, ante p. 67, where *per cur.* "The wife cannot be a trustee for the husband."

(2) This case seems to come within the principle that influences the deci-

sions on voluntary settlement on wife, *Stileman v. Ashdown*, 2 Atk. 477, 481, and for the doctrine on which, vide the cases cited in not. to *Fletcher v. Sedley*, ante 490, 1.

KIRSLEY & Al'. *versus* DUCK & Ux'.

CASE 609.

May 31.

A MAN possessed of land for a term of *two thousand* years, in 1671, (3) grants the land to *Duck* and his wife, (without mentioning any term,) to the use of *Kirsley* (4) for life, and to the heirs of his body; and in default of issue, to the use and behoof of *Duck* for *one thousand eight hundred* years. (5)

One possessed of a term for 2000 years in land, grants the land to *A.* without mentioning any term. It is void for uncertainty.

The question was, whether the limitation to *Duck* was good.

It was agreed the *first* limitation void for uncertainty, it mentioning to grant to *Duck & ux'*, and not saying for what estate or term. (6)

But for the defendant it was insisted that the limitation to *Duck* and his wife, in default of issue of *Kirsley* for *one thousand eight hundred* years, was a good limitation, as an *interesse termini*. A man may grant a term \*to commence upon failure of issue, or expectant on an estate-tail.

One seised in fee may create a term for years, to commence after his death without issue; but one possessed of a term for 2000 years, cannot out of that term carve a future term to commence after the determination of an estate in tail.

To which it was answered, that a man may carve such term out of his inheritance; but one that is possessed only of a term for years, cannot carve any future term out of his term for years to commence after the determination of an estate-tail.

[ \*685 ]

*First.* Because such an estate-tail, is deemed a greater and more durable estate.

*Secondly.* It would create a perpetuity, not to be barred by any common recovery. (7)

(3) "In consideration of 100*l.* truly paid, and of natural love and affection." R. L.

(4) "The grantor." R. L.

(5) The remainder of the said term of 2000 years at a yearly rent. R. L.

(6) If termor grants the land, the grantee is but tenant at will; contra, if

he devise it, the whole term passes, *Germain & ux.' v. Orchard*, 1 Salk. 346.

(7) A trial at law in ejectment was ordered; but by the statement in the Register's book the question above does not appear to have been argued. Reg. Lib. 1711. A. fol. 641.

TURNER & Ux'. *versus* JENNINGS and LONGLAND.

CASE 610.

June 16, 1708.

Eq. Ca. Ab. 152.

pl. 6. S. C.

A freeman of London having one daughter and

*JOHN LONGLAND*, a master carpenter at *Pauls*, being a freeman of *London*, had issue a son and a daughter; his son dying and leaving *three* children, he in *July*, 1706, by deed

three grandchildren by a deceased son, by deed assigns over several leases, in trust to pay any sum not exceeding 1000*l.* as he should appoint; he appoints 500*l.* to his daughter, and the residue to the grandchildren. This is in fraud of the custom, and void as to the moiety, which the daughter is intitled to.

TURNER v.  
LONGLAND.

assigned over several leasehold estates to the defendant *Jennings*, on trust to sell and to pay any sum not exceeding 1000*l.* as he should appoint; and by deed and will appointed 500*l.* to his daughter, and the residue to his grandchildren.

Decreed to be set aside, as to a moiety, which the daughter by the custom, as only surviving child, was intitled to as being in fraud of the custom. (1)

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(1) Vide *Hall v. Hall*, ante p. 277, and cases cited in not. there.

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[ 686 ]

CASE 611.

LORD  
KEEPER.

June 16, 1708.

Eq. Ca. Ab. 202.

pl. 22. S. C.

*A.* devises

lands to his

son and his

heirs: and if

his son dies

without issue,

then 200*l.* to

his daughter.

Son leaves is-

sue, which dies

*JOHN JACKSON*, 14th *March*, 1693, devised his estate at *A.* to *Mary* his wife for life, and after her decease to his son *Thomas*, his heirs and assigns for ever. Provided if *Thomas* died without issue of his body; then he bequeathed unto his daughters *Mary Nicholls* and *Elizabeth Newman* 200*l.* to be divided equally between them, and to be paid out of his estate within six months after the decease of the survivor of the wife and son.

Son leaves issue, which dies without issue. The 200*l.* not due.

*Mary* the widow died, *Thomas* the son also died, leaving issue *I. S.* who died within three months after the father.

The bill was to have the 200*l.*

*Per Cur.* Although in some cases a man is said to die without issue, whenever there is a failure of issue, as to the limitation over of lands of inheritance; yet in this case the 200*l.* as a personal legacy, was not intended to arise upon any remoter contingency, than that of *Thomas* dying without issue living at his death, and therefore dismissed the bill. (2)

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(2) Vide 1 P. Wms. 198. S. C. and particularly note (3) p. 200; and as to the construction of the words "*dying without issue*," &c. [*Deering v. Hanbury*, ante, 1 vol. 478.] *Pawlett v. Dogget*, ante p. 88, and cases cited in not. there.

DE  
TERM. S. HILLARII, 1713.

IN CURIA CANCELLARIÆ.

ELIZABETH ACKLAND, Widow of JOHN ACKLAND,  
deceased, *versus* RICH. ACKLAND & Ux'. & Al'.

CASE 612.  
Eq. Ca. Ab. 177.  
pl. 14. S. C.  
*A.* devises to  
his brother *B.*  
all his lands  
and heredita-  
ments, and all  
his personal  
estate, desir-  
ing him to pay  
his debts and  
legacies. A fee passes.

*ARTHUR ACKLAND* by will devised to his brother *Richard*, all his lands, tenements, and hereditaments, and all his personal estate, and whatever else he had in the world, and made him executor, desiring him to pay his debts and legacies.

On a *special verdict* in *communi banco*, adjudged the inheritance passed by this devise: *Richard Ackland*, the devisee, was the testator's younger brother; and *John* his eldest brother left a daughter. (1).

(1) Vide on this point note to *Hook v. Taylor*, ante p. 562. Et vide the doctrine of the principal case recognized in *Tanner v. Wise*, 3 P. Wms. 295, 297. The above statement, however, does not quite accord with that in the Register's book, the case was shortly as follows:—A marriage being agreed upon between the plaintiff *Elizabeth Ackland* and *John Ackland* the younger, a nephew of the testator *Arthur Ackland*, who had no children of his own; the said *Arthur Ackland*, in consideration of such marriage, 10th August, 1687, entered into a bond in 2000*l.* penalty to *John Vincent*, the plaintiff's father, with a condition to be void if the said *Arthur Ackland* or his heirs, in a year after his death, charged such of his lands as were proportionate to the charge, with the payment of an annuity of 100*l.* payable quarterly to the said *Vincent* and his heirs, for the use

of the said *John Ackland* the younger, for his life, to take effect from the decease of the said *Arthur Ackland*; and after the death of the said *John Ackland*, though the said *Arthur* should survive, to the use of the said plaintiff *Elizabeth*, for her life, if she should be the widow of the said *John Ackland*, with other remainders over. The marriage took effect, and had issue the plaintiff.—*John Ackland* the husband died in 1690, and *Arthur* paid the annuity to *Elizabeth* the plaintiff, till his death, which happened about a year after; and by his will, 4th January, 1690, devised all his lands, except as therein is excepted, and all his personal estate to his brother *Richard Ackland*, father of the defendant *Richard Ackland*, he paying and securing all his debts and legacies; and of his said will made the said *Richard Ackland*, the father, sole executor. *Richard Ack-*

land, the father, proved the will, and entered upon the testator's real estate, and possessed himself of the personal, and paid the annuity to plaintiff, without deducting taxes, till his death 1704; he having made his will, and the defendant *Richard Ackland* his executor, whom he also left his heir, and who entered upon the real and personal estate of the said *Arthur Ackland* left unadministered by his father *Richard*: and the bill was for an account of the arrears of the annuity of 100*l.* and of the real and personal estate of the testator *Arthur Ackland*, unadministered, and the personal estate of *Richard Ackland*, the father; and to have the arrears paid and the growing payments of the said annuity secured, either out the said real or personal estate. The defendants stated a settlement made on the marriage of defendants *Richard Ackland* and his wife, of all the lands so devised by *Arthur Ackland*, and denied notice of the bond, and claimed to hold the lands exempt from payment of the said annuity, which they insisted ought to be paid out of the personal estate of *Arthur Ackland*, there having been judgment on a special verdict in the *Common Pleas* that the devise, as above, was a devise in fee; the defendants *Richard Ackland* and his wife then submit by their answer to pay the arrears and growing payments of the annuity, deducting taxes, and admit assets for plaintiff's demand. The decree was, "Whereupon, &c. this Court declared that the said annuity or rent-charge of 100*l. per annum*, ought to be secured to the plaintiff, and to the defendant *Elizabeth Ackland*, her daughter, according to the intent of the agreement mentioned in the condition of the bond entered into by the said *Arthur Ackland*, deceased, dated 10th August, 1687; and that a sufficient part of the lands of

"the said *Arthur Ackland* devised by his will to *Richard Ackland*, ought to stand charged therewith, unless the said *Richard Ackland*, the defendant, shall pay the arrears of the said annuity to the plaintiff, deducting taxes, and bring the sum of 2000*l.* before one of the Masters of this Court to exonerate his estate from that demand; the said 2000*l.* to be placed out at interest, and the interest thereof to be paid to the plaintiff during her life, in full satisfaction of the said annuity; and after her decease the said principal sum of 2000*l.* is to go to the defendant *Elizabeth Ackland*, the daughter of the said plaintiff, for her own use," (she having been declared by the decree tenant in tail of the said annuity, under the limitation which is not stated in the pleadings,) "and in default of the said defendant *Richard Ackland* paying the said arrears of the said annuity which the said Master shall certify to be due, and bringing the sum of 2000*l.* before the said Master, within three months, it is further ordered and decreed that the estate of the said *Arthur Ackland*, devised as aforesaid, do stand charged with the arrears and growing payments of the said annuity, which arrears and growing payments are to be paid to the plaintiff during her life; and after her decease the said annuity or rent-charge of 100*l.* is to be paid to the defendant *Elizabeth*, and the heirs of her body; and the said Master is to set apart 200*l. per annum*, of the estate so devised by the said *Arthur Ackland*, to answer the arrears and growing payments of the said 100*l. per annum.*" The defendant *Richard Ackland* to pay the costs both of plaintiff and what plaintiff should pay to defendant *Elizabeth Ackland*. Reg. Lib. 1713. A. fol. 262.



DE  
TERM S. MICHAELIS, 1714.  
IN CURIA CANCELLARIÆ.

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SAYER *versus* SAYER.

**J. S.** by will devises to his wife, the defendant, all his personal estate at a place called *Wouston*, and devised to the plaintiff a legacy of 500*l.* and several other legacies; and assets proved deficient.

CASE 613.  
Eq. Ca. Ab.  
200. pl. 9. 298.  
pl. 1. Pre. Ch.  
392. Gilb. Eq.  
Rep. 87. S. C.  
One devises to

his wife all his personal estate at *W.*, this is a specific legacy, and to be preferred to pecuniary legacies, in case of deficiency of assets. All the testator's personal estate that was at *W.* at his death shall pass, though not there at the making the will.

*Per Cur.* The defendant's legacy is a specific legacy, and therefore to take place, although there be a defect of assets for payment of money legacies. (1)

And as to what passes by the devise, the *Chancellor* declared the general words of all his personal estate at *Wouston* will pass whatever personal estate he had there at the time of his death; the personal estate being fluctuating and varying until the time of the testator's death; and therefore what he died possessed of, passes, and not what he had at the time of the making the will. The legacy is to respect the time of his death. Coaches, horses, and whatever he had at *Wouston* will pass. (2) [ 689 ]

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(1) So *Webb v. Webb*, ante p. 111. 538, and cases cited in note there. *Note.* and further on this point vide *Brown v. Allen*, ante 1 vol. 31, and cases cited in not. there. There is a long statement of a case in the Register's Book, *Sayer v. Sayer*, but the above point does not appear.

(2) *Gayre v. Gayre and North*, ante Reg. Lib. 1714. B. fol. 228.

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TATE *versus* AUSTIN.

**THE** wife joined with her husband in a fine to raise 400*l.* out of her own estate for the use of her husband, to equip him as an officer in the army.

CASE 614.  
Eq. Ca. Ab.  
62. pl. 5. S. C.  
The wife joins  
with her hus-  
band in a fine  
to raise 400*l.*

by mortgage of her own estate, to buy a place for her husband. Husband dies. The mortgage shall be paid out of the husband's personal estate, if there be enough to pay all his other debts.

TATE v.  
AUSTIN.

The question was, Whether the husband's personal estate shall be applied to exonerate the mortgage.

*Per Cur.* The wife subjects her estate to supply the wants of her husband ; it must be taken to be a debt due from the husband, and to be paid out of his personal estate, if he be able : but all other debts shall be first paid. (3)

(3) Affirmed in Dom. Proc. 1 Bro. P. C. 1. Vide 1 P. Wms. 264. S. C. where Mr. Cox, in a note, has given a full statement of the material part of the decree. Et vide *Pawlet v. Delaval*, 2 Vez. 663, 669. where per *Hardwicke*, Lord Chancellor, " There are several instances wherein wives concurred to pledge part of their separate property for a debt of the husband as a security ; the Court has never said that the security should not take place, but held it to stand, as a pledge indeed, and that the husband should exonerate." But although it appear to be clearly

settled that where a wife's estate is mortgaged for the benefit of the husband, she has a right to stand as a creditor, yet it is also held that this may be repelled by evidence to shew her intention to the contrary, *Clinton v. Hooper*, 3 Bro. Ch. Rep. 201. in which the doctrine and cases are stated and considered, and the rule laid down by *Thurlow*, Lord Chancellor, that the title of the wife to be exonerated is precisely the same with that of the heir. Et vide *Rayson v. Sacheverel*, ante 1 vol. p. 41, and note there. [*Innes v. Jackson*, 16 Ves. 356, 1 Bligh, 104. *Ruscombe v. Hare*, 6 Dow, 1.]

[ 690 ]

DE

## TERM. S. TRINITATIS, 1715.

IN CURIA CANCELLARIÆ.

CASE 615.

MARIA BEACHCROFT, Widow of NATHANIEL BEACHCROFT, deceased, *versus* BEACHCROFT.

LORD  
CHANCELLOR.

Eq. Ca. Ab.  
198. pl. 5. S. C.

*A.* begins his will with disposing of all his worldly

estate ; and then wills that all his debts be first paid, and gives his wife a moiety of what is left after his debts paid. The real estate is charged with the debts, and a fee in a moiety of the surplus of the real estate passes to the wife.

*NATHANIEL BEACHCROFT* by his will devised, viz. I do by this my will dispose of such worldly estate as it hath pleased God to bestow upon me ; first, I will that all my debts be paid and discharged ; and out of the remainder of my estate,

I give and bequeath unto my wife 300*l.* (1) My mind and will is, that my wife have one moiety of what is left after my debts paid. (2) *Item.* I give to my dear brother Sir *Robert Beachcroft* a close lying in the parish of *St. Peter* in *Derby*; and for the remaining part of my estate, as well real as personal, I give and bequeath unto my brother *Joseph Beachcroft*, whom I make executor.

BEACHCROFT  
v.  
BEACHCROFT.

The question was, whether a moiety of the real estate, after debts paid, passed to the wife, or only half of the personal estate; and the case of *Bowman* and *Milbank* was cited, where the words were, *I give all to my mother*, and adjudged that only the personal estate passed. (3)

1 Sid. 191.  
Raym. 97.

*Lord Chancellor.* My worldly estate comprises as well real, as personal. His worldly estate comprises all he had in the world. (4) Without doubt those words subjected his real estate to the payment of his debts, and consequently a devise of a moiety of what is left, after debts paid, must comprise all that was liable to the debts; and therefore decreed a moiety of the surplus of the real and personal estate to the wife. (5)

[ 691 ]

A devise of all  
a man's world-  
ly estate com-  
prises all he  
has in the  
world.

(1) Provided the testator's son-in-law, *William Vesey*, together with the plaintiff, gave security to his executor to keep him harmless from a bond entered into by the testator, for making a jointure upon *Vesey's* wife, and that the plaintiff should bring in three bonds which she had from *William Johnson*, therein named, otherwise the said legacy of 300*l.* to be void. R. L.

give the plaintiff liberty to take all the goods belonging to the testator out of the house.

(3) As to the effect of the word "*all all*," in a *nuncupative* will before the statute of frauds, vide *Thraxton v. Attorney General*, ante 1 vol. 340.

(4) *Hook v. Taylor*, ante p. 561, and cases cited in note there.

(5) Reg. Lib. 1714. A. fol. 535.

(2) And that his executor should

### DEMAINBRAY *versus* METCALFE & A<sup>r</sup>.

CASE 616.  
June 27.

LORD  
CHANCELLOR.

PLAINTIFF pawned some jewels and plate to the defendant *Knight*, a goldsmith, for 110*l.* redeemable in *twelve* months. *Knight* in *two* days after pawns them to the defendant *Metcalfe* for 200*l.* and after borrowed the further sums of 36*l.* and 50*l.* of *Metcalfe* on promissory notes, to be repaid on demand. *Knight* became a bankrupt and insolvent.

One pawns  
jewels to A.  
and after bor-  
rows 50*l.* more  
of A. on a pro-  
missory note.  
He shall not  
redeem the  
Post Ca. 621.

jewels without paying also the money on the note.

Bill by the plaintiff to redeem from *Metcalfe*, who by answer insisted, that although he took promissory notes for repayment of the sums of 36*l.* and 50*l.* upon demand; yet it was agreed at the same time that the pawn should also remain as a security for those sums, as well as for the money before lent; but no

DEMAINBRAY  
v. METCALFE.

person was then present, therefore he could not prove the agreement.

*Lord Chancellor* said, It was natural to suppose, that although *Metcalf* took promissory notes, yet his having a pawn in his hands of greater value might be the inducement to him to lend, and took time to consider of it; and at last decreed that the plaintiff must pay, as well the 36*l.* and 50*l.* as other monies due. *Q. tamen.*

[ 692 ]

CASE 617.

LORD  
CHANCELLOR.

July 3.

Eq. Ca. Ab.

44. pl. 4. S. P.

An assignee of  
a bond must  
take it subject  
to the same  
equity, as it  
was in the ob-  
ligee's hands.

### COLES *versus* JONES and COLES.

*JONES* gave bond to the defendant *Coles* in 250*l.* for payment of 120*l.*; the defendant assigns that bond to the plaintiff, in satisfaction of a debt of 56*l.* and to indemnify him against a bond, he was bound in, as surety for the defendant *Coles*; and at the same time the plaintiff *Coles* gave a note to the defendant to indemnify him against a debt of 50*l.* to *Jewel*, in which the defendant *Coles* was bound as surety for the plaintiff. (1)

*Lord Chancellor* decreed the plaintiff to have the benefit of the bond, and thereout to discount the debt to *Jewel*, the note being (as he said) in the nature of a defeazance to the bond; and although the assignee comes in upon a full and valuable consideration; yet he must take the bond subject to the same equity, as it was in the obligee's hands. (2)

(1) The defendant, *Jones* had been bound with the defendant *Coles* to *Jewel* for the 50*l.* and the note in question was given by the defendant *Coles* to *Jones* (and not by the plaintiff to defendant *Coles*) to indemnify him against that debt, and the decree as in the printed report. Reg. Lib. 1714. A. fol. 564.

(2) So *Turton v. Benson*, post. 764. *Hill v. Caillovel*, 1 Vez. 122. [*Pridy v. Rose*, 2 Mer. 86.] But length of time and circumstances may vary that, and make the case of the assignee stronger, *Hill v. Caillovel*, ub. sup. per *Hardwieke*, Lord Chancellor. So a bond given for a general purpose of raising money, and deposited by obligee as a security, shall be liable to the obligee's debt, *Cator v. Burke*, 1 Bro. Ch. Rep. 434. But the assignment of a bond can in no case, it should

seem, convey a legal right to the assignee; e. g. he cannot petition for a commission of bankrupt, for he is not a legal creditor, *ex parte Lee*, 1 P. Wms. 782, and a commission was superseded, because grounded on such a debt, *Medlicott's case*, 2 Stra. 899. W. Kel. 6. S. C. As to the sufficiency of the assignee of a bond to sustain a suit, it should seem that in all cases where it is necessary to ascertain that the obligee has not received any part of the money secured by the bond, there the obligee or his representative must be a party, *Brace v. Harrington*, 2 Atk. 235. So where motion for *ne exeat regno* against the obligor, *Thurlow*, Lord Chancellor, refused to grant it, because the suit, without a representative of the original obligee in the bond, must be dismissed for want of parties. *Ray v. Fenwick*, 3 Bro. Ch. Rep. 25.

BASSE *versus* GRAY, Bart.

CASE 618.  
LORD  
CHANCELLOR.  
July 5.  
Eq. Ca. Ab.  
362. pl. 16.  
Gilb. Eq. Rep.  
97. S. C.  
*A.* possessed  
of an exche-  
quer annuity  
for ninety-six  
years by mar-  
riage-articles  
covenants to  
pay it to the  
wife for her  
separate use,  
and then to  
the survivor  
of husband  
and wife for

THE defendant Sir *James Gray* on the marriage of *Elizabeth Jennings* (supposed to be his natural daughter), gave her 700*l.* portion, and having purchased an annuity in the *Exchequer* of 14*l. per ann.* for a term of *ninety-six* years, he by the marriage-articles covenanted to pay the 14*l. per ann.* to the intended wife during the coverture, for her separate maintenance, and that the survivor of them should have the 14*l. per ann.* for life, if the term should not sooner determine; \* and if the survivor died before the determination thereof, then the residue thereof to the child or children begotten between them; and in case there should be no such child or children, then the 14*l. per ann.* to be for the benefit of Sir *James Gray*.

life, and after to the children of the marriage, and if no child, then to be for the benefit of *A.* Husband and wife die leaving a child, who soon after dies. *A.* shall keep the annuity, and it shall not go to the administrator of the child.

[ \* 693 ]

The marriage took effect; *Basse* and his wife died leaving a son, who survived them for the space of *four* years, and then died, and the plaintiff took administration to him.

The question was, to whom the residue of the term belonged; whether to the plaintiff as administrator to *Basse* the son, or to Sir *James Gray*.

For the plaintiff it was insisted, that the limitation to the wife during the coverture, and then to the survivor of husband and wife for life, and if a child, to such child or children begotten between them, was a disposition of the whole term, and would not admit of any further remainder over; being limited unto two persons for their lives, and the life of the survivor, and then to the child or children afterwards to be begotten; and especially since there was a child, (1) who survived father and mother; and the words seem to import that if there was a child or children, they were to have the residue of the term; but if no child to take, that is, a child living at the decease of the survivor of father or mother, then the defendant, Sir *James Gray*, to have the residue of the term; and if not so understood and limited, the remainder is void.

*Per Cur.* The defendant has not assigned the order, nor transferred the property, only covenanted to pay; and a court Difference between an actual assignment, and only a covenant to assign. The latter not to be carried in equity beyond the letter.

(1) There having been a child in the principal case must make a material difference, vide *Higgins v. Dowler*, ante p. 600, which seems to contain a principle contrary to that on which this case was decided.

BASSE v.  
GRAY.

of equity must not carry the covenant, (being a free gift) beyond the letter. (2)

*Quære tamen.* If that distinction be allowed, (3) settlements of terms hereafter will be done by way of covenant, with such remainders over, as cannot be done by way of limitation of an estate or of a trust. (4)

(2) The words of the decree are :  
 “ Whereupon, &c. his Lordship was of  
 “ opinion, that by the deed ” (mean-  
 “ ing the marriage-articles) “ the pro-  
 “ perty in the annuity, was vested in  
 “ the defendant, Sir *James Gray*, for  
 “ it was the intention of the parties  
 “ to that deed, that it should be so,  
 “ there being no notice taken of the  
 “ tally and order, but only a covenant  
 “ for the annual payment of the an-  
 “ nuity, which was commenced, in  
 “ order to prevent the disposing of it,  
 “ so as the defendant, Sir *James Gray*,  
 “ might have a hand over it, if there  
 “ should be a failure of issue of that  
 “ marriage. and the words in the deed  
 “ would not have carried it to the de-  
 “ fendant, had not the property been  
 “ still in him ; but he having the legal

“ property in him, it ought not to be  
 “ taken from him by a Court of  
 “ Equity.” Bill dismissed except as  
 to arrears, during the life of the son,  
 which defendant was to pay. No costs.  
 Reg. Lib. 1714, A. fol. 576. Nor will  
 equity, in any case, decree a specific  
 execution of a voluntary agreement,  
*Brownsmith v. Gilborne*, 2 Stra. 739.  
 Vide *Ayliffe v. Mr. Just. Tracy*, 2 P.  
 Wms. 65. [*Metcalf v. Pulvertoft*, 18  
 Ves. 99.]

(3) And thought at the bar to be an  
 over nice distinction. Eq. Ca. Ab. ub.  
 sup.

(4) Vide the same mode of reason-  
 ing urged in regard to perpetuities,  
*Duke of Norfolk v. Howard*, ante 1  
 vol. 164.

CASE 619.  
Aug. 6.  
LORD  
CHANCELLOR.

Sir WILLIAM JOLLIFFE *versus* PITT and WHISTLER.

THE plaintiff, Sir *William Jolliffe*, lent *Whistler* 4,500 dollars, on a note dated *Aug. 10*, 1689, to be repaid with interest, at 1l. per cent. per mensem, until repaid ; *Whistler*, then residing at *Tripoly* in *Turkey*, paid two years interest, but then failed, and went to *Fort St. George* in the *Indies*, and there acquired a considerable estate, and in *Feb. 1706*, died in the *East Indies*, and made the defendant *Pitt*, his executor. Sir *William Jolliffe* continued in *Turkey* till 1702, and on *April 30*, 1702, takes out a *latitat* against *Whistler*, and the same was continued on the Roll till 1706 ; at which time *Whistler* died in the *Indies*, and made Mr. *Pitt* his executor, who also then resided in the *Indies*. *October*, 1710, the defendant Mr. *Pitt*, *Whistler's* executor, came over to *England*, and proved the will ; and upon application made to him by the plaintiff he declared he was willing to apply the assets to the payment of his testator's debts. On *May 8*, 1714, the plaintiff filed his bill ; *Pitt*, the executor, submitted to do as the Court should direct ; but the



other creditors, who were made defendants, insisted the plaintiff was bound by the *Statute of Limitations*.

JOLLIFFE v.  
PITT.

*First.* It was agreed that the plaintiff being abroad, and not returning into *England* till 1702, and then bringing his *latitat*, and the same being continued on the roll to the time of the death of *Whistler*, all that time \* was well excused; and also until *Whistler's* will was proved, and there was an executor. The statute could not run upon a man whilst beyond sea. It is expressly excepted out of the statute, when the party, who has a right of action is beyond sea; nor can *laches* be attributed to him for not suing, while there was no executor against whom he could bring his action. But it was objected that the action which was so long depending, was the action which ought to have been revived, and he ought not to let the action fall, and bring a bill in equity, but *that* action ought to have been carried on, and the recovery ought to have been in that action.

If the creditor is beyond sea, the statute of limitation will not take place. So it is by the late statute of 4 & 5 Q. Ann. if the debtor is beyond sea.

[ \* 695 ]

Neither will the statute take place if there be no executor, until administration be taken out.

And as to the defendants, the creditors, who thought fit to insist on the *Statute of Limitations*, their demands were entirely barred; for although they were merchants, and the debts contracted in the way of trade; yet it appeared of their own shewing, their accounts were long since stated, and only open accounts were saved by the *Statute*. (1)

Merchants' accounts not within the statute. Otherwise if stated.

The *Lord Chancellor* inclined to be of opinion, that the *Statute of Limitations* was not to take place; and a dispute arising, whether the plaintiff should be intitled to *Turkish* interest, at 12 per cent. and for how long, whether until such time as the parties arrived in *England*, referred it to a Master to state the facts, and the *quantum* of the debts and assets; and reserved the further consideration of the case, until the account should be taken. (2)

If a creditor sues out a *latitat* against *J. S.* and continues it, and *J. S.* dies, the creditor may bring a bill in equity against the executor of *J. S.* and need not go on in the old ac-

tion, and statute of limitations no bar.

The time till *Whistler's* death being answered, and the executor being beyond sea, the *statute* of the 4th and 5th of the late *Queen* (3) took place, which saves the right of action, as well where the debtor is beyond sea, as where the creditor is beyond sea. (4)

(1) Vide *Scudemore v. White*, ante 1 vol. p. 456, and cases cited in not. there. *Webber v. Tivill*, 2 Saun. 124, and not. (6) p. 127. there. *Martin v. Delboe*, 1 Vent. 89. 1 Mod. 70, S. C.

(2) Vide *Anon.* ante 1 vol. p. 73, and cases cited in not. there.

(3) Cap. 16. sec. 19. Vide *Dupleix*

*v. De Roven*, ante 540, before the statute.

(4) It was referred to the Master to take an account of the testator's estate, and also of his debts, and of the proceedings of the creditors as to keeping up their demands, notwithstanding the statute of limitations, and to certify the

proportion each creditor was to have of the said estate. " But as to the plaintiff's demand upon the testator's note, the said Master is to compute Turkish interest for the same, according to the said note." Reg. Lib. 1714. A. fol. 474. The note was as follows: " I, the underwritten *Henry Whistler*, do confess to owe unto *William Jolliffe de Aleppo*, the sum of Lyon dollars 4500, which I received of him in money, and for the

" aforesaid sum I do oblige to pay him interest at the rate of 1*l*. per cent. per month, for three months certain, and for what time more may pass till he is reimbursed his money. Witness my hand, in *Tripoli d'Soria*, 10th Aug. 1689. *Henry Whistler*." Note, at the time of giving the note in question the plaintiff was a merchant at *Aleppo*, and *Whistler* a merchant in *Tripoli*.

## CASE 620.

LORD

CHANCELLOR.

Aug. 11.

A bankrupt having his certificate allowed, and having slipped his time of pleading it at law, to a debt precedent to the bankruptcy, is not to be relieved in equity.

## Ex parte GOODWIN.

THE petitioner *Goodwin* complained, that although he had in every thing conformed to the statutes made against bankrupts, and had his *certificate* allowed; yet Mr. *Arthur Turner* had taken him in execution, and detained him in prison for a debt due before his bankruptcy.

And the case appeared to be that Mr. *Turner* had lent Mr. *Dibble* 1500*l*. on bond, and the petitioner *Nicholas Goodwin*, the scrivener, was bound as his surety; and *Goodwin* having a judgment against *Dibble* for 15,000*l*. promised Mr. *Turner* when he levied his own debt, he would pay Mr. *Turner*; but failing so to do, and *Dibble* being also failed, Mr. *Turner* brings his action against *Goodwin* on his bond. Then a commission of bankrupt issued against *Goodwin*. June 7, 1714, being the last day of *Trinity Term*, a rule was given for entering up judgment; and on June 26, *Goodwin's certificate* was allowed. Mr. *Turner*, by the rules of the Court of *King's Bench*, being at liberty to enter his judgment either of *Trinity* or *Michaelmas Term*, signed judgment as of *Michaelmas Term*; and consequently this being a judgment subsequent to the *certificate*, was not within the Act of Parliament.

The matter had been several times argued at law, and *Goodwin* could have no relief there; and therefore now sought to be relieved by petition to the *Lord Chancellor*.

It being manifestly the intention of the law, that all debts due before the bankruptcy should be discharged, it was said this was an art, and contrivance, to evade the *statute* by entering judgment as of *Michaelmas Term*, when judgment was pronounced in *Trinity Term*.

*Per Cur.* A court of equity is not to alter the law. The statute is binding in equity, as well as at law; and if the judgment be good at law, it cannot be set aside in equity. But it was agreed that *Goodwin* might have pleaded his *certificate* upon the Roll, and have prevented the judgment from being entered up; and having neglected so to do, it was his own default; (1) and a court of equity is not to relieve either mispleading, or where there is a neglect and want of plea, or no proper plea put in in time; and it was also agreed that *Goodwin* could not be relieved at law upon an *audita querela*, (3) because he had an opportunity, and might have pleaded his certificate before the judgment was entered up; and upon producing of some precedents, where bankrupts had been relieved against judgments obtained against them, they did not come up to the case in question, and the petition was dismissed.

For Mr. *Turner*, two cases at law were cited, *Bailey versus Robinson*, Trin. 6 Ann..in *Banco Reg.* judgment was entered against a bankrupt upon a warrant of attorney, and he taken in execution during the time that his *certificate* was referred to the Judges; and although it appeared that the debt was discharged by the statute of bankrupts; yet the court would not discharge him, but put him to his *audita querela*.

And the case of *Grumby versus Smith*, H. 8. *Annæ Banco Reg.* a man puts in special bail to an action, and the plaintiff had judgment against the defendant by default: the bail surrendered the defendant; it was moved to discharge the de-

EX PARTE  
GOODWIN.  
Statutes relating to bankrupts, bind the courts of equity, as well as of law.

Court of equity will not relieve against misleading, or neglect of pleading a proper plea at law. (2)

Bankrupt is taken in execution, pending the reference of his certificate to the Judges. The court will not discharge him; but put him to his *audita querela*.

(1) Mr. *Cooke* says the certificate discharges the bankrupt from all debts, both joint and separate, that might have been proved under the commission, therefore it discharges a bankrupt from a debt accruing before the act of bankruptcy, "though judgment is not obtained till after the certificate allowed." *Cooke Bank. Law*, 1 vol. 508. But it is presumed he must mean if in such case the certificate is duly pleaded, as he cites the principal case amongst others, as an authority. The case of *Blackall v. Combs*, 2 P. Wms. 70, also cited by him, is different from this, and was at first determined by the *Master of the Rolls*, against the bankrupt, though afterwards, upon the circumstances of the case, reversed by *Macclesfield*, Lord Chancellor; and in

that case the proceedings at law were, on a *sci. fac.* after certificate, on a judgment obtained against the bankrupt before the certificate, and four years had elapsed between the judgment and the *scire facias*. On the whole it appears that the principal case is purely a case of misleading, and that the law on this point is at this day as laid down above, and in the cases cited in the note to the *Anon.* case, ub. inf.

(2) Vide on this point cases cited to *Anon.* ante 1 vol. 119.

(3) This is a writ now almost grown out of use since the Courts have been in the habit of granting summary relief after judgment, upon motion. For the learning relating to it, vide *Tomlins Jac. Law Dict. Tit. Audita Querela*, and the references there.

**EX PARTE** fendant, because he had listed himself a soldier after the bail  
**GOODWIN,** put in, and before the judgment; but refused *per cur.* (4).

(4) In the *Sheriff of Middlesex's* Case, 2 Raym. 1246, the Court said the Act 4 and 5 Ann. cap. 10. worked by way of a *supersedeas* to any process to be issued against any persons listed; and that if the Sheriff should arrest such a person, he would be liable to an action for false imprisonment.

[ 698 ]

DE

## TERM. S. MICHAELIS, 1715.

IN CURIA CANCELLARIÆ.

CASE 621.

LORD

CHANCELLOR.

Nov. 16.

Ante Case 616.

Pre. Ch. 419.

Gilb. Eq. Rcp.

104.

Eq. Ca. Ab.

324. pl. 4. S. C.

DEMAINBRAY *versus* METCALFE & AL'.

PLAINTIFF pawned some jewels to *Knight*, who signed a writing that they were to be redeemed in *twelve* months, otherwise for the 110*l.* they were to be as bought and sold. *Knight* within a short time after delivers over the jewels, together with some plate of his own, to *Metcalf*e, as a pledge for 200*l.* and *Knight* afterwards borrowed 38*l.* and 50*l.* of *Metcalf*e on promissory notes, to be repaid on demand; and *Metcalf*e by answer insisted, it was agreed (1) that the pledge should be a security, as well for the money upon the notes, as for the money first lent; but could make no proof of any such promise or agreement.

*Lord Chancellor.* Although *Metcalf*e, a bookseller, and did not deal in plate or jewels, and so had not gained any property, as having bought in a market-overt; yet it is natural to think, although he took notes for the 30*l.* and 50*l.* that the pawn was not to be parted with, until *that* money, as well as what was before lent, was paid; and said, he looked upon it (2) as an account current between *Knight* and *Metcalf*e, and therefore

[ 699 ]

(1) Verbally. R. L.

(2) Being a personal pawn. R. L.

he might retain what he had in his hands, until balance paid: (3) and therefore decreed a redemption to the plaintiff of his jewels, upon payment of all that was due to *Metcalfe*, as well upon the notes, as on the pawns; (4) but the goods of *Knight*, which were pawned, were to be first applied, as far as the value thereof would extend.

DEMAINBRAY  
v. METCALFE.

(3) Three classes of cases seem to come, as to tacking and stoppage, within the principle of the above case: 1st. Mortgages. 2nd. Mutual Credit. 3d. Personal Pawns or Pledges. With respect to the first class, vide *Baxter v. Manning*, ante 1 vol. p. 244. *Shuttleworth v. Laycock*, ibid. 245, and the cases cited in not. there respectively: as to the second class, vide *Curson v. African Company*, ibid. p. 121, and cases cited in not. there: and as to the third class, the only general rule that appears from the cases is, that the Court is favourable to liens; but how far it will determine that a subject which is pledged as a security for a debt shall be considered as security for

further loans, must, from the nature of the thing, and in fact does, depend in each particular case on the circumstances: the cases that contain the material disquisition on the subject are, *Green v. Farmer*, 4 Burr. 2214. 1 Bl. Rep. 651. S. C. *Jones v. Smith*, 2 Ves. jun. 372, in which the other cases that have occurred on the point are respectively referred to.

(4) Viz. principal, interest and costs, and in default of payment thereof, the bill to be dismissed with costs, Reg. Lib. 1715. A. fol. 108. Note, *Knight* was a bankrupt, and the bill as against his assignees, dismissed with 40s. costs.

### GOSSE & Al'. *versus* TRACY, & è contra. (1)

ONE *Tilsley* had made his will, (2) and devised all his real estate to his mother and her heirs, to which the defendant *Tracy* was privy; and being an acquaintance and related to Mr. *Tilsley* was intrusted to draw the will.

CASE 622.  
LORD  
CHANCELLOR.  
Nov. 17.  
One examined  
as a witness,  
when disinter-  
ested, after-  
wards be-

comes intitled to the estate in question. His deposition shall be read.

He afterwards came to Mrs. *Tilsley* and surmised to her, that the will was not sufficient, and that it wanted to be guarded, as he called it; and thereupon drew another will, (3) as he pretended, for that purpose only; but in truth had inserted therein a devise of the real estate to the mother only for life, with a remainder to himself, and his heirs.

This last will was not only gained by such a contrivance, but the testator was then languishing of a palsy, and was supposed to be *non compos mentis*. (4) And the question upon the bill, and cross bill was, which will ought to take place: but before

(1) 1 P. Wms. 287, S. C. and note there.

(2) 26th October, 1710. R. L.

(3) 24th March, 1712. R. L.

(4) And died three days after the making the second mentioned will. R. L.

GOSSE v.  
TRACY.

the cause was brought to hearing Mrs. *Tilsley* died, and devised the estate to the plaintiff *Gosse*, who in the life-time of Mrs. *Tilsley* had been examined as a witness; but was now become plaintiff in a bill of revivor.

[ 700 ]

It was therefore objected, that she being now the plaintiff in the bill by her brought, as devisee to Mrs. *Tilsley*, in the nature of a bill of revivor; her deposition taken in the life-time of Mrs. *Tilsley*, ought not to be admitted to be read; and a case at law was cited, where the deposition of a witness taken, whilst unconcerned in interest, could not be read. (5)

But it was answered, that *that* opinion at law was not, because the witness after examination became a party; but upon another rule at law, viz. that where the witness is living, and might be produced at the trial, the deposition of such witness should not be read. (6) Where the obligee makes the only living witness to the bond, executor, it has been ruled at law, that the executor shall be allowed to prove the hands of the witnesses. (7) And the *Lord Chancellor* upon debate ordered the deposition to be read. (8)

The obligee makes the only living witness to the bond executor. The executor shall be allowed at law to prove the hands of the other witnesses, that are dead.

It was also objected, that a will concerning land is only triable at common law; and the party may there take advantage of any fraud or imposition on the testator, and therefore not proper to be examined into, or set aside in equity upon pretence of fraud or surprise.

Fraud in obtaining a will of land may be relieved against in equity; as if *A.* agrees to give *B.* 1000*l.* in bank-bills, if *B.* will devise his land to *A.* and *A.* gives bills to *B.* that are forged. On proof hereof, this will shall be set aside in equity.

*Lord Chancellor.* There may be a fraud in obtaining a will, that may be relievable in equity; and of which no advantage

(5) i. e. it is presumed after he became interested; the case here referred to appears to be *Tilley's Case*, 1 Salk. 286.

(6) Vide *Anon.* Salk. 691, where the deposition of a witness examined before a Judge, because going beyond sea, could not be read on his continuing afterwards in *England*, for the rule for examining him was made on a supposition that he would have been absent.

(7) Vide the report of S. C. as to this point, different 1 P. Wms. 289. *Haws v. Hand*, 2 Atk. 615, where one *Haws*, the father, being plaintiff, as administrator, in an original cause, examined his son to the merits. The father dying, leaving the son his executor, the son becoming interested in the estate to which his said father was adminis-

trator, as such executor, by having taken out administration *de bonis non*, brought a bill of revivor; but on the authority of the principal case as above reported, his deposition allowed to be read, et vide *Glynn v. Bank of England*, 2 Vez. 38, 42. As to the distinction taken between the interest of trustee and an executor, in regard to their testimony, vide *Mabank v. Metcalf*, 3 Atk. 95, and cases cited in not there. [*Bellew v. Russell*, 1 Ba. & Be. 96. *Mulvany v. Dillon*, *ibid.* 409.]

(8) An issue was directed whether the will of the 26th October, 1710, was the last will of the testator, *Thomas Tilsley*, sufficient to pass the lands in question, and a receiver in the mean time appointed of the rents and profits of the premises in question. Reg. Lib. 1715. A. fol. 66.



can be taken at law; as if a man agrees to give the testator 2000*l.* in bank-bills, if he will devise his estate to him, and on the delivery of such bills makes his will, and devises his estate to him, and the bills prove to be forged or counterfeit. (9)

GOSSE v.  
TRACY.

(9) And this was formerly considered to be so, the principal case, *ub. sup.* *Welby v. Thornagh & Ux'*. Pre. Ch. 123. *Herbert v. Louns*, 1 Ch. Rep. 12. *Maundy v. Maundy*, *ibid.* 66. But the law on this subject seems now clearly to be, that equity can in no case set aside a will for fraud and imposition, because a will of personal estate may be set aside in the Ecclesiastical Court for fraud, and a will of real estate at law, *Bennet v. Vade*, 2 Atk. 324, and cases cited in not. there. *Nelson v. Oldfield*, ante p. 76. *Plume v. Beale*, 1 P. Wms. 388. *James v. Greaves*, 2 P. Wms. 270. *Stephenson v. Gardiner & Al'*. *ibid.* 286. *Towers v. Andrews*, 2 Bro. P. C. 476. *Bransby v. Kerridge*, 3 Bro. P. C. 358. *Webb v. Claverden*, 2 Atk. 424. *Anon.* 3 Atk. 17. [*Jones v. Jones*, 3 Mer. 161, 7 Price, 663. *Jones v. Frost*, 3 Madd. 1. Jacob, 466.] But this Court will relieve against fraud in respect of will (as

forgery) after death of testator, for though it cannot set aside the probate, if of personal estate, it will decree executors or others acting in the imposition to be trustees for the person imposed on, *Marriot v. Marriot*, Str. 666. *Barnesly v. Powel*, 1 Vez. 284. *Meadows & Ux' v. Duchess of Kingston & Al'*. Amb. 756. 762. And if a party claiming under such will comes for any aid in equity, he shall not have it. *Nelson v. Oldfield*, ante p. 76. And if probate of a will comes into equity on an incident in a cause, and that incident is admitted by the parties, this Court, or a Court of Law, may determine it, and hold the parties bound by their admission, *Sheffield v. Duchess of Buckinghamshire*, 1 Atk. 630. Et vide Fonbl. Tr. Eq. Book 4. Part 1. Ch. 1. § 3. And for further learning on the jurisdiction of equity in matters of wills, *Bissell v. Artell*, ante p. 47, and cases cited in not. there.

### STEPHENS *versus* GAULE.

[ 701 ]

CASE 623.

Nov. 16.

Eq. Ca. Ab.

222. pl. 15.

S. C.

A jointress is not bound to answer, whether her hus-

THE bill was to redeem a mortgage, and charged that the defendant pretended to be a jointress, and in nature of a purchaser from her husband; whereas her husband was only an assignee of a mortgage, and had no other title.

band had no other title than as assignee of a mortgage. She denying she had any notice of this mortgage, and that her husband told her, he was in by descent.

The defendant pleaded her title, and denied notice of the mortgage, (1) but had not answered, whether her husband had any other title than as assignee of a mortgage; and the plea was over-ruled by the Lord *Harcourt*.

Exceptions being taken to the defendant's answer, she insisted on the same matter, that she was a purchaser without

(1) For the rule for such a plea, vide *Lord Keeper v. Wyld*, ante 1 vol. 139. *Butcher v. Stapely*, ante 1 vol. 363. *Walley v. Walley*, *ibid.* p. 484. and cases cited in not. there respectively,

and also, the cases cited in not. to Lady *Bodmin v. Vandembendy*, ante 1 vol. p. 179. and for the principle of the plea, *Wallwyn v. Lee*, 9 Ves. 32, 33.

STEPHENS v.  
GAULE.

notice, and that her husband alleged, that he was in by descent from his mother; but did not answer, whether her husband had any other title than as assignee of the mortgage.

The *Lord Chancellor* allowed the answer to be good and sufficient, and would not oblige her to answer, whether her husband had any other title than as an assignee of the mortgage. (2)

(2) Nothing can be more clearly settled than the law of the Court, that a purchaser for valuable consideration without notice shall not have his title impeached in equity, nor be compelled to discover any writings which may weaken his title, nor any advantage taken from him which may defend him at law, Sir *John Fagg's* case, Eq. Ca. Ab. 354, pl. 1. *Huntington v. Greenville*, ante 1 vol. 49, 52. *Snelling v. Squib*, 2 Ch. Ca. 47. *Jerrard v. Saunders*, 2 Ves. jun. 454, and per *Loughborough*, Lord Chancellor, "I believe it has been decided that you cannot even have a bill to perpetuate testimony against him," *ibid.* p. 458. *Bechinall v. Arnold*, ante 1 vol. p. 354. *Hoare v. Parker*, 1 Bro. Ch. Rep. 578.

And although this doctrine seems to have been rendered questionable in the case of such a purchaser out of possession in *Strode v. Blackburne*, 3 Ves. 222, yet it seems to be fully restored in the case of *Wallwyn v. Lee*, 9 Ves. 24, where the doctrine and the cases, particularly *Strode v. Blackburne*, are much discussed: as to such purchasers being affected by variance between articles and settlement, in case of marriage, it is clear they cannot, *West v. Errissey*, 2 P. Wms. 349. *Powell v. Price*, *ibid.* 535. *Warwick v. Warwick*, 3 Atk. 291, and cases therein respectively referred to. As to what shall be esteemed notice to purchasers, vide *Bovey v. Smith*, ante 1 vol. p. 60, and cases cited in not. there.

CASE 624.

LORD

CHANCELLOR.

Nov. 18.

Pre. Ch. 423.

Gilb. Eq. Rep. 106.

Eq. Ca. Ab. 270. pl. 7. S. C.

### HOWELL versus PRICE & Ux'. & è contra.

A MORTGAGE in fee for 300*l.* was made redeemable at *Michaelmas*, 1710, or at any other *Michaelmas* on six months' notice, and no covenant to pay the money.

A mortgage in fee is made redeemable on payment of 300*l.* and interest, upon any *Michaelmas* day, on six months' notice. Mortgagor dies, having devised his personal estate to his wife. Personal estate not liable to pay the mortgage, there being no covenant expressed or implied.

[ 702 ] The mortgagor continued in possession, paid the interest, and by will devised his personal estate to his wife and daughter. (3)

The question was, whether the personal estate should be applied in ease of the real estate, to pay off this 300*l.*

*Lord Chancellor.* The personal estate is not liable. Here is no covenant either expressed or implied. (4)

(3) Towards payment of his legacies and debts according to the statement in the bill. R. L.

(4) An issue was directed on another

point, and the consideration of the above question reserved, Reg. Lib. 1715. A. fol. 98. [The cause coming on again after the trial, the *Lord*

*Chancellor* then held that the mortgage money was a debt, and decreed the personal estate to be applied in discharge of it.] Vide S. C. reported 1 P. Wms. 291, and the cases on the subject collected by Mr. Cox, in his note p. 294, there.

WHITE & Ux.' & Al.' *versus* THORNBOROUGH & Al.'

CASE 625.

LORD

CHANCELLOR.

Pre. Ch. 425.

Gilb. Eq. Rep.

107. S. C.

*J. S.* seised of freehold and copyhold lands, on his marriage covenanted to levy a fine of the freehold, and to surrender the copyhold to the use of himself for life, and to his wife for life, remainder to the heirs male of his body by his wife, remainder to the heirs of their *two* bodies, remainder to his own right heirs.

One upon his marriage covenants to levy a fine of his freehold, and to surrender

his copyhold, to the use of himself and his wife for their lives, remainder to the heirs male of their bodies, remainder to the heirs of their bodies; and dies leaving issue a son and a daughter, before any fine levied, or surrender made. The son for securing of money, covenants to levy a fine of the freehold lands, and to surrender the copyhold, and surrenders the copyhold, but dies without having levied a fine, and without issue. Decreed by the Lord *Harcourt*, that it being in case of articles for valuable consideration, the settlement should be to the first, &c. son of the marriage, with the remainder to the daughters; and that the daughter was intitled to both freehold and copyhold. And on re-hearing, Lord *Cowper* confirmed the decree as to the freehold, but for other reasons; and reversed it as to the copyhold. Ant. Case 597.

The marriage took effect, and there was issue a son and a daughter; but *J. S.* died before any fine was levied, or surrender made.

The son attained *twenty-one*, and borrowed money of the defendants, and also of others on bond, in which the defendants were bound as his sureties, and which they afterwards were obliged to pay.

The son to reimburse the defendants, and to counter-secure them, covenanted to levy a fine of the freehold, and to surrender the copyhold to them and their heirs, redeemable on payment of the money by them lent, and of what they should be obliged to pay as his sureties; and by his will devised his lands to the defendants, in trust to raise money for the payment of his debts, and make them executors, and afterwards died without issue, having surrendered his copyhold lands to the defendants; but without having levied a fine of the freehold.

[ 703 ]

The plaintiff *White* having married the sister, they brought their bill against the defendants, to have the freehold conveyed, and the copyhold surrendered to them, according to the intent of the marriage-settlement; and to have an account of the rents and profits.

The defendants insisted they were honest creditors for great sums of money, and having a security made to them by the plaintiff's brother, who had the whole legal estate descended

WHITE v.  
THORNBURGH.

to him, there having been no fine levied, or surrender made, pursuant to the marriage-settlement, and if the settlement had been perfected by a fine and surrender, yet the plaintiff's brother would have been tenant in tail, and might by a fine have barred, not only his own issue, but also the plaintiff his sister; and he having the fee-simple of the legal estate, and being tenant in tail of the equitable estate, the deed of covenant to lead the uses of the intended fine (although no fine actually levied) was sufficient in equity to bar it.

[ 704 ]

That it had been held that tenant in tail of an equitable estate might alien by a bargain and sale, or feoffment, or even by articles; and in the case of *Aley* versus *Aley*, the feoffment made by the *cestuy que trust* in tail, and the trustees, was adjudged a good bar of the intail; (1) and as to the copyhold, he having actually surrendered it to the defendants, and there being no particular custom within the manor for suffering of common recoveries, a general surrender thereof would have been a good bar of the intail, in case it had (as it was not) been settled in tail; (2) and although the plaintiff's brother had not levied a fine of the freehold to the defendants, according to his covenant; yet the defendants had the legal estate in them by the will, and, having both law and equity on their side, ought to prevail against the plaintiffs, who had only a demand in equity, by virtue of the father's marriage-agreement.

The cause was first heard before the Lord Chancellor *Harcourt*, (3) who looked upon the deed of the father's in the nature of articles, and when to be carried into an execution by a court of equity, might be settled in a stricter manner, than barely in the words of the deed; and that a remainder might be expressly limited to the daughters of the marriage, so as the son's fine could not bar it; and decreed both freehold and copyhold to the plaintiffs. (4)

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(1) But the law is not so now, vide *North v. Way*, ante 1 vol. p. 13. and cases in not. p. 14, there.

(2) Vide on this point *Otway v. Hudson*, ante 583, and the cases cited in not. p. 585 there, by which the above position appears to be clearly the law. So *Martin* on dem. of *Weston v. Mowlin*, 2 Burr. 969, 979. and as to surrender made in the lifetime of tenant for life, which it should seem will not bar, *Highway v. Banner*, 1 Bro. Ch. Rep. 584, 586.

(3) 9th June, 13 Ann.

(4) The plaintiff's brother, the son of J. S. had also made a mortgage of the premises in question, as to which Lord *Harcourt* declared, that nothing passed thereby, inasmuch as no fine was levied by the mortgagor; but that even if a fine had been levied, the mortgagee ought to have taken no benefit thereby, he having notice of the indenture of settlement, the same being recited in a decree mentioned to have been had in this cause, 18th July,

Upon a re-hearing before the Lord Chancellor *Cowper*, he declared that the settlement by deed to lead the uses of a fine was to be considered, not as articles, but as a defective settlement, and the uses not to be altered or varied; but being a weak and feeble settlement, a court of equity would assist it so far, as to consider it, as if a fine had been levied, and then the plaintiff could not have been barred without a fine; and the plaintiff is to be considered as heir of the body of the father, and the limitation in the deed to the heirs of their bodies, could be inserted for no other end or purpose but to carry the estate to the daughters of the marriage, it being before limited to the heirs male; and therefore confirmed the decree as to the freehold estate. (5)

But as to the copyhold, there appearing no particular custom within the manor for the suffering a recovery, he held the surrender would bar the intail, in case the copyhold had been well settled; and therefore varied the decree, and dismissed the bill as to the copyhold. (6)

WHITE v.  
THORNBURGH.

Where there is no custom within a manor for suffering a recovery, a surrender will bar an intail.

30 Car. Sec. and which decree is recited in the mortgage deed; and as to the copyhold surrendered to the said mortgagees of the freehold lands, the legal interest was declared to be vested in them, but it was also declared, that they ought not to take any benefit thereby in respect of the covenants in the said indenture of settlement, to surrender the copyhold to the same uses to which the said freehold lands were thereby agreed to be conveyed, of which covenant the said mortgagees had full notice before such surrender made to them; (vide the report of this case in Pre. Ch. p. 429.) and therefore decreed the said mortgagees to reconvey the freehold, and re-surrender the copyhold estate; and decreed that the widow of the mortgagor was intitled to dower in the freehold lands, and to account for rents and profits by them received, as therein mentioned. R.

(5) Except as to the claim of the widow of the mortgagor, who dying in the life-time of his mother, the wife of the original covenantor, was not seised thereof, and therefore she not intitled to dowry. R. L.

(6) The plaintiffs to give up possession of the said copyhold estate, and to

account for the rents and profits, Reg. Lib. 1715. B. fol. 72. On the doctrine of varying settlement by articles, vide *Beachinall v. Beachinall*, ante 1 vol. 246, and cases cited in not. there.— Et vide Fonbl. Tr. Eq. book 1. ch. 3. § 11. in which the distinction between the case where articles are made before the marriage, and the settlement after, and both articles and settlement made before the marriage, as stated by Lord Talbot, in *Legg v. Goldwire*, Forr. 20. is mentioned as recognised also by Mr. Fearn, whereby it appears to be his conclusion upon the result of the cases, that although the Court will interfere in the former of these cases, yet it will not if both articles and settlement are made before marriage, unless the settlement in that case be expressed to be made in pursuance of the articles. So *Honor v. Honor*, 1 P. Wms. 123. ante 658. *S. C. Roberts v. Kingsley*, 1 Vez. 238, yet from the case of *Barstow v. Kilvington*, 5 Ves. jun. 593, it seems perhaps somewhat doubtful, whether the Court would at all events tie itself up to that, and whether it would not, under circumstances, interfere to rectify the settlement in the case of articles and settle-

ment, *both before marriage*, although the settlement did not profess to be made pursuant to the articles, or writing considered as articles; that was a case where no articles but settlement made *before marriage*; and after the marriage, the wife, on the marriage of her daughter, one of the children of that marriage, wrote a letter to the intended husband, in which she expressed the intention of the parties to that settlement, to have been different from the purport of the settlement as executed, and the Court reformed the settlement by that letter. As to difference of con-

struction in creating estate-tail, and estate for life, between marriage-articles and will, vide *Baile v. Coleman*, ante 670. Note, by the report of the principal case in Pre. Ch. 425, 429, it appears that several at the bar were dissatisfied with this and the former decree, as to the freehold, and thought that the defendants having the estate in law in them by the devise, and being just creditors, ought not to have had this estate taken from them by the assistance of a Court of Equity, and thought the distinction of an infirm settlement unintelligible.

## CASE 626.

CORNEFORTH *versus* GEER.

LORD

CHANCELLOR. BILL to set aside an award.  
Nov. 22.

Eq. Ca. Ab. 51.  
pl. 7. S. C.

If arbitrators go upon a plain mistake either as to law or fact, equity will relieve against the award.

*Per Lord Chancellor.* If it appears that the arbitrators went upon a plain mistake, either as to the law, or in a matter of fact; the same is an error appearing in the body of the award, and sufficient to set it aside; but the plaintiff failing to make out his case by proof, bill dismissed. (1)

(1) With costs, but merely an order 1715, *A.* fol. 104. On the above point of dismissal: no case stated, Reg. Lib. vide *Brown v. Brown*, ante 1 vol. p. 157.

## CASE 627.

WELD *versus* BRADBURY & AL'. (1)

LORD

CHANCELLOR.  
Dec. 9.

Eq. Ca. Ab. 203.  
pl. 25. S. C.

One devises the surplus of his personal estate to the children of *A.* and *B.* Neither

of them has a child at the making of the will, or the death of testator. The devise is executory, and shall extend to any children that *A.* and *B.* shall afterwards have; and the children of each shall take *per capita* and not *per stirpes*.

Neither *J. S.* nor *J. N.* had any child living at the making of the will, or at the death of the testator. (2)

*Per Cur.* It must be intended an executory devise, and to be to such children, as they, or either of them, should at any time after have, and the children to take *per capita*, and not *per stirpes*, they claiming in their own right, and not as representing their parents. (3)

(1) Cited in *Godfrey v. Davis*, 6 Ves. 43, 45.

(2) "No certain rule can be laid down in cases of this kind; they



“ must be various, as very few words  
 “ will vary the evidence of the testa-  
 “ tor’s intention, and consequently the  
 “ meaning of the will,” per *Hardwicke*,  
 Lord Chancellor, *Ellison v. Airey*, 1  
 Vez. 111, 114. But he then proceeds  
 to lay down this general principle:  
 “ The Court generally takes it, that  
 “ there ought to be a legatee in being,  
 “ and therefore will not construe a will  
 “ to extend to persons not in being,  
 “ unless the testator shows his inten-  
 “ tion to be such by words in the will:”  
 and the rules by which the gift is con-  
 fined to the death of the testator, or  
 extended to children born after his  
 death, are laid down, and the cases  
 cited by Mr. *Sanders* in not. (2) to  
*Heathe v. Heathe*, 2 Atk. 122. as fol-  
 lows, “ The general rule in cases of  
 “ this nature, seems to be, that where  
 “ the devise or gift to the children is  
 “ general, and not limited to any par-  
 “ ticular period, then it is confined to  
 “ the death of the testator, *Northey v.*  
 “ *Burbage*, Pre. Ch. 470. *Heathe v.*  
 “ *Heathe*, supra. *Horsley v. Chaloner*,  
 “ 2 Vez. 83. *Isaac v. Isaac*, Amb. 348.  
 “ 1 Bro. Ch. Rep. 532. S. C. cited  
 “ *Viner v. Francis*, 2 Bro. Ch. Rep.  
 “ 658. *Hughes v. Hughes*, 3 Bro. Ch.  
 “ Rep. 352, 434, *Hill v. Chapman*, ibid.  
 “ 391. But where such devise or gift is  
 “ to one for life, or where the distribu-  
 “ tion is postponed to a future time,  
 “ then children born during the life or  
 “ before that time are let in, *Harding*  
 “ v. *Glynn*, ante 1 vol. 470. *Graves v.*  
 “ *Boyle*, ante 1 vol. 509. *Haughton v.*  
 “ *Harrison*, post 329. *Ellison v. Airey*,  
 “ 1 Vez. 111. *Attorney General v.*  
 “ *Crispin*, 1 Bro. Ch. Rep. 386. *Con-*  
 “ *greve v. Congreve*, 1 Bro. Ch. Rep.  
 “ 530. *Devisme v. Mello*, ibid. 537.  
 “ *Baldwin v. Karver*, Cowp. 309. *An-*  
 “ *drews v. Partington*, 3 Bro. Ch. Rep.  
 “ 401. *Pulsford v. Hunter*, ibid. 416.”  
 Although this appears on the whole to  
 be correct, yet it will be found that the  
 cases are not quite uniform on the sub-  
 ject; and particularly that, in the case  
 of a general gift, it may possibly be  
 construed to relate to the time of the  
 will, and not of the death of the tes-  
 tator. In order therefore to arrive at  
 a more distinct and particular view of  
 the subject, and as it is a subject of

some embarrassment to the student, it  
 may not be useless to examine the cases  
 that have occurred rather more mi-  
 nutely. In the case of real estate, the  
 rule seems to have been considered  
 formerly, to vary from the case of per-  
 sonalty, though later cases have not  
 noticed it; for in *Cook v. Cook*, ante  
 p. 545. where there was a devise “ to  
 the issue of J. S.” who, at the death of  
 testator had a daughter living, and  
 afterwards had a son born, *Lord Keeper*  
 decreed, that all the children should  
 take, and that the word begotten made  
 no difference; but in S. C. per *Lord*  
*Keeper*, “ Where a devise to a man  
 “ and his children of a personal estate,  
 “ a child born after the death of the  
 “ testator shall not take, for it vested  
 “ upon the death of testator, and shall  
 “ not be divested.” But if this devise  
 mean to a man for life, and then to his  
 children, *Goodwin v. Goodwin*, cited in  
*Bartlett v. Hollister*, Amb. 334. is  
 clearly contrary. So in respect of real  
 estate, the case of *Singleton v. Single-*  
*ton*, 24th Feb. 1784, cited in not. to  
*Devisme v. Mello*, 1 Bro. Ch. Rep. 542.  
 seems contrary; there the testatrix  
 gave her real estates to trustees for  
 500 years and 1000 years, for securing  
 her debts to a certain amount, to raise  
 annuities, and for other purposes, and  
 subject to the terms, she gave the  
 estate to all and every the child and  
 children of her brother *Thomas Gilbert*,  
 and the heirs of their body and bodies,  
 &c. and in case of failure of issue, &c.  
 to every the remaining child or child-  
 ren of the said T. G. in tail, and in  
 failure of issue, &c. then over; and  
 then the testatrix directed the remain-  
 der of her personal estate to be placed  
 at interest, and subject to annuities,  
 she gave it to all and every the child  
 and children of her brother, T. G. who  
 should attain twenty-one, equally, and  
 if none, or none attaining twenty-one,  
 then over; *Lord Chancellor* was of  
 opinion, there was no point of time in  
 this case to which the words “ all and  
 every the child or children of T. G.”  
 could be confined, except the death of  
 the testatrix; and therefore, that child-  
 ren born after the death of the testa-  
 trix could have no share—if there be  
 no distinction in the application of the

doctrine on this subject to real and personal property, then the devise in *Cook v. Cook*, being general and not limited to a particular period, ought, according to some of the decisions, to have been confined to the daughter living at the death of the testator; or if the decision in *Cook v. Cook* be right, it seems difficult to reconcile it with the above case of *Singleton v. Singleton*, unless the subjection to the terms of 500 years and 1000 years make the difference. But then, if so, and if there be no distinction as above-mentioned, between real and personal, then the devise in this last-mentioned case is not general, but is a gift where the distribution is postponed during the existence of the terms both as to real and personal; and then according to some of the cases, the children born after the death of the testatrix, and during the existence of the terms, ought to have been let in, which they were not. In *Northey v. Burbage*, the terms of the devise are not stated; but though the word "devise" is used, the subject was evidently personalty; it is, however, there stated, "In this case, it was said by the counsel, and agreed to by the Court, that a devise to all his children and grandchildren, extends only to those who were *in esse*, not at the time of the testator's death," according to the the above dictum of the *Lord Keeper* in *Cook v. Cook*, ante 544, "but at the time when the will was made;" and so is *Northey v. Strange*, 1 P. Wms. 340. S. C. with that reported in Pre. Ch. *Heathe v. Heathe* was a charge of 400*l.* by testator *George Madgwick*, by his will on premises thereby devised to *Averilla* his wife for life, "to be paid within six months after the death of *Averilla*, among all the children of his sister *Catherine Heathe*, share and share alike." *Averilla* then made a will, and bequeathed the residue of her property among all the children respectively, male or female, of her brother and sister *Heathe*: some years after the death of the testator and testatrix, *Catherine Heathe* had another daughter born, and the question was, whether the after-born child should have any share under either of the wills; it is

clear, that as to the first will, the gift was to one for life, and the distribution postponed to a future time, the characteristic of the second class of cases above cited by Mr. *Sanders*; and that the second will is a gift to the children in general, and not limited to a particular period, the characteristic of the first class of cases; yet the decree takes no notice of this distinction, but is (as reported) a general sweeping opinion in the following words: "For my part, I have no notion that this devise can have any relation to a child not *in esse*, till some years after the testator's and testatrix's death; it may as well be intended twenty years afterwards, if a woman is capable of bearing so long, and would make great confusion by unravelling accounts that have been settled so long before." So *Congreve v. Congreve*, 1 Bro. Ch. Rep. 530, was a devise of real estate to trustees, the rents to *T. C.* for life, and after his death, to sell, and divide the money amongst all and every the child and children of *T. C.* at the age of *twenty-one*; and then a gift of personal estate to same trustees in trust to divide the same amongst all her children at *twenty-one*, with liberty to apply any part of the interest for maintenance; and child born after the death of testatrix; here a life-estate given in the real, but the personal generally: no notice taken of this distinction, but appears to be decided as to the whole, on the authority of *Bartlett v. Hollister*, Amb. 334. In *Maddison v. Andrew*, 1 Vez. 57, the bequest was of 300*l.* to the children of his sister *Sarah*, to be paid with interest at *twenty-one* or marriage, with survivorship, and failing all, then over; here the bequest seems general and not limited to a particular period; *Sarah* at the time of the will had only one child; others were born afterwards, but does not state whether any born after testator's death; and the question was, whether those after-born should take. *Lord Chancellor*, "I doubted at first, but now think it was meant for the benefit of all the children *Sarah* should have; for the testator knowing she had but one then, has yet given it to children, has pointed out survivors, and

“ gives it over to another branch  
 “ of his family, which he could not  
 “ mean till all failed.” *Ellison v. Airey*, 1 Vez. 111, was a devise of 300*l.* to the younger children of *A.* if *B.* died before twenty-one or marriage. Some of the younger children were born before the making of the will, others after the will, others after the death of the testatrix; and it must be necessarily presumed, though it is not stated, others also after the death of *B.* before twenty-one or marriage; and it was contended, that all the younger children of *A.* whatsoever were intitled, but the decree confined it to such as were the younger children at the death of *B.* before twenty-one or marriage. *Haughton v. Harrison*, 2 Atk. 329, like bequest; children born after testator’s death held intitled; so *Attorney General v. Crispin*, 1 Bro. Ch. Rep. 386. *Coleman v. Seymour*, 1 Vez. 209, was a devise of 3000*l.* to *A.* the wife of *Coleman*, for the use of her younger children, subject to her appointment, with survivorship if death of any child under age, or unmarried. Lord Chancellor, “ This legacy, both  
 “ in the intent and words is present to  
 “ them, and not to be extended to  
 “ those born after death of testator;  
 “ and it can only mean children living  
 “ at the making of the will, or at far-  
 “ thest at the death of the testator.” In *Graves v. Boyle*, 1 Atk. 509, the profits of personal estate to wife for life, and then to trustees to pay 5000*l.* to two younger children as she should appoint; and if no appointment, equally at twenty-one; and there a child born after the death of the testator, was let in, testator having given a bond to leave 5000*l.* amongst his daughter’s younger children. *Horsley v. Chaloner*, 2 Vez. 83. The bequest was of 200*l.* to the younger child or children of *A.* to be paid at twenty-one, with survivorship; and if no younger child or children, or none attaining twenty-one, then over: and per M. R. “ principally to avoid the inconvenience of keeping children out of  
 “ this provision, expressly appointed to  
 “ be paid at twenty-one, it is con-  
 “ strued vested in those living at the  
 “ death of testator and cannot go fur-

“ ther.” So *Roberts v. Higman*, 12 July, 1779, cited in *Congreve v. Congreve*, 1 Bro. Ch. Rep. 532, where the devise was all his goods and chattels to be sold, and debts paid, and overplus if any to be employed for the best use of their children begotten. *Bartlett v. Hollister*, Amb. 384, was a devise of real estate to trustees to the use of *H.* his daughter for life, and after her death, without issue, in trust, to sell and divide the money equally amongst all and every the children of *B.* the wife of *C.* at their respective ages of twenty-one: *B.* had a child born after the death of testator, but in the lifetime of *H.* who afterwards died without issue. The Master of the Rolls, Sir Thomas Clarke, clearly of opinion, that the after-born child should be intitled; 1st, this is the case of a trust, in which the Court expounds more liberally than in the case of a legal estate; 2dly, he speaks of *B.* as a wife; 3dly, the words are as general as possible; 4thly, this is a disposition of a remote interest after the death of *H.* without issue. So *Goodwin v. Goodwin*, 11 Mar. 1748, there cited; 3 Atk. 370. 1 Vez. 227. S. C., devise to *A.* for life, then to her children; child born after death of testator is intitled. *Hodges v. Isaac*, Amb. 348, *I. S.* gave the residue of his estate to the children of his niece *A. I.* to be paid into the bank, the interest applied for their learning, and to be equally divided between them at twenty. *A. I.* had a child born after death of testator, no decision; but money directed to be laid out with liberty for any of the children to apply on attaining their age of twenty. *Devisme v. Mello*, (considered by the Master of the Rolls in *Godfrey v. Davis*, 6 Ves. 49, as settling the law on this subject,) was a bequest of 5000*l.* to purchase stock, and “ the interest to be paid to my  
 “ mother,” does not say for life, but  
 “ at her death, the interest to be paid  
 “ to my brother *W. D.* and at his de-  
 “ mise, to my godson *Stephen*; and  
 “ at his decease, if before he is of age,  
 “ to be divided amongst his brothers  
 “ equally. Also, to my brother *D.*  
 “ 4000*l.* to buy stock to enjoy the in-  
 “ come during life; and in case he

“ does not marry and leave children,  
 “ to revert to my brother *William's*  
 “ children in equal parts”—the godson  
*Stephen* died in the life-time of testa-  
 tor, leaving *two* brothers and *two* sis-  
 ters, who were all living at the time of  
 the testator's decease; *Andrew De-*  
*visme* was born after the death of the  
 testator. *Lord Chancellor* declared,  
 that the word *brothers* made no differ-  
 ence; and that considering the terms  
 of the bequest, the testator could not  
 otherwise have described the children  
 of his brother *W. D.* and therefore  
 declared *Andrew* intitled.—In *Ayton v.*  
*Ayton*, 14 Feb. 1787, cited in not. to  
*Devisme v. Mello*, ub. sup. the be-  
 quest was of the residue of real and  
 personal estate to his wife for life; and  
 after her death, he gave the same to *the*  
*children of I. A.* to be equally divided  
 amongst them, the said *I. A's* children,  
 and not any children of any other mar-  
 riage by either party; the wife sur-  
 vived testator a few months; three  
 children were born of that marriage,  
 after the death of testator and his wife,  
 and his Honor (*Kenyon*) declared, that  
 the interest in the residue (not men-  
 tioning any distinction between the  
 real and personal) vested absolutely  
 in the children who were *in esse* during  
 the life of the wife; and that those  
 born after were not intitled; this, how-  
 ever, seems evidently to imply that all  
 the children of that marriage, who had  
 happened to be born during the life of  
 the wife, *though after the death of the*  
*testator*, would have been intitled. In  
*Hughes v. Hughes*, 3 Bro. Ch. Rep.  
 352, 434, and by the report of which,  
*Thurlow*, Lord Chancellor, appears to  
 have given two different determina-  
 tions, the bequest was of the residue  
 to trustees to pay two of his daughters,  
*S. A.* and *D. A.* each the yearly sum of  
 100*l.* during their lives, and subject  
 thereto to pay all the rest and residue  
 of the rents, &c. for the maintenance,  
 &c. of *all the* children of his *three*  
 daughters, share and share alike, *until*  
*the youngest of his said grandchildren*  
*should attain twenty-one*, with benefit  
 to the children of any of them dying  
 before *twenty-one*, as therein men-  
 tioned; and when such youngest grand-  
 child should attain *twenty-one*, then to

be divided. All the said daughters had  
 children living at the death of testator,  
 and children born after his death;  
 during the argument, his Lordship  
 laid down *totidem verbis* with Mr.  
*Sanders's* statement above, and then is  
 said to have finally determined in fa-  
 vour of the children living at the de-  
 cease of the testator, p. 354. but after-  
 wards. p. 434. his Lordship is reported  
 to say, “ Where a testator gives all his  
 “ property to be divided amongst his  
 “ children when they shall attain  
 “ *twenty-one*, in so general a manner,  
 “ the principle of the cases seems to  
 “ have been that such general devise  
 “ shall embrace *all* the children, and  
 “ the distribution must be accordingly  
 “ amongst *all*: but where the Court  
 “ has ascertained the time as perfectly  
 “ marked out by the intention of the  
 “ testator, it is considered as the pe-  
 “ riod of vesting the property in pos-  
 “ session, and consequently when it  
 “ comes to be distributed, *it must be*  
 “ *amongst those only who are in esse*  
 “ *at that time*. This being a general  
 “ gift, not narrowed or controlled by  
 “ any words the testator has used;  
 “ consequently the youngest child  
 “ must take at *twenty-one* with the  
 “ rest.” In *Hill v. Chapman*, 3 Bro.  
 Ch. Rep. 391, the testator gave the re-  
 sidue to trustees in trust for the benefit  
 of all his grandchildren by his daugh-  
 ter *Sarah*, equally to be divided be-  
 tween them and laid out for their re-  
 spective benefit; the testator afterwards  
 by a codicil ordered 1000*l.* 3 per cent.  
 bank annuities, to be set apart to pay  
 an annuity of 80*l.* to his servants.  
*Sarah* had a child born after the death  
 of testator, and the question was, whe-  
 ther such after-born child should take  
 a share of the 1000*l.* and the Lord  
 Chancellor was of opinion, that that  
 child could not, because the 1000*l.*  
 must fall into the residue, and that the  
 residue *must be divided at the testa-*  
*tor's death*; yet the words of the be-  
 quest in this case seem to be as gene-  
 ral as possible—and note, the Lord  
 Chancellor is also reported in this case  
 to say, “ It is intelligible, that by *the*  
 “ *children of A.* the testator means  
 “ children *then* born; if you go fur-  
 “ ther it must extend to *all possible*



“ *children*: to tie it up to the death of the testator is rather a forced construction;” the question here naturally arises, whether by the above word “ *then*” his Lordship must not be taken to mean at the time of executing the will, because, in *Northey v. Strange*, 1 P. Wms. 340, 342, it is said by the Court, “ A devise to one’s children and grand-children should, *prima facie*, refer only to such children and grand-children as were living at the time of making the will;” and yet the decree in *Hill v. Chapman*, ub. sup. was made with reference to the death of the testator. In *Andrews v. Partington*, 3 Bro. Ch. Rep. 401, the bequest was (after paying 600*l.* a year to his wife for life, and subject thereto) of 2000*l.* to his daughter *Diana*, and 1000*l.* to his daughter *Catharine*; and after his wife’s decease, 3000*l.* to *Diana*, and 4000*l.* to *Catharine* on their respective marriages; and in case his said daughters or either of them should die unmarried, then to pay her share to all and every the child and children of his son *Robert Andrews*, to be paid at twenty-one or marriage, or to be sooner advanced if the trustees should think fit; and in case all the children should die before their shares became payable, then the whole to his son.—Lord Chancellor said, “ Where a time of payment was pointed out, as where a legacy is given to all the children of *A.* when they shall attain twenty-one, it was too late to say that the time so pointed out shall regulate among what children the distribution shall be made; it must be among the children *in esse* at the time the eldest attains such age.” *Pulsford v. Hunter*, 3 Bro. Ch. Rep. 416, was a devise of freehold estates to trustees, as to a moiety to pay the rents and profits to his daughter *A.* for her separate use, remainder to the use of all and every the children of *A.*; as to the other moiety, to his daughter *B.* and her children in the same manner; then a bequest of the residue of his personal property, as to a moiety to his said daughter *A.* as to the interest, &c. for her separate use; and then to transfer and assign such moiety unto and

amongst all and every the child or children begotten or to be begotten, who shall be living at the time of her decease; and the other moiety to his said daughter *B.* for life, and then to her children in like manner; then by a codicil the testator, after giving two annuities of ten guineas each, sets apart certain monies in his and his banker’s hands for payment of the said annuities, and then orders the remainder of the interest of those monies to be applied for the use and education of his grand-children, till they arrive at twenty-one, and then the principal to be equally divided amongst them. A child was born after testator’s death. The question, according to the report, was confined to the property in the hands of the banker, whether the after-born child should have a share; and as to this, the Lord Chancellor held, “ that she should; that all the children born before the division was actually to take place, that is, until some one of them should attain twenty-one, should take a share.” And this principle is clearly recognised in *Prescott v. Long*, 2 Ves. jun. 690, where the bequest was of 15,000*l.* in trust for five of the children of his son *Thomas Prescott*, naming them, and to all and every other the child and children of his said son *T. P.* to be divided and paid at twenty-one or marriage, the first attaining twenty-one, decreed intitled to his share. So *Hoste v. Pratt*, 3 Ves. 730, where a trust for all and every the children of *A.* as they should attain sixteen, and admitted by the Counsel for the children born since the eldest obtained sixteen that, upon the authorities decided, he could not support their interest. So *Godfrey v. Davis*, 6 Ves. 43, where bequest of an annuity over on the death of the annuitant, to the eldest child of *A.* and no child at death of annuitant, but one born after, held not entitled. So *Whitbread v. Lord St. John*, 10 Ves. 152. But in *Mills v. Norris*, 5 Ves. 335. where, after charging his real and personal estate with debts, &c. and annuities, testator gave certain freehold estates to trustees to apply rents and profits till *A. M.* attained twenty-one, and then to convey; but if *A. M.* died before

*twenty-one*, then to sell and pay the money arising by the sale to and amongst the children of his daughters *E. M.* and *M. N.* to be paid at *twenty-one* or marriage: and as to the rest and residue of his real and personal estate, he gave the same to trustees to sell and to place out the money, and to apply the interest and produce thereof to and amongst the child and children of his said *two* daughters, in like manner as the money to arise by sale of his real estate is directed to be paid: in case *A. M.* should die before *twenty-one*, the issue of such children to stand in the place of their parent, marrying and dying in the life-time of either of their mothers; or in case his said daughters should die without issue, or having had issue, such issue should die without issue in the life-time of his said daughters, then in trust to transfer all his real and personal estate to his brother, his heirs, &c. and decreed upon the clause in the will limiting over in the event of the failure of issue of the *two* daughters, and that *all the children* of the *two* daughters were intitled to the capital without reference to the age of *twenty-one*; and though each child would have a vested interest at the age, yet it would be liable to be divested by the birth of others; but not so as to the by-gone interest, to a share of which the after-born child was held not intitled. Note, the above decree appears in the report only by the argument of Mr. *Stanley*: the matter came on upon exceptions of the Master's report, who had included the after-born child; the exception was allowed as to the by-gone interest.—And that a bequest will be confined to children born before a particular time; from the plain intent of the will, though the words are general, *Paul v. Compton*, 8 Ves. 375, where the bequest was of the rest and residue of testator's estate and effects to pay the interest to wife during her life, and then to transfer the capital to such of his daughters and their children as the wife by her will should appoint; and if no appointment, then in trust to divide the same residue amongst the children of his said daughters, and in trust during the minority of his said grand-children, to employ the interest in maintenance, &c.: the wife made an

appointment; and held that as to a child of one of the daughters of testator, born after the death of the wife, she was excluded; and as to the other children, those born after one of them had attained *twenty-one*, also excluded, though no time in particular mentioned; and in *Gilbert v. Boorman*, 11 Ves. 238, where bequest was to *A.* and all other the children of *B. hereafter to be born* at their respective ages of *twenty-one* years, admitted that the words "*hereafter to be born*," the time being marked out would make no difference; and a child born after one had attained *twenty-one* excluded. [The later cases on this subject are *Hughes v. Hughes*, 14 Ves. 256. *Defflis v. Goldschmidt*, 1 Mer. 417. *Leake v. Robinson*, 2 Mer. 363.] As to the effect of the words "*living at the death*," vide cases cited in not. to *Palmer v. Cracroft*, ante p. 580; but as to illegitimate children it is decided, that by a bequest to *all the natural children* of *I. S.* after-born bastards cannot take, nor a child *ex ventre sa mere*, *Metham v. Duke of Devon*, 1 P. Wms. 529. Nor can a bastard take by a devise to children generally, though strong implication upon the will, as well as evidence *dehors* in favor of that child, *Cartwright v. Vawdry*, 5 Ves. 530; nor where the testator having bequeathed to the *eldest child*, male or female, of a certain family, and well knew that all the children of that family were illegitimate, *Godfrey v. Davis*, 6 Ves. 43; "and, "legally speaking, there can be no "children without a marriage," dict. per Master of the Rolls, *Bell v. Phyn*, 7 Ves. 453, 459. [The subject of bequests to natural children as a class is much discussed in *Wilkinson v. Adams*, 1 V. & B. 422. See also *Swaine v. Kennerley*, 1 V. & B. 469. *Woodhouselee v. Dalrymple*, 2 Mer. 419. *Beachcroft v. Beachcroft*, 1 Madd. 430. *Bayley v. Snelham*, 1 S. & S. 78.] Note, in a case of guardianship, where testator committed the care, tuition, and guardianship of *all his sons hereafter to be born* to his wife; the Court construed the guardianship to extend to all the children by that or a future marriage, *Ex parte the Earl of Ilchester*, 7 Ves. 348.

(3) It appears to have been contend-



ed at the bar, that the devise of the last-mentioned moiety was void for uncertainty; as to which, the decree is, his Lordship considered "that this devise" ought not to be considered as void "for uncertainty, for that it was the" plain and manifest intention of the "testator at the time of making his" will, that such last-mentioned moiety

"should go and be divided equally" amongst all the children that the "said I. S. and I. N. should leave at" their deaths," Reg. Lib. 1715. B. fol. 75. On the point of the children taking *per capita*, vide *Bretton v. Lethulier*, ante p. 653. *Blackler v. Webb*, 2 P. Wms. 383. *Thomas v. Hole*, Forr. 251.

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Ex parte CROWDER.

A. and B. being joint-traders, a commission of bankruptcy issued against them: their separate creditors now applied by petition, that they might be let in for their debts upon the respective separate estates of the bankrupts, under that joint-commission; the separate estates being of small value, and would not bear the charge of taking out two new commissions against them separately.

first to pay the partnership debts, and then the separate debts; and as to the separate effects, first the separate creditors, and afterwards the partnership creditors, are to be paid out of the same. Ant. Case 283.

CASE 628.

Dec. 19.

Eq. Ca. Ab. 55. pl. 6. S. C. Separate creditors allowed to come in under a joint commission against two partners; but the joint-effects are to be applied,

The *Lord Chancellor* ordered them to be let in to prove their respective separate debts upon the joint-commission, they paying contribution to the charge of it; and directed that, as the joint or partnership estate was in the first place to be applied to pay the joint or partnership debts; so in like manner the separate estate should be in the first place to pay all the separate debts: and as separate creditors are not to be let in upon the joint-estate, until all the joint-debts are first paid; so likewise the creditors to the partnership shall not come in for any deficiency of the joint-estate, upon the separate estate, until the separate debts are first paid. (1)

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(1) It is now settled, that the commissioners in a joint-commission may admit the proof of separate debts, and that under such commission, the separate creditors may assent to or dissent from the bankrupt's certificate; and that distinct accounts must be kept of the joint and separate estates, and that that which belongs to the separate estate shall be applied to satisfy the separate creditors; and that which belongs to the joint-estate, to satisfy the joint-creditors; and if there be any surplus of the joint-estate after satisfying the joint creditors, it shall be applied

in satisfaction of the separate creditors, *quoad* the bankrupt's share; and so if there be any surplus of the separate estate, after satisfying the separate creditors, it shall be applied in satisfaction of the joint-creditors. Vide Lord *Loughborough's* order 8 Mar. 1794. 4 Bro. Ch. Rep. 548. *Gray v. Chiswell*, 9 Ves. 118, 124. And since the above order, it has been determined, that joint-creditors may in the first instance be admitted to prove under a separate commission, and so, it is presumed, *vice versa*, for the purpose of the account, and of assenting to and dis-

senting from the certificate, but not to receive a dividend, till accounts taken, *Ex parte Elton*, 3 Ves. 238, 241. *Ex parte Clay*, 6 Ves. 813. So under a joint-commission, not only the affairs of the separate creditors, but also of separate firms of the persons against whom the commission has been issued may be arranged, *ex parte Bonbonous*, 8 Ves. 540, 545. And afterwards, in *ex parte Chandler*, 9 Ves. 35. it appears, that where a separate commission issued on petition of joint-creditor, the joint-creditor on behalf of himself and all other the joint-creditors, petitioned the *Chancellor* to be permitted to prove for the purpose of voting in the choice of assignees, and receiving dividends; and the order made accordingly, provided the petitioners would pay the separate creditors.—Note, an affidavit was there made, that there was no separate debt, except about 30*l.* which it was suggested would not be proved. And a joint-certificate allowed as the separate certificate of the survivor, *ex parte Currie*, 10 Ves. 51. And where a creditor joint and separate, he must elect against which estate to go in the first instance, and then he has no preference to the other creditors with whom he

elects to class himself, *ex parte Bevan*, *ibid.* 107. As to the mode of administering the joint-property under a separate commission, vide *Everett v. Backhouse*, *ibid.* 94, 98. And for a summary of the history of the practice on the above point, vide *Cooke Bank. Law.* 1 vol. p. 237, et seq. tit. joint-debts, *Bridgman*, *Dig. Index.* 1 vol. p. 100. tit. joint-traders. [By stat. 6 G. 4. c. 16. s. 62, in all commissions against one or more of the partners of a firm, any creditor to whom the bankrupt or bankrupts is or are indebted jointly with the other partner or partners of the said firm, or any of them, shall be intitled to prove his debt under such commission for the purpose only of voting in the choice of assignees under such commission, and of assenting to or dissenting from the certificate of such bankrupt or bankrupts, or either of such purposes; but such creditor shall not receive any dividend out of the separate estate of the bankrupt or bankrupts until all the separate creditors shall have received the full amount of their respective debts, unless such creditor shall be a petitioning creditor in a commission against one member of a firm.]

[ 707 ]

CASE 629.

Dec. 19.

Eq. Ca. Ab.

69. pl. 6. S. C.

*A.* being indebted to a feme covert, becomes a bankrupt; the

husband pays the contribution-money, and dies before distribution, and then the wife died. The executors of the wife are intitled to the dividend; for the husband paying the contribution money does not alter the property of the bond.

## ANONYMOUS.

*J. S.* indebted by bond to the wife of *A.* became a bankrupt; the husband comes in and claims the debt, pays the contribution-money, but dies before any dividend was made; the wife survives, and dies also before any distribution.

*Lord Chancellor* directed the distribution to be made to the executors of the wife, and not to the executors of the husband, repaying to the husband's executors what was paid for contribution.

The husband paying the contribution-money did not alter the property of the debt; but it remained a *chose en action*, and survived to the wife.

DE

TERM. S. HILLARII, 1715.

IN CURIA CANCELLARIÆ.

TROTT & Al'. *versus* VERNON.

SIR *Henry Boothby* made his will, and thereby willed and devised that his debts, legacies and funerals should be paid in the first place; *Item*, (1) he gave to his sister several manors and lands for life, remainder to her issue if any, remainder over to others; and after some legacies given, made his sister executrix, who married the defendant *Math. Vernon*, and died leaving issue the other defendant the infant.

for life, remainder to her issue, remainder over; and made the sister executrix. Decreed the lands to be charged with the debts.

The plaintiffs were creditors of Sir *Henry Boothby* by simple contract. The question was, whether the real estate (there being not sufficient personal assets) was made subject and liable to the debts by simple contract.

For the defendant it was insisted, that there was no direct charge upon the land, and the clause, willing his debts and legacies to be paid in the first place, does not necessarily imply, that his lands shall be charged therewith; and the rather, because it includes even legacies and funerals; and the devise to his only sister, who was his heir at law, was not the better to enable her to perform the will, or to give any thing to her for that purpose; but to prevent her from taking as heir at law, and to secure the estate to her issue, and remainder men; and gave her barely an estate for life, which was not a proper fund for payment of debts, legacies, and funerals.

*Sed non allocatur.*

CASE 630.  
Pre. Ch. 430.  
Eq. Ca. Ab.  
198. pl. 6.  
Gilb. Eq. Rep.  
III. S. C.  
One by will  
devises that  
his debts and  
legacies  
should be  
paid in the  
first place;  
and then de-  
vises his lands  
to his sister

---

(1) "And subject to the same devise." R. L.

TROTT v.  
VERNON.

*Lord Chancellor.* It is but natural to suppose, that all persons would provide for the payment of their just debts; and directing them to be paid in the first place imports, that before any devise by his will should take place, his debts, &c. should be paid; and he seemed to lay some stress upon the word *Devise* (2), and decreed the real estate to be liable to the payment of the debts.

(2) The words of the decree in this particular are, "and his using the word *devise*, in his said will, must mean some benefit, and the plaintiffs can have no devise should not their debts be charged on the real estate, for without the word *devise* they would have been paid their debts out of the personal estate so far as the same would extend, and that this will is executed in the same manner so as to charge lands." Reg. Lib. 1715. B. fol. 168. and in *Keeling v. Brown*, 5 Ves. 359, 361, where testator willed and directed that all his just debts and funeral expenses should be paid and discharged by his executors, and then devised his real estate; and the personal estate sufficient to pay debts but not all the legacies; *Arden*, Master of the Rolls, refused to marshal the assets in favour of the legatees, and gave *int. al.* as a reason, "There is no devise, no trust in them of the real estate which is all otherwise disposed of." So *Powell v. Robins*, 7 Ves. 209. where, however, assets marshalled in favour of simple contract creditors: but in the case of *Stanger v. Tryon*, 22 June, 1778. MS. on the will of *Robert Tryon, Clerk*, where the words were, "In the first place I will that all my just debts and funeral expenses be fully paid and satisfied," and then testator gave and devised *int. al.* his copyhold lands, which he had surrendered to the use of his will to his wife for life, remainder

to his daughter and her heirs, charged with certain annuities; and gave the residue of his estate and effects to his wife: *Sir Thomas Sewell*, held the copyholds liable to make good the deficiencies of the personal estate for payment of debts, Reg. Lib. 1775. B. fol. 29. Reg. Lib. 1777. B. fol. 472. So as to real estate, in a case of *Kay v. Townsend*, 21 Feb. 1776, where testator after directing his debts and funeral expenses to be fully paid and discharged, "gave and bequeathed his estates both real and personal to his wife *Ann Townsend*, with full power to dispose, settle, and distribute the same amongst his six children as she should think proper; and his will was, that she should make choice of Mr. *W. F.* attorney at law, to assist her in settling, disposing, and distributing his said estates, both real and personal, amongst his said children, in the best and most just manner they could contrive and devise: the decree declared that the testator's real estate is chargeable with his debts, as an auxiliary fund to make good the deficiency of his personal estate for payment thereof." Reg. Lib. 1775. A. fol. 223. As to the mode by which real estate charged with payment of debts, vide [*Newman v. Jackson*, ante, 1 vol. 45.] *Cloudsley v. Pelham*, ante 1 vol. p. 411, and cases cited in notes there: and for the cases on marshalling assets, *Sagitary v. Hyde*, ante 1 vol. p. 455.

CASE 631.  
MASTER of the  
ROLLS.  
Feb. 15.

### BLANDY versus WIDMORE.

*BENJAMIN BLANDY* on his marriage with the defendant (now the wife of *Widmore*) covenanted, if she survived, to leave wife 650*l.* he dies intestate, and the wife's share, on the statute of distribution, comes to more than the 650*l.* this is a satisfaction. Post Case 641.

her 650*l.* He died intestate without issue, but left four brothers or their representatives. The defendant having taken administration to her husband, the bill was by a son of one of the brothers for an account and distribution of the intestate's estate.

BLANDY v.  
WIDMORE.

And it being admitted that the widow's moiety of the estate, upon the distribution, amounted to above 1000*l.* the question was, whether the widow should first come in as a creditor for the 650*l.* and after for a moiety of the surplus of the estate by the *statute of distributions*.

[ 710 ]

For the plaintiff it was insisted, that by the husband's dying intestate, possessed of a personal estate of upwards of 2000*l.* a moiety whereof comes to his widow; *that* was a good performance, even literally, of the covenant, for he had left her 650*l.* and upwards, and falls under the same reason, as if he had made a will, and left her *that* sum; for where a man dies intestate, the statute of distributions has made a will for him. The case of *Wilcocks* and *Wilcocks*, *Trin.* 1706, was cited, *Ant. Ca.* 506. where the father covenanted to settle 100*l.* *per ann.* on his son, but did not; yet having suffered 100*l.* *per ann.* to descend upon him, *that* was decreed to be a good performance of the covenant; and the case of *Phinny* and *Phinny*, where the husband covenanted, if he married a second wife, to give his son by the first wife 500*l.* He dying intestate, decreed to have it brought into *hotch-pot*. *Ant. Ca.* 568.

In the principal case, the Master of the *Rolls* decreed for the plaintiff, that the widow's 650*l.* was well satisfied, by her having a moiety of the personal estate of greater value by the statute of distributions, and that she should not come in first as a creditor for the 650*l.* and also for a moiety of the surplus. (1)

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(1) Affirmed on a re-hearing; vide 1 P. Wms. 324. S. C, and cases cited in not. there; and further on the head of satisfaction, *Goodfellow v. Burchett*, ante p. 298; but where trust term by the will of the grandfather for raising portions, provided, amongst other events, that if the children should be by their father, in his life-time, advanced and preferred with portions as good or greater, then the trust term to cease; the father died intestate, and the children became intitled to personal property of the father under the intestacy; *Eldon*, Lord Chancellor, was

of opinion, that this personal estate so taken by the children did not adeem the portion given by the grandfather's will, *Twisden v. Twisden*, 9 Ves. 413. But note, the Lord Chancellor intimated to the parties, that on account of the importance of the question, he was willing to hear it re-argued with the assistance of the Master of the *Rolls* and Lord *Alvanley*; but afterwards, the parties not having expressed any inclination to have the case argued again, the Lord Chancellor made the decree for raising the portion. However, in the case of *Garthshore v. Cha.*

lie, 10 Ves. 1, where a covenant in marriage-settlement by the husband in the event of his death, leaving his wife surviving, and children, that his heirs, &c. should convey for her use a moiety of his real and personal estate; it was held, that the widow was not intitled to a third of the residue of the personal estate by the intestacy of the husband in addition to the moiety under the

covenant. *Note.* In the above case of *Garthshore v. Chalie*, ub. sup. p. 12. the authority of the principal case is a good deal canvassed, and considered as established. Et vide further on the doctrine of satisfaction, *Leake v. Leake*, 10 Ves. 477. [*Goldsmid v. Goldsmid*, 1 Swan. 211, and cases collected in note, *ibid.* 221.]

## CASE 632.

LORD

CHANCELLOR.

Feb. 25.

Eq. Ca. Ab.

202. pl. 24.

S. C.

One devises the surplus of his estate to his grandchildren living at his death; grandchildren born after his decease shall not take.

MUSGRAVE & Al'. *versus* PARRY & Al'.

SIR *John Chardine* devised the surplus of his estate to his grand-children, living at the time of his decease, to be paid to them at *twenty-one*, or marriage. (1) There were two grand-children born, the one within four months, the other within six months after his decease.

A child *en ventre sa mere* may be vouched, is capable of taking; the mother may detain charters on behalf of such child; a suit may be brought on behalf of such child, and the Court will grant an injunction to stay waste; and *hereditus de corpore procreatis* and *procreandis* are the same. Ant. Ca. 522.

\*For the plaintiffs, the grand-children born after his decease, it was insisted, that a child in *ventre sa mere* is capable of taking, may be vouched, a bill may be brought on its behalf, and an injunction to stay waste. (2) The mother may justify detaining of writings on the behalf of a child in *ventre sa mere*, a limitation *hereditus de corpore procreatis* shall include issue after born, and so *è converso procreandis* includes issue already born. And the case of *Palmer and Creaghcroft* cited. (3)

The Court will grant an injunction to stay waste; and *hereditus de corpore procreatis* and *procreandis* are the same. Ant. Ca. 522.

[\* 711 ] *Lord Chancellor.* The words, living at the time of his decease, must be restrictive words, and can be of no other use, else the devise had been to his grand-children. A will must be expounded according to what is contained in it; and we must not make or vary the will, to provide for children or grand-children not provided for by the will; and decreed it for the grand-children living at the testator's death, and excluded the *two* born after his decease. (4)

(1) With survivorship; and also 100l. a-piece for mourning to each of such grand-children. R. L.

(2) So *Lutterel's* case, cited in *Hale v. Hale*, Pre. Ch. 50. Et vide *Scatterwood v. Edge*, 1 Salk. 229.

(3) Ante p. 578. quod vide and cases

cited in not. there, and also the cases cited in note to *Weld v. Bradbury*, ante p. 705. *Darbison v. Beaumont*, 1 P. Wms. 229.

(4) And the like decree as to the legacies for mourning. Reg. Lib. 1715. B. fol. 180.



WARD & Al'. *versus* CECIL & Al'.

Case 633.

LORD

CHANCELLOR.

March 12.

Act of Parliament for sale of Lord Stawell's estate, and that the monies arising by sale should be first applied to pay off the mortgages, and afterwards for payment of statutes, judgments, and re-

A PRIVATE act of parliament was obtained for the sale of the Lord *Stawell's* estate, by which it was enacted, that the estate should be vested in trustees to be sold; and that the money arising by sale, should in the first place be applied to pay the money due to the mortgagees, and after payment thereof, then to pay the creditors by statutes, judgments, and recognizances; and in the close of the act, there was a general saving of the rights of all persons, bodies politic and corporate, \* other than and except the heir at law, and several others of the Lord *Stawell's* family.

cognizances, with a saving to all but the right of the heirs of the Lord *Stawell*. Decreed that subsequent mortgages shall be paid before precedent statutes.

Several of the statutes and judgments were prior to some of [ \* 712 ] the mortgages; and there being a decree for sale and execution of the trust in the act of parliament, the question now before the Court, upon a special report, was, whether mortgages should be paid in the first place; or whether the creditors by statutes, judgments, and recognizances, should be let in to receive a satisfaction according to their priority, or be postponed to the mortgages.

For the creditors by statutes, judgments, and recognizances, it was insisted, that as their securities bound the land as well as the mortgages, they were, both in law and equity, to be considered as having a prior right to the subsequent mortgages; and although in the beginning of the act it is provided, that the mortgages shall be paid in the first place; yet there is a general saving of the rights of all persons, except the heir at law, and those of the Lord *Stawell's* family: and *that* saving set the matter at large again, and restored them to their priority.

*Lord Chancellor.* The act expressly provides that the mortgages shall be paid in the first place, and the general saving must not control the express provision of the act; but must be so expounded, as to consist with the express preference given to the mortgagees; (1) and he must decree the execution of the trust accordingly; but seemed to admit that, by virtue of the general saving in the act, they might make use of their incumbrances as they could at law.

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(1) On the subject of expounding private acts of parliament, vide *Riddell v. White and others*, 1 Anstr. 281. As to the precedence of incumbrances in general, *Bristol v. Hungerford*, ante p. 524. and cases cited in notes (1) (2) p. 526. there.

WARD v.  
CECIL.

[ 713 ]

And it was further observed, that the act of parliament had not done them such manifest injury as was supposed, in regard at the time of passing the act, the heir of the Lord *Stawell* was an infant of but *four* years old, and the statutes, judgments, and recognizances could not reach the estate, till the heir came of age; (2) but the mortgagees might enter presently; and therefore to induce them to consent to a sale, there might be some reason for giving them the preference, it being apprehended at that time, that the estate, if presently sold, would have raised sufficient to have paid the whole; and upon that supposition it was provided that 200*l.* *per ann.* should be allowed for the heir's maintenance during his minority.

(2) Neither is the guardian compellable to apply the profits of the estate of infant heir to pay off the bond-debts; *Waters v. Ebrall*, ante p. 606. and cases cited in not. there: because in the case of an infant the parol shall

demur till he comes of age, even where to the prejudice of infant, if insisted on in the pleadings, *Scarth v. Cotton*, Forr. 198. And further on this point vide *Creed v. Colvile*, ante 1 vol. p. 172. and cases cited in note (1) p. 174. there.

CASE 634.  
LORD

CHANCELLOR.  
One claims a fee-farm rent under the Stat. of Car. 2. and the land is sequestered, out of which the rent issues. Court ordered the grantee of the fee-farm rent might take his remedy at law for the rent, notwithstanding the sequestration.

ATTORNEY GENERAL *versus* MAYOR, &c. of COVENTRY.

THE plaintiffs having obtained a decree against the Corporation of *Coventry* for 2000*l.* and upwards, belonging to Sir *Thomas White's* charity; and for non-payment thereof having obtained a sequestration, and taken possession of all the corporation-lands; the Earl of *Aylesford* having a fee-farm rent of 50*l.* *per ann.* payable by the Corporation, moved the court, that the sequestrators might be ordered to pay it out of the money in their hands; and upon that motion it was referred to a Master to examine, and state the nature of the demand. (1)

Upon the report it appeared, that Queen *Isabel*, having a grant for life of the tolls, fines, and amerciaments, &c. of the town, and the reversion in fee granted to Prince *Edward*; they granted the same to the Corporation, reserving a fee-farm rent of 50*l.* *per ann.* and the estate afterwards coming to the Crown, the franchises, tolls, fines, and amerciaments, were by several charters confirmed to the Corporation, reserving the

(1) This came on before Lord Chancellor, assisted by *Parker* and *King*, Ch. Just. upon exceptions taken by the Earl of *Aylesford*, to the Master's report; the Master having reported that the commissioners named in the seques-

tration were not in possession of any lands or other matters liable to the fee-farm rent of 50*l.* *per ann.* formerly payable by the defendants, the Mayor and Corporation of *Coventry*, to the Crown. R. L.

50*l.* *per ann.* which had been constantly paid to the *Crown*, until the fee-farm rents were sold ; and this fee-farm rent was purchased from the trustees appointed by the Act 22 *Car.* 2. *cap.* 6. by the Lord Chancellor *Nottingham*, and by him devised to the Lord *Aylesford* his younger son, (2) to whom it was paid, until about *two* years since ; and the act of parliament to encourage purchasers gave them the like liberty the *Crown* had to distrain, not only upon the estate granted, but upon any of the lands of the tenant, who ought to pay the fee-farm rent.

ATTORNEY  
GENERAL *v.*  
MAYOR OF  
COVENTRY.

For the encouragement of purchasers of fee-farm rents, Stat. *Car.* 2. gives the purchasers the same

power of distress, not only on the land out of which the fee-farm issues ; but on any other of the lands of the tenant, as the king had.

For the plaintiff it was insisted, *first*, that this was a rent originally reserved to a subject, and consequently void ; for although the *Crown* may, yet a subject cannot, reserve a rent out of an incorporeal inheritance. (3) But to that it was answered, that the subsequent charters having confirmed the grant, reserving the same rent, it made the rent good ; and besides at this distance of time having been so long paid, it would be presumed to be well reserved.

*Secondly.* It was objected, that the fee-farm rent issuing only out of tolls, fines, amerciaments, &c. the grantee could not distrain upon the lands of the tenants, the act of parliament providing that a purchaser of a fee-farm rent might distrain on all or any of the lands of the tenant, for the time being, that should hold any lands charged with the said rent : but here the tenant holds no lands charged ; for nothing is charged with the rent, but the tolls, fines, and franchises. (4)

*Sed non allocatur.*

*Thirdly.* It was insisted, that although the *King* may distrain in any of the lands of the tenant ; yet it must be \*admitted, that if the tenant alien any part of his lands, or if he devises ; nay, if he leases to a tenant at a rent, although but at will, the *King* cannot distrain upon those lands, being no part of the lands originally charged with the rent ; and so it is upon a recovery by *elegit* ; and therefore even the *Crown* is precarious in the matter ; the tenant may at any time determine *that*

Though the *King* may distrain on any other of the lands of his tenant, as well as on those out of which the rent issues ; yet if the tenant alien, devise, or lease at will

only, his other lands, the *Crown* cannot distrain on those lands.

[ \*715 ]

(2) Under whom the Earl of *Aylesford* claimed. R. L. at the bottom.

(3) So Co. Litt 47. *a.* et vide the page.  
Lord *Mountjoy's* case, 5 Rep. p. 4. *a.*

(4) Vide on this point note (1) next

ATTORNEY  
GENERAL v.  
MAYOR OF  
COVENTRY.

right of distraining by aliening, by devising or setting his land It is only liable, whilst it is in his own hands ; and therefore no great regard was to be given to such privilege ; and if the tenant might do it even by a voluntary act ; if a tenant at will was to be exempt from that power of distress, *a fortiori* the sequestrators, who come in by process, and by a judicial proceeding for a just debt, ought in equity to be equally regarded, and put upon an equal foot with those who come in by *elegit*.

*Lord Chancellor* declared, that all he could do upon the motion, was to declare that notwithstanding the sequestration the Earl of *Aylesford* might take his remedy at law as he should be advised. (1)

(1) The words of the order are as follow : “ Whereupon, and upon hearing the Stat. 22 *Charles II.* &c. read, his Lordship was of opinion that the Earl of *Aylesford* stands in the place of the Crown, as grantee of the Crown, of the said fee-farm rent of 50*l.* per ann. and that the statute 22 *Car. 2.* gives the like remedy to a purchaser of fee-farm rents as the Crown had, and there is more want of remedy where the thing is incorporeal than where lands are charged ; but on the motion of the said Earl, and on the said report, and what was now used in argument, his Lordship cannot relieve him further than that all difficulties be removed which this Court hath brought, and doth therefore declare that the said Earl may, without any apprehension of a contempt of this Court, distrain

“ for the said rent, as he shall think fit, notwithstanding the said sequestration or any process of this Court, and if the parties go to law, and any replevin shall be brought on such distress, any lease or pretended lease of the said sequestrators is not to be given in evidence.” Reg. Lib. 1715. A. fol. 193. Vide 1 P. Wms. 306. S. C. and references there. And note, *Parker*, Ch. Just. seems, by the report of the principal case in P. Wms. to have been of opinion that the Court might reasonably enough have ordered the sequestrators to pay the rent, as before the sequestration. The Corporation paid the fee-farm rent voluntarily, and now appeared sensible of the Earl’s right, and that putting the Earl to distrain was putting the charge of this suit upon the estate.

DE

## TERM. S. MICHAELIS, 1716.

IN CURIA CANCELLARIÆ.

LE PYPRE & Al'. *versus* FARR.

CASE 635.  
 LORD  
 CHANCELLOR.  
 Nov. 7.  
 Eq. Ca. Ab.  
 372. pl. 4. S. C.

ON a policy of insurance on goods by agreement valued at 600*l.* and the insured not to be obliged to prove any interest. Goods insured by agreement, valued at 600*l.* and the insured not to be obliged to prove any interest; yet the insured is ordered to discover what goods be put on board, that the value of his goods saved may be deducted out of the 600*l.*

*Lord Chancellor.* Ordered the defendant to discover what goods he put on board; for although the defendant offered to renounce all interest to the insurers; yet referred it to a Master to examine the value of the goods saved, (1) and to deduct it out of the value or sum of 600*l.* at which the goods were valued by the agreement. (2)

(1) "Or come to the hands of the defendant or any of his agents." R. L.

(2) Reg. Lib. 1716. B. fol. 52. The plaintiffs by their bill stated, that they were assured by one *Boddington*, who applied to them as the agent of the defendant to subscribe the policy, that the ship was a tight and good ship, and well fitted for the voyage, and that there were goods on board her of the

value of 600*l.* belonging to the defendant. The defendant by his answer said, that *Boddington* had no orders from him to say the goods on board were of the value of 600*l.* or any other value. Vide *Goddart v. Garret*, ante p. 269. and note there. Stat. 19 Geo. II. cap. 37. Park on Insurance, p. 261. *et seq.* [And the notes to *Goram v. Sweeting*, 2 Sand. 201, h. 202, c. 5th edit.]

HARMAN *versus* VANHATTON.

CASE 636.  
 LORD  
 CHANCELLOR.  
 Nov. 7.  
 Eq. Ca. Ab.  
 371. pl. 3. S. C.  
 One lends  
 250*l.* on a bot-  
 tomry-bond,  
 and after-

DEFENDANT lent the plaintiff 250*l.* on a *bottomry-bond*, and afterwards insured on the same ship; but the insurance was larger as to the voyage, there being liberty to go to other ports and places than what were contained in the condition of the *bottomry-bond*. The ship being lost, the defendant re-wards insures on the same ship. The ship is lost. He shall have both the benefit of the insurance, and the money due on the bond too.

HARMAN v.  
VANHATTON.

covered the money on the policy of insurance, and also put the *bottomry-bond* in suit: the ship, though lost, had deviated from the voyage mentioned in the bond, in going to *Virgin-gardo* to buy salt.

The plaintiff brought his bill, pretending the defendant ought not to have a double satisfaction to recover both on the insurance, and also on the bond, he having insured only in respect of the money he had lent on *bottomry*, and had no other interest in the ship or cargo; and therefore the plaintiff would have had the benefit of the insurance, paying the *premium*.

*Sed non allocatur.*

Paying the premium in-  
titles the party  
to the benefit  
of the insur-  
ance.

The defendant having paid the *premium*, was entitled to the benefit of the policy, and run the risk, whether the ship was lost or not; and the insurers might as well pretend to have aid of the *bottomry-bond*, and to discount the money recovered thereon, as the plaintiff to have the money recovered on the policy to ease the *bottomry* bond.

An offer to de-  
liver up a bond  
upon terms not  
complied with  
is not binding,  
and if made  
without con-  
sideration, is  
*nudum pac-  
tum*.

The plaintiff also charged that the defendant had promised and agreed to deliver up the bond, on the plaintiff's \*making up the money recovered on the policy, as much as he lent on the bond, with interest and costs, and proved such offer and promise. *Sed non allocatur.* It was but *nudum pactum*, a voluntary offer, and on condition that the money was then paid, and it was not complied with. (1)

(1) Reg. Lib. 1716. A. fol. 28. vide *Goddart v. Garret*, ante p. 269. The law on this subject now is, that under a general insurance on goods, the party insured cannot recover money lent on *bottomry*, vide *Glover v. Black*, 3 Burr. 1394. 1 Blackst. Rep. 405. S. C. and *respondentia* and *bottomry* on the same principle, *ibid.* Vide Park on Insurance, p. 10. And for difference be-

tween *bottomry* and *respondentia*, it appears, that when the loan is not made upon the vessel, but upon the goods, then the borrower is only personally bound to answer the contract, and that in this consists the chief difference between *bottomry* and *respondentia*; in most other respects they are the same, vide Parke on Insurance, p. 410. *et seq.*

CASE 637.

LORD

CHANCELLOR.

Dec. 26.

Eq. Ca. Ab.

271. pl. 12.

Gilb. Eq. Rep.

125. Pre. Ch.

451. S. C.

A. devises his

fee-farm rents to be sold for the payment of his debts, and the surplus to go betwixt his heir at law, and his younger brother; devises his household goods to go with his house, and the residue of his personal estate to his sister. The personal estate shall not be applied to pay debts in case of the real estate.

### WAINWRIGHT versus BENDLOWES.

*THOMAS BENDLOWES* devised his fee-farm rent to be sold for the payment of his debts, and the surplus arising by sale after debts paid, he devised to his brother *John*, his heir at law, and to his brother *Philip*, and to his brother-in-law *Wainwright*; and willed his household goods should go along



with his house, and devised the rest and residue of his personal estate to his sister *Wainwright*, and made her executrix.

WAINWRIGHT  
v.  
BENDLOWES.

The question was, whether the personal estate should be applied to the payment of debts, in ease of the fee-farm rent.

*Lord Chancellor.* A difference is to be taken, where an estate is to be sold out and out for payment of debts; and where only the debts are charged on it, and the estate made liable to the debts, and cited *Feltham's case*, 1 Lev. 203; and the present case is the stronger, because the surplus arising by sale after debts paid, is not to go to the heir, but is devised away; and besides, here the debts being great, the devise of the personal estate would come to nothing, which is at law deemed the worst construction that can be made of a will; and therefore decreed the debts to be paid in the first place, out of the money arising by sale of the fee-farm rents, and the personal estate only to come in aid of the fund, if deficient, and the surplus of the personal estate to the sister the executrix. The devise of the rest and residue of the personal estate to her is to be understood, what he had not otherwise devised by his will, viz. the household goods to go with the house, and not the residue after debts paid. (1)

Difference  
where an es-  
tate is only  
charged with  
payment of  
debts, and  
where it is de-  
vised to be  
sold out and  
out to pay  
debts.

[ 719 ]

(1) Reg. Lib. 1716. B. fol. 91. Vide fully on this point the cases cited in not. to *Cloudsley v. Pelham*, ante 1 vol. 411. And in confirmation of the doctrine re-

sulting from those cases, the *Duke of Ancaster v. Mayer*, 1 Bro. Ch. Rep. 454. *Watson v. Brickwood*, 9 Ves. 447. *Hancox v. Abbey*. 11 Ves. 179.

### DUX DEVON. versus KINTON Wid'.

CASE 638.

*KINTON* having an estate granted by the Bishop of *London*, to him and his heirs for the lives of *A. B.* and *C.*, upon his daughter's marriage conveyed it over for the use of his son and daughter for their lives, (2) remainder to his own executors, administrators, and assigns; his daughter being dead, and *Kinton* dying indebted to the plaintiff (whose steward he was) by simple contract, and having devised this estate to his wife, the defendant,

LORD  
CHANCELLOR.  
Dec. 5.  
Eq. Ca. Ab.  
242. pl. 8. S. C.  
*A.* seised of a  
leasehold es-  
tate to him  
and his heirs  
for three lives,  
settles it on  
his daughter  
and her hus-  
band for their

lives, remainder to the use of his own executors and administrators. The daughter and her husband die. *A.* dies indebted by simple contract, and devises his estate to his wife. Decreed that the use of this estate being limited to the executors and administrators of *A.* this makes it personal estate in *A.* and being personal estate, *A.* cannot devise it exempt from his debts, though due but by simple contract.

(2) " And after to permit the issue of  
" that marriage to receive the rents,  
" and for want of such issue to permit  
" the executors, administrators, and as-  
" signs of *Aaron Kinton* (the settlor  
" and testator above) to take to his and  
" their use and uses, all the rents and  
" profits during all the estate, as should  
" then be in the premises upon such  
" renewal from time to time." R. L.

DUX DEVON.  
v. KINTON.

The question was, whether the residue of this term expectant on his son-in-law's decease, should be assets to pay a creditor by simple contract.

By the *statute* against *Frauds* and *Perjuries*, (1) an estate *pur auter vie* is made devisable, and is assets to pay bonds and specialties, if it comes to the heir, and assets general, if it comes to the administrator: but if it be devised, (as in this case Mr. *Kinton* has devised it to his wife,) the devisee takes it as devised to him; and it is no more assets now, than it was before the statute of *Frauds* and *Perjuries*.

Lord Chancellor. As to the *statute* against *fraudulent devises*, (2) although the general words in it may extend to a devise of an estate *pur auter vie*, yet that is only for creditors by specialty; and the plaintiff here was only a creditor by simple contract. But in this case the residue of the term being to Mr. *Kinton*, and to his executors and administrators, he had made it personal estate, and his Lordship took it that before the statute of *Frauds* and *Perjuries*, if an estate *pur auter vie* came to an executor or administrator it would be assets, (3) and decreed it accordingly. (4)

[ 720 ]

Estate *pur auter vie*, if limited to executors, was assets before the statute of *frauds* and *perjuries*.

(1) Stat. 29. Car. 2. cap. 3. sect. 12. and see stat. 14 Geo. II. cap. 20. sect. 9.

(2) Stat. 3 Wm. and Mary, cap. 14.

(3) But where an occupancy before the statute of *frauds*, there not subject to debts, *Raggett v. Clerke*, ante 1 vol. 234. And *quære* whether before the stat. 14 Geo. II. cap. 20, such a limitation would convert an estate originally freehold, into personal estate? for where a dean and chapter made a lease to a man, his executors and administrators,

for three lives, it was held to be a descendible estate, and to belong to the heir, and not to the executor, *St. John's College v. Fleming*, ante p. 320.

(4) Reg. Lib. 1716, A. fol. 408. Vide *Duke of Devon. v. Atkins*, 2 P. Wms. 381. S. C. *Westfailing v. Westfailing*, 3 Atk. 460. And the cases and doctrine fully stated and discussed, *Ripley v. Waterworth*, 7 Ves. 425, 444, 446-7-8.

CASE 639.

LORD

CHANCELLOR.

Eq. Ca. Ab.

112. pl. 8. 412.  
pl. 13. S. C.

A. devises lands in trust to permit his daughter *Susan* to re-

ceive the rents until her marriage or death; and in case she marry with the consent of trustees, then to convey the premises to her and her heirs. But if she died before marriage, or married without such consent, then to convey to other persons. *Susan* afterwards marries with the consent of her father, who settles part of the lands on his daughter and her husband, and dies. This settlement is no revocation of the will as to the devise of the other lands to *Susan*.

CLARKE & Ux'. versus BERKELEY & Ux'. & Al'.  
and è contra.

GEORGE BOHUN, having issue four daughters, and no male issue, 17th July, 1705, devises his messuage called *New-house*, and the park and other lands adjoining, to four trustees, upon trust to permit his daughter *Susan*, now the wife of Mr.

CLARKE v.  
BERKELEY.

*Clarke*, to receive the rents and profits until her death or marriage, and in case she married with the consent of *two* of the trustees and of her mother, then to convey unto her and her heirs, or to such person as she should appoint ; but if she died before marriage, or married without such consent, then the trustees to convey those lands to the same uses, as he had devised his other lands by his will. (1).

*Susan* afterwards in the life-time of her father, and with his consent, married with the plaintiff Mr. *Clarke* ; and the testator upon her marriage conveyed to Mr. *Clarke*, *Newhouse* and park, and other lands part of the trust-estate, and died, having made such will as aforesaid.

The bill was brought by Mr. *Clarke* and his wife, against the trustees and the other *three* daughters, to have the residue of the trust-estate conveyed to the plaintiff *Susan*, according to the will.

[ 721 ]

It was insisted by the defendants, that the testator having in his life-time preferred his daughter *Susan* in marriage, and given her a portion by conveying part of the trust-estate to her husband, and that in present possession, *that* amounted to a revocation of the devise ; the lands devised to her being intended as a portion to advance her in marriage, and the conveyance to her of the greatest part, although not of the whole, in present possession upon the marriage, was an equivalent and as good a portion, as the whole would have been after the testator's decease.

And it was also insisted by the defendants, that she could not take by the will, the devise being on a condition precedent, that she married with the consent of the trustees and her mother, in her widowhood, and no such consent was had ; she marrying in her father's life-time, when the trustees had no estate or trust, and the conveyance was to have been made on her marriage : and the devise was grounded only upon a supposition of a marriage to be had after the testator's decease, which did not happen.

*Lord Chancellor* decreed a conveyance according to the will, declaring that the marriage did not work a revocation ; (2) and as to the condition in the will, of her having the consent of the trustees, and of her mother, *that* was dispensed with by having

By the daughter's marrying with consent of her father in his life-time, the condition is dispensed with.

(1) On the doctrine of limitations of this nature, vide [*Jervois v. Duhe*, ante vol. 1. 20.] *Creagh & Ux'. v. Wilson & Al'*. ante p. 572, and cases cited in

not. there.

(2) " Except as to such part of the lands devised as were settled on the said marriage." R. L.

CLARKE v.  
BERKELEY.

the testator's own consent; which was more to be regarded than any consent of trustees, to whom he had delegated a power to consent, in case of a marriage after his decease. (2)

(2) Reg. Lib. 1716, A. fol. 71. On the doctrine of revocation in general, vide *Perkins & Al'. v. Walker & Al'*. ante 1 vol. 97. *Hall v. Dench*, ibid. 329, and cases cited in not. there respectively, *Burtenshaw v. Gilbert*, Cowp. p. 49. And as to the ground of partition, merely as such not being a revocation, and which is laid down in *Attorney General v. Vigor*, 8 Ves. 281,

that is fortified by *Maundrell v. Maundrell*, 10 Ves. 246, 256, 264, but with this distinction, that where a partition is made, and in the mode of doing it, the deviser conveys to such uses as he shall appoint, and in default of appointment to himself in fee, that is a revocation, there being a purpose beyond the partition, viz. the power of appointment.

[ 722 ]

CASE 640.  
LORD

CHANCELLOR.  
Nov. 9.

Pre. Ch. 439.  
*Nomine*

Sympson v.  
Hornsby.

Gilb. Eq. Rep.  
115, 120.

Eq. Ca. Ab.  
216.

pl. 6. 407. pl.  
6. S. C.

Devise of  
lands to A.

and the heirs  
male of his

body. A. dies  
in the life of

the testator,  
leaving issue.

The devise  
is void,

and the issue cannot take.

### HUTTON *versus* SIMPSON & Ux'. & è contra.

**THOMAS ADDISON** having issue two daughters, *Jane* the wife of *Simpson*, and *Bridget* the wife of *Hutton*, 14th Aug. 1702, made his will, and thereby declares that his daughter had married *Simpson* against his will; yet devised to her some tithes, and a sum of money, and gives legacies to her children, and declared what he had so given to his daughter *Jane*, was in full of her portion, and in bar of any further part of his real estate; and after the decease of his wife, he devises his lands in *Turpentro* and in *Whitehaven*, and all other his real estate, to his daughter *Bridget*, and the heirs of her body begotten; and for want of such issue, unto his daughter *Jane Simpson* for life, and to her *first* and other sons in tail, remainder to her daughters in tail.

*Bridget* afterwards married *Hutton* with the testator's consent, and died in his life-time, leaving issue the plaintiff *Hutton*. After the death of *Bridget*, the testator annexed a codicil to his will, and thereby disposed of some part of his personal estate.

*First*. Resolved that *Bridget* dying in the life-time of the testator, the devise became void, and that her son could not take as heir of her body, but the estate was to have vested in the mother; and the words heirs of her body were words of *limitation*, and do denote the nature and duration of the estate the mother was to take. (1)

(1) It appears to be clearly settled as the law, that in such a devise as the above, the heirs of the body cannot take by purchase, *Elliot v. Davenport*,

1 P. Wms. 83, 85. *Goodright v. Wright*, ibid. p. 397, and cases cited in not. there. *Shelley's Case*, 1 Rep. 105.

*Secondly.* That although a codicil was annexed to the will, *that* could not amount to a republication of the will, nor give any title to the son. (2)

HUTTON v. SIMPSON. Making a codicil and annexing

it to the will, is no republication of the will.

*Thirdly.* Whereas the lands in *Turpentro* and *Whitehaven*, were devised to *Jane Simpson* after the death of her sister without issue, who had issue now living, the plaintiff; yet the devise to *Bridget* and the heirs of her body becoming void by the death of *Bridget*, in the life-time of the testator, *Jane* should take immediately by virtue of the devise. The authorities in the books being so, although the *Lord Chancellor* at the same time declared, it was not only against the intention of the testator, but also against the express words of the will, and also against a maxim in law, that an heir is not to be disinherited without express words. (3)

[ 723 ]  
Devise of land to *A.* in tail, and after *A.*'s death without issue, to *B.* *A.* dies in the life of the testator, leaving issue; the devise to *A.* is void, and *B.* shall take the remainder presently, though against the words and intent.

*Fourthly.* That a devise to *Bridget* after the death of his wife, although *Bridget* was but one of the two co-heirs, would give an estate for life to the wife by implication: but *that* would not concern this case; for the words in the will after the death of the wife, related only to her jointure-lands devised to *Bridget*.

One having a wife and four daughters, devises lands to one of his daughters after the death of his wife; this is a devise to the wife for one of the co-heirs.

life by implication, though the daughter was only one

The cases cited were *Fuller* versus *Fuller*, *Cro. Eliz.* 422, when the first devise is void, the remainder shall take place, as if no such devise had been made; and *Hartop's* case, 1 *Levinz*, and *Cro. Eliz.* 243. Devise to *A.* and heirs of his body, remainder to *B.* *A.* dies in the life-time of the testator; *B.* shall take presently, although *A.* left issue. (4)

*Fifthly.* The testator having given the residue of his estate to his wife, with power to dispose thereof with the approbation of his trustees, although she made a will and devised to the plaintiff *Hutton*: *Lord Chancellor* declared *that* devise void, she not having the concurrence of the trustees, and that the testator died intestate as to the residue of his estate.

*A.* having a power of disposing of land with consent of trustees, devises the lands by her will, this being without the consent

of the trustees, is void.

(2) Yet republication of wills is much favoured in equity, per Sir John Churchill, Master of the Rolls. *Hall v. Dench*, ante 1 vol. 330. And on the above point of republication, vide *Alford v. Earle*, ante p. 209, and cases cited in not. there.

(3) Vide cases cited in not. (2) to *Fawlknor v. Fawlknor*, ante 1 vol. p. 21.

(4) 1 Leon. Rep. 253. S. C. And for instances in which the remainder shall be good, although the particular estate is defeated, vide *Co. Litt.* 298, a.

HUTTON v.  
SIMPSON.  
Equity will  
not relieve for  
mesne profits,  
unless in case  
of trust or an  
infant, where  
no entry is  
made by the  
person intitled  
to the mesne  
profits.

*Sixthly.* Although the wife did not take an estate for life by implication, (the words after the death of the wife, having respect to the jointure-lands only, and not to the other lands mentioned to be devised to his daughter *Bridget*;) (1) yet she had taken the rents and profits of the whole; however there being no trust, nor infant in the case, nor any entry made by *Jane Simpson* in the life-time of the wife; the *Lord Chancellor* would not decree any account of the rents and profits taken by the wife. (2)

(1) [See *Dyer v. Dyer*, 1 Mer. 414.]

(2) Vide *Tilley & Ux' v. Bridge & Al'*. ante p. 519. As to Court ordering an account of profits by infant against an intruder, where a verdict against infant's title, vide *Com. Newburgh v. Bickerstaffe*, ante 1 vol. 295. And it

is stated as a principle, that wherever the Court decree an account of rents and profits, they do it from the time of the title accruing, *Dormer v. Fortescue*, 3 Atk. 125. [See Note (z) to *Ben-net v. Whitehead*, 2 P. Wms. 646. 6th Edit.]

CASE 641.

LORD

CHANCELLOR.

Nov. 7.

*A.* by marriage-articles is bound to pay his wife, if she survives him, 1500*l.* in full of dower, thirds, custom of London, or otherwise, out of his real and personal estate. *A.* dies intestate; this bars the wife of her share by the statute of distributions.

DAVILA versus DAVILA.

MR. *Davila*, on the marriage of his wife in 1703, in consideration of the intended marriage, and of 1000*l.* portion, covenanted, if his wife survived him, to pay her 1500*l.* in a month after his decease, in full of dower, thirds, custom of *London*, or otherwise out of his real or personal estate.

*A.* dies intestate; this bars the wife of her share by the statute of distributions.

Mr. *Davila* died intestate, and without issue; his widow brought her bill against the administrator of her husband, to have a moiety of the personal estate by the statute for distribution of intestate's estates.

The defendant, the administrator, pleaded in bar thereunto the said marriage agreement, and that thereby the plaintiff was to have but 1500*l.* out of her husband's real and personal estate, which he was ready to pay.

[ 725 ]

For the plaintiff it was insisted, that the marriage-agreement did not extend to debar her from a moiety of the personal estate, which the law gave her, not by her marriage, but by her husband's dying intestate; and the marriage-agreement was intended to bar her only of all such right as she might claim or become intitled unto by virtue of her intermarriage; and as the husband might have given her by will any part of his real or personal estate, and as the marriage-agreement would not hinder her from taking a moiety of his estate, if he had



thought fit to devise it to her by will ; the statute for settling intestate's estates was in the nature of a will, for all such as die intestate.

DAVILA v.  
DAVILA.

Or if she might not have the 1500*l.* by the marriage-agreement, and also the moiety of the estate by the statute ; yet she might elect *that* of the *two* provisions, which was most beneficial.

*Lord Chancellor.* By the words of the agreement she is tied down to accept the 1500*l.* in full for what she might claim for dower or thirds, or by the custom of the city of *London*, or otherwise, out of the real or personal estate ; words are never to be confined or restrained from their natural signification, and therefore allowed the plea. (1)

It is objected, her husband might have given her a legacy : it is true he might have so done, and so he might have made a will, and have given her nothing ; and possibly he might think it not necessary to make a will, and devise the estate to his next of kin ; because he knew his wife was barred by the agreement from claiming more than the 1500*l.* and that all the rest of his estate would go to his next of kin.

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(1) Reg. Lib. 1716, A. fol. 127. *Blandy v. Widmore*, ante p. 709, and Merely the entry of plea allowed. vide cases cited in not. there respectively. *Benson v. Bellasis*, ante 1 vol. 15.

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### PETER *versus* RUSSELL.

[ 726 ]

*GOFFE* having a lease from Mr. *Poultney* for *sixty* years, of the Thatched Tavern, in St. *James's*, and of a void piece of ground adjoining to it, with power to build thereon, had mortgaged it to Dr. *Lancaster* and to Mr. *Haberfield*, which by mesne assignment came down to the defendant *Russell*, on which there was due on the 5th of *March*, 1705, 1700*l.* In *May*, 1706, *Goffe* pretending he had contracted to let out part of the ground to be built upon, under a ground-rent that would be an improvement to the estate, desired the defendant *Russell*, who had the original lease in his custody, to lend it to him, to satisfy the persons he was contracting with, as to the duration of his term, and that he had power to grant a building lease ; the defendant *Russell* accordingly let him have it, being then at *Goffe's* house ; and in a few hours after, *Goffe* delivered back the lease to the defendant *Russell*.

CASE 642.  
LORD  
CHANCELLOR.  
Eq. Ca. Ab.  
321. pl. 7.  
Gillb. Eq. Rep.  
122. S. C.  
*A.* having a mortgage of a leasehold estate, the mortgagor borrows the original lease of *A.* with an intention to borrow more money on the premises. If *A.* was privy to the mortgagor's intention of taking up more money on the

premises, *A's* mortgage shall be postponed to the subsequent mortgage, as being accessory to the fraud. Otherwise if *A.* was not privy to the subsequent loan, but innocently lent, the lease to the mortgagor.

PETER v.  
RUSSELL.

The plaintiff brought his bill, and alleged that on the 27th of *May*, 1706, he lent *Goffe* 250*l.* on mortgage of part of the premises, and that he was induced so to do upon *Goffe's* shewing and producing to him the original lease, and was drawn in to lend the money by the defendant's parting with and trusting *Goffe* with the original lease: and although *Russell* swore by answer he did not know the plaintiff was about to lend, or *Goffe* to borrow any money, and only produced it to satisfy such persons, as *Goffe* alleged were treating with him to make an improvement upon the estate; yet at the *Rolls* the plaintiff obtained a decree to be paid the money by him lent in the first place, and to postpone *Russell's* mortgage; and the estate not being sufficient to pay both, *Russell* appealed from the decree.

*Lord Chancellor* reversed the decree, it being denied by answer, and there being no proof, that *Russell* knew, or was informed that the plaintiff was about to lend *Goffe* money; but produced his lease upon another occasion, to satisfy the persons who were supposed to be treating for leases to build on; and did not any thing against good conscience, whereby to forfeit his mortgage, he having neither actually encouraged the plaintiff to lend the money, nor passively, as standing by and concealing the mortgage, knowing that the plaintiff was about to lend money on the premises. (1)

(1) "Especially since the plaintiff lent his money without having or insisting to have the custody of the said original lease," and dismissed the bill with costs, "unless the said plaintiff shall pay unto the said defendant his principal and interest due upon his said security, together with his costs at law, and of this suit, within six months after the same shall be computed and taxed." Reg. Lib. 1716. B. fol. 184. Cases of this nature necessarily depend upon particular circumstances, but the general principle resulting from the leading cases on the subject is, that in order to postpone a prior mortgagee, it is necessary to prove against him fraud, or actual notice, or negligence so gross as to amount to fraud; and that the mere possession of title-deeds by a second

mortgagee without notice will not do; this principle is stated and thoroughly discussed by *Eldon*, Lord Chancellor, in *Evans v. Bicknell*, 6 Ves. 174. in which the cases on the subject, particularly *Plumb v. Fluitt*, 2 Anstr. 432. and those collected, Fonb. Tr. Eq. Book 1. Ch. 3. § 4. note (n.) are so fully collected and referred to, as to render, it is presumed, a repetition of them here unnecessary. [See also *Barnett v. Weston*, 12 Ves. 133. *Harper v. Faulder*, 4 Madd. 129.] Note, as to gift of lease by lessee, it is said by Lord Coke, that if lessee making deed of gift of his lease, retain the lease, this would, as against subsequent assignee, be clearly fraudulent, even at law; and to this the whole Court assented. *Stowe v. Grubham*, 2 Bulstr. 225.

JOHN EDWARDS and ELIZABETH his Wife, Widow and Executrix of CAPTAIN JENEFER, *versus* SIR RICHARD CHILD, SHEPHERD and Others, Owners of the Ship Success, and the EAST-INDIA COMPANY.

CASE 643.  
Eq. Ca. Ab.  
375 pl. 8. S. C.  
East-India  
Company  
take bonds  
from the ma-  
riners and  
officers of the  
ships, not to  
demand their  
wages, unless  
the ship re-  
turned to the  
port of Lon-  
don. The  
ship arrives at  
a delivering  
port, and is  
afterwards  
taken by the  
French. The  
seamen and  
officers shall  
have their  
wages to the  
time of the ar-  
rival of the  
ship at the  
delivering  
port.

[ 728 ]

IN 1693, *Jenefer* was appointed Captain of the ship *Success*, on a voyage to *India*, at 10*l.* per month wages, and to have two servants, the one at 30*s.* per month, and the other at 20*s.* per month wages. *Jenefer* the master, and the defendants the part-owners, enter into a charter-party with the *East-India Company*, in which recital was made, that the *Company* had paid to the master and mariners in part of freight 1200*l.* by way of imprest money; and further agreed, that the seamen at the end of every *six* months during the voyage, should receive one month's wages; and that until *six* days after the return of the ship to the port of *London*, the *East-India Company* were not to pay any freight, save the said imprest money, which was not to be returned, although the ship should be lost in the voyage: and therefore by the direction of the *Company*, *Jenefer* the commander, when he hired the seamen, took bonds from them not to demand any wages till the return of the ship to the port of *London*, and that they should not demand any wages, if the ship was lost before her return to *London*.

The ship sailed to *Bengal*, and there delivered her outward bound cargo. In her return home the ship was taken by the *French*, on the coast of *Ireland*, and the captain and mariners made prisoners.

The captain was sued by the mariners for their wages, being *four* months, that became due at *Bengal*, the first delivering port; and although the bonds were given in evidence, yet the mariners recovered their wages in an action tried before the Lord Chief Justice *Holt*.

The bill by the plaintiffs, the wife being the executrix of Captain *Jenefer*, was to recover about 800*l.* he had been forced to pay to the mariners, and likewise to have the Captain's own wages, and the wages of his servants for *four* months, that became due at *Bengal*, the first delivering port.

Upon producing of precedents, where relief had been given in like cases, viz. the case of Sir *Humphry Edwin* and Captain *Stafford* against the *East-India Company* in 1695, (1) and the

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(1) Ante p. 210. quod vide, and cases cited in not. there. *Westland v. Robinson*, Eq. Ca. Ab. 375. pl. 7.

**EDWARDS v. CHILD.** case of *Buck* and Sir *Thomas Rawlinson*, affirmed upon an appeal in the *House of Peers*; notwithstanding the *East-India Company* had taken bonds from the mariners not to demand their wages, unless the ship returned to the port of *London*, the *Lord Chancellor* decreed the plaintiffs to be paid the wages due to Captain *Jenefer* for himself and servants, and likewise what *Jenefer* had paid to the seamen, with interest and costs. (2)

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(2) "But without prejudice to any demands by the part-owners against the trustees of the *Old East-India Company*." Reg. Lib. 1716. A. fol. 74. Note, the defendants insisted by their answer on the statute of limitations, but the decree declared, "that the plaintiffs' demands are not barred by the statute of limitations, for that the contract for wages does subsist by the said deed of the 9th of Nov. 1693," (the deed of charter-party in the pleadings mentioned,) "whereby the residue of the seaman's wages is to be paid by the part owners, as well as two months advanced: and the said *Jenefer* having paid the seamen their wages by virtue of the said deed, he by virtue of the same deed, ought to be reimbursed the same by the part-owners of the said ship."

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[ 729 ]

DE

## TERM. S. HILLARII, 1716.

## IN CURIA CANCELLARIÆ.

CASE 644.  
LORD  
CHANCELLOR.  
Feb. 9.  
Pre. Ch. 442.  
461.  
*Nomine*  
*Brown v.*  
*Barkham.*  
Eq. Ca. Ab.  
215.pl.14.S.C.

SAMUEL NEWCOMEN, and MARY his wife, *versus* EDWARD BARKHAM, and Sir WILLIAM MASSENBURGH & A<sup>r</sup>.

EDWARD BARKHAM *versus* NEWCOMEN & Ux', Sir WILLIAM MASSENBURGH, DIMOCK WALPOOL and JOHN WALPOOL.

*A.* devises lands in trust, after debts paid, to convey the premises to the heirs male of the body of *B.* the testator's great grandfather. *C.* is the heir male of the body of *B.* but not heir general, there being a daughter of an elder brother, who is heir general. Decreed trustees to convey to *C.* As *C.* would be well intitled to take as heir male by descent, so he is sufficiently described to take by purchase.

to raise money for payment of his debts and legacies, and to convey the rest and residue of all his lands, tenements and hereditaments, which should remain unsold, to his cousin *Robert Barkham*, and the heirs male of his body; and for want of such heirs male, then to the heirs male of the body of Sir *Robert Barkham* his great grandfather; and for want of such heirs male, to his own right heirs for ever. And directed, that the overplus of the money should be paid to his cousin *Robert Barkham*, or to such heirs male as should be intitled to the residue of his manors and hereditaments by his will; and thereby gave to his sister *Newcomen* 2000*l.* to be put out at interest during her life, she to receive the interest, and after her death to her children.

[ 730 ]

Sir *Edward Barkham* died in about a year after, and *Robert Barkham* died soon after in *Spain*, without issue. The plaintiff *Edward Barkham*, who was the brother of the said *Robert Barkham*, being then in the *East Indies*, now brought his bill, as being the heir male of the body of Sir *Robert Barkham*, the testator's great grandfather, against the trustees, and Mrs. *Newcomen*, to have a conveyance of the trust-estate; and Mrs. *Newcomen's* bill was that the trustees might account, and convey to her, as being the only sister and heiress of the testator.

The question was to whom the trustees should convey, whether to the plaintiff *Edward Barkham*, as the person described, and intended to take by the will, being the heir male of the body of Sir *Robert Barkham*, the testator's great grandfather, or to Mrs. *Newcomen*, the testator's sister and heiress at law, who insisted, that although the plaintiff *Edward Barkham* was heir male of the body of Sir *Robert Barkham*, and might have taken as such by descent, or by way of limitation; yet being to take by way of purchase, he ought to be as well heir general, as heir male of the body, and ought to be complete heir at law to Sir *Robert Barkham*.

*Lord Chancellor.* The meaning and intention of the testator is so very plain and obvious, that it becomes a question only by the artificial reasoning of the law, but not a doubt to any man of sense and right reason, if that is to be the rule. And it is fit therefore to consider, how far this Court is hindered from decreeing according to the intent and meaning of the testator agreeable to common sense and right reason. What has been objected is, that it has been adjudged and settled, that he that would take under the description of heir by way of purchase, must be a complete heir, or in other words, heir general, as well as heir special; and that it is a maxim and rule in law,

[ 731 ]

NEWCOMEN v. BARKHAM. *quod non est hæres viventis*; but neither that maxim, nor any of the authorities built upon it, will affect this case.

For here, *first*, the ancestor is dead, which frees us from the authority of *Archer's* case in *Co. Rep.* That case goes no further, than that a man shall not take as heir in the life-time of the ancestor, *non est hæres viventis*; but in this case the ancestor is dead, and *Edward Barkham* is the heir male of his body. All the words of the definition of the person intended to take, exactly concur, and are verified in him, even in a legal sense; and no arguments are to be drawn from cases, where the words do not suit the devisee; and therefore the cases cited of *Chalener* and *Bowyer*, 2 *Leo.* 70. as an authority by *Newcomen's* counsel may be laid aside, the devise there being to the heir of the body of the son, who was then living, and he could not have an heir in his life-time; and so likewise the case in *Dyer* 99. there the ancestor was living; but it is there implied that the son might have taken, if the ancestor had been dead; and in that case it would be hard to say that the son of the second marriage might not take as heir of the bodies of the husband and his second wife, because he was not heir general to them both, which he could not be, if either the husband by a former wife, or the wife by a former husband had happened to have had issue a son. In the case of *Etterick* and *Sterling*, *Pre. Cha.* 54. he was not their heir male in any legal sense whatsoever, and could only say he was a male; and it is to be observed, *that* was upon a deed: and it may be admitted, that the words (heir male) without more, will not carry it in a descent, or by way of limitation, if he be not also heir; but do hold that he may take as heir male of the body of a person deceased, although he be not heir general.

[ 732 ]

A person may take as well by a description, as by a christian or surname.

And as the intent and meaning of the testator is evident, as to the person he designed to succeed to his estate, so I think it ought to obtain. For *first*, it is a known principle in law, that a person is allowed to take, as well by a description, as by a christian or surname; nay it has been carried further, even to pass by mistakes or untruths in the description, as where the christian name is mistaken, or the like. (1)

In the case of a descent, the heir male of the body takes only as a person described; and if a person may take by a description of the person, then it certainly follows he must take, when the description is true, and is perfect and complete.

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(1) So *Co. Litt.* 3. a. [*Beaumont v. Fell*, 2 P. Wms. 141, and cases collected in the notes there.]



In the present case the description is not only true, but is certain, is perfect and complete; and *that* also in a legal sense, and in terms of art. It must be admitted he is truly and certainly described, otherwise the same description of the same person would not intitle him to take by way of descent, or limitation; and yet the reason, which the authorities cited seem to have gone upon, is, that these words are not true of him; that they are not entirely verified; because, although he is heir male of the body, yet he is not heir general, or complete heir.

NRWCOMEN v  
BARKHAM.

I may say this is an unfair and disingenuous exposition. If a man devises to his heirs in *Borough English*, or\* to his heirs in *Gavelkind*, should not such special heir take, although he was not heir general at common law: so that the objection comes to this, that here are words proper to limit and restrain the sense, and to distinguish the person from the heir general, and yet the person so described or distinguished, shall not take as heir special, because he is not the heir general; whereas the heir general is neither the person intended nor described.

A man may devise land to his heirs in Borough English, or to his heirs in Gavelkind; and such a special heir will take though not heir general.  
[ \* 733 ]

As to the certainty of the description, he is the only person living, that can be called heir male of the body of Sir *Edward Barkham*, and is described by proper and artful words, and not a word redundant, and is not only true and certain, but artful and correct, and admits not or leaves room for so much as a cavil: and there is the same reason, that the heir male of the body may take by purchase, as it is admitted he may by way of descent, since in both cases he takes by description of the person intended to take. But a distinction has been made, that the special heir of the body, who takes by descent, is within the statute *de donis*; but *that* statute extends not to such as take by purchase, and that is true in fact. (1) But it does not follow, but the same description may as well ascertain the person that is to take by purchase, as it will when he is to take by way of descent, or limitation; and besides, the statute *de donis* creates no new estates, or limitations, but only secures and preserves such estates to the heir special, as were before at common law, from being liable to alienation in such manner as they were at law: and no true reason can be given why the same description may not ascertain the person intended to take by purchase, as well as to intitle him to take by descent. If such distinctions are to be admitted, and to become

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(1) Vide *Goodright v. Wright*, 1 P. Wms. 397, 8.

NEWCOMEN v.  
BARKHAM.

[ 734 ]

Hob. 31.

1 Co. Rep. 103.  
b.

rules in law, the knowledge of the common law will become rather a matter of memory, than of judgment and reason.

I do admit that the Lord *Hobart*, in the case cited in his argument to maintain the point there adjudged, says *obiter*, that where the heir male or female of the body is to take by way of purchase, he must be heir general, and gives as a reason for it, that he is not within the statute *de donis* : but that is no good reason ; and the rather, because such special heirs were well known at common law. In *Shelley's* case, the question there was upon words of limitation, and whether they were good words of purchase could not come in question ; but what is there said, that they would not be good words of purchase, was delivered only as the Lord *Coke's* opinion in arguing for his client, and not so much as taken notice of by the Court, nor was it the point in question ; yet he transcribes it into the book of *Coke on Littleton*, fol. 24. b. The authorities there cited in the margin, do none of them come up to this case, as 9 H. 6. 24. *Farrington's* case ; there the limitation is to the heir male, and not to the heir male of the body, those words (of the body) wanting ; and besides it appears by the book, that the person was not *in esse* when he ought to have taken. And so likewise the case of 37 H. 8. *Bro. Abridgment*. There a case put of a limitation by a deed to a man and the heirs female of his body, and although he had a son, yet the daughter took ; and that of *Dyer* 374. a. appears to be an imperfect sketch of *Shelley's* case. It is generally found that in cases *obiter*, the points adjudged are not to be much relied on ; and when sifted, the law will be found consistent with itself, and the adjudged cases reconciled.

[ 735 ]

The case of *James and Richardson* in *Pollexfen* 457, and the same case in second *Ventris* 311, (1) in other names ; the devise to the heir male of R. S. now living, adjudged a good devise. That is a much stronger case than the present, for there the devisee was neither heir general, nor heir special, the ancestor being living, and a maxim of the law dispensed with, (*non est hæres viventis*,) and *Pollexfen* in that case lays it down as a principle, that if well described, he ought to take.

And the case of *Long and Beaumont* (2) in the House of Lords. A devise to the heir male of *Elizabeth Long* lawfully begotten ; and for want of such heir, to his own right heirs ; there held good, although not to the heirs of the body ; those

(1) 2 Lev. 232. S. C.

reversed in Dom. Proc. 27th May, 1714.

(2) 1 P. Wms, 229. the decree there

1 Bro. P. C. p. 489.

words (of her body) wanting ; yet the description supplied, and made good by other words *tantamount*. NEWCOMEN v.  
BARKHAM.

In the case of *Pibus* and *Mitford*, 1 *Vent.* 372, where, in the limitation in a deed, *Mitford* covenanted to stand seised to the use of his heirs male, begotten or to be begotten on the body of his second wife ; although a son by the first wife ; there held good, even in a deed ; and it is stronger in the case of a will. And although the other judges gave it a nice turn, that the heirs took by descent, and not by purchase, by saying *Mitford* took an estate for life by implication ; yet the Lord *Hale* said he took by purchase, and by description, and held he was well described ; and says, it was absurd to say he could not take because he was not heir general, when he is described as an heir special, to distinguish him from the heir general : and the Lord *Hale* there says, he finds not any case adjudged contrary to that opinion : and *Wyld*, as convinced by his argument, declares he was of the same opinion : So that the opinion of *Hale* and *Wyld* may out-weigh (by way of authority) the opinion of *Coke obiter* in *Shelley's* case and *that* Fol. 29. of *Hobart* in *Counden* and *Clarke*, their opinions not being upon the point adjudged ; and besides right reason and common sense speak against those *obiter* opinions ; and the case cited by the Lord *Hale* in the case of *Pibus* and *Mitford* comes very near the present case. A man having two daughters and a nephew, gave his daughters 2000*l.* and gave the land to his nephew, by the name of his heir male ; provided, if his daughters troubled the heir, the devise of the 2000*l.* to be void ; and adjudged good. In our case the testator takes notice of the sister who was his heir, and gives her 2000*l.* and then devises to the heirs male of his great grandfather. And the case [ 736 ]  
 ———— *Trin.* 8 *Annæ Reginae, Communi Banco, Rot.* 1884. Where a devise to his heir male, although neither heir of the body, nor heir at law, held good ; because by other words in the will it appeared, the testator did not intend he should be hindered from taking by his heir female.

And therefore upon the whole matter, decreed the devise to Mr. *Barkham* was good, and a conveyance to be made to him, he having not only the intention of the testator, and the strength of reason on his side, but also the stronger authorities ; and directed the conveyance to be made to *Edward Barkham*, and to his heirs male of the body of Sir *Edward* the great grandfather. (1)

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(1) It seems unnecessary to lengthen a note on this case by reference to other

NEWCOMEN v.  
BARKHAM.

When a question arises how a trust ought to be executed by a conveyance, there is no better rule than to observe and follow what has been done at law in the executing of conditions, that are matters executory, and to be performed, so far as the case will admit of.

cases on the subject, after the elaborate investigation of it by Mr. *Hargrave* in his note to Co. Litt. 24. b. It will be proper, therefore, only to state that the case of 10th Nov. 1741, on bill of review mentioned in that note in which Lord *Cowper's* decree as above is affirmed, is

the case of *Newcoman v. Bethlehem Hospital*, Amb. Rep. 8. and to refer the reader to the report of the principal case in Stra. Rep. p. 35. and Mr. *Nolan's* note p. 3. there. [And see *Cholmondeley v. Clinton*, 2 J. & W. 106, et seq.]

CASE 645.

BATCHELLOR & Ux'. versus SEARL.

LORD  
CHANCELLOR.  
Jan. 24.  
Eq. Ca. Ab.  
246 pl. 12.  
S. C.

One by will gives his executor an express legacy, and makes no disposition of the surplus. The Court will admit of parol evidence to shew the intention of the testator, and if proved that the testator intended the surplus to the executor, he shall have it notwithstanding his express legacy. Ante Case 601.

*WILLIAM ALLEN*, to whom the plaintiff was sister of the half blood, being a single man when he came to town, was often at old *Searl's* house, who had a daughter and four sons, and falling sick, sent for *Parsons* \* a scrivener to draw his will, and gave legacies of 10*l.* a-piece to the plaintiffs for mourning, and also his horse to *John Searl*, and his wearing apparel to his executors, and made *John* and *George Searl* his executors; (1) and made no disposition of the residue or surplus.

[ \*737 ] Plaintiff's bill was to have the surplus, as being his sister of the half blood, and next of kin. *Parsons* who drew the will swore, that the testator gave no particular directions as to the surplus; but said, the plaintiffs *should have no more, would give no more away.*

*Lord Chancellor*, The evidence of *Parsons* falls in with the tenor of the will, and his evidence takes away the presumption, that he did not intend the surplus for his executors; and this is a much stronger case than that of *Littlebury* and *Buckley* in the House of Lords, (2) and therefore dismissed the bill; saying, these resolutions do not thwart the authority of those cases, where a money legacy given to an executor shall exclude him from the surplus; the presumption being, that the testator did not intend him all and some: but such presumption may be ousted or taken away by a proof of the testator's intention, that his executor should have the surplus, or that his next of

(1) " And 10*l.* a-piece for mourning." R. L.

(2) 1 Bro. P. C. 341. S. C.

kin should not have it: and here the witness proves, that the testator declared his sister should have no more; should not have the surplus. (3) BATCHELLOR  
v. SEARL.

(3) The decree is so, and evidence appears to have been admitted, but to what point in particular is not stated, Reg. Lib. 1716. A. fol. 216. vide *Foster v. Munt*, ante 1 vol. p. 473, and cases cited in not. there, et vide the principal case better reported in Eq. Ca. Ab. ub. sup.

HUMBERSTON *versus* HUMBERSTON.

[ \*738 ]

CASE 646.

Eq. Ca. Ab.  
207. pl. 8.  
Pre. Ch. 455.  
Gilb. Eq. Rep.  
128. S. C.

A. devises  
lands to the  
Drapers' Com-  
pany, in trust  
to convey to  
B. for life, re-  
mainder to his  
first, &c. sons

MR. HUMBERSTON (1) devised his manors, messuages, &c. to the *Drapers' Company*, and their successors, &c. (2) upon trust to convey to *Matthew Humberston* for life, and \*to his first son, and all other his sons for life, and to their issue male for life; and for want of such issue to *John Humberston* for life, and to his issue male for life, &c. and so to a great number of them (3) for life, and their issue male for life, and so to convey *toties quoties*.

for their lives successively, and so to their issue male for their lives only, remainder over. Though this be a vain attempt of a perpetuity, yet the trustees shall make as strict a settlement as may be, making all the persons in being but tenants for life; but the limitation to the son unborn must be in tail.

*Per Cur.* An attempt to make a perpetual succession of estates for life, is vain and not practicable; however there ought to be a strict settlement made, and the intent of the testator followed as far as the rules of law will admit of; and therefore directed the settlement to be made, so that such who were in being should be only tenants for life; (4) but where the limitation was to be to a son not in being, there he must be made tenant in tail male. (5)

(1) "In regard he had no children  
"to propagate his name, and enjoy his  
"estate, thought it consistent with rea-  
"son to provide for the male family of  
"his name, rather than for strangers  
"to succeed him, so as his estate might  
"always go from one male issue to  
"another for life only; therefore, that  
"he might for ever be remembered by  
"them to all posterity, and to perpetu-  
"ate his said name." R. L.

(2) And directed them to lay out 15,000*l.* in the purchase of other lands as therein mentioned. R. L.

(3) Fifty persons and upwards. R. L.

(4) With powers of leasing accord-

ing to the custom of the country. R. L.

(5) 1 P. Wms. 332. S. C. Reg. Lib. 1716. A. fol. 529. vide on the subject of perpetuities at large, *Thellusson v. Woodford*, 4 Ves. 227. [11 Ves. 112.] and the principal case cited 4 Ves. 244, 248, 275, 303, 304, 329, 332; and the decree stated by the Master of the Rolls, and observation on the case: and as to the doctrine of *cy pres*, that has been adduced from the principal case, vide Mr. Mansfield's argument in *Thellusson v. Woodford*, 4 Ves. 304. Fearne Execut. Dev. p. 392. and the cases cited in not. to *Churchill v. Lady Speake*, ante 1 vol. 251.

CASE 674.

LORD

CHANCELLOR.

Jan. 24.

Eq. Ca. Ab.

399. pl. 3.

Pre. Ch. 454.

Gilb. Eq. Rep.

127. 1 Salk.

161. S. C.

A. on marriage

VANE *versus* LORD BARNARD.

THE defendant on the marriage of the plaintiff his eldest son with the daughter of *Morgan Randyll*, and 10,000*l.* portion, settled (*inter alia*) *Raby Castle* on himself for life, without impeachment of waste, (1) remainder to his son for life, and to his first and other sons in tail male.

of his son, settles a messuage on himself for life, *sans* waste, remainder to his son. The father, though his estate for life be *sans* waste, cannot pull down the house, nor commit any voluntary waste therein; if he does, the Court will grant an injunction to stay waste, and compel the father to put the messuage in as good repair as before the waste committed.

The defendant, the Lord *Barnard*, having taken some displeasure against his son, got *two hundred* workmen together, and of a sudden, in a few days, stript the castle of the lead, iron, glass-doors, and boards, &c. to the value of 3000*l.* (2).

[ 739 ] The Court upon filing the bill, (3) granted an injunction to stay committing of waste, in pulling down the castle; and now, upon the hearing of the cause, decreed, not only the injunction to continue, but that the castle should be repaired, and put into the same condition it was in, in *August*, 1714; and for that purpose a commission was to issue to ascertain what ought to be repaired, and a master to see it done at the expense and charge of the defendant, the Lord *Barnard*; and decreed the plaintiff his costs. (4)

(1) Subject to the two several yearly sums of 800*l.* and 200*l.* payable to the plaintiff on the events, and in manner therein mentioned. R. L.

(2) It is stated in the bill, that the defendant had proceeded to demolish the castle, and had pulled down one of the rooms, and sold the timber, lead, iron, glass, and other materials, and converted the money, being a considerable sum, to his own use, "the joists on which the floors were laid being each a whole oak tree, the said castle being heretofore very strongly built, and made use of for a fortification;" but that on representation made to him he desisted, but was permitted to keep the money for which he had sold the said materials, but had afterwards proceeded further as above. R. L.

(3) And plea and answer put in by

Lord *Barnard*.

(4) Reg. Lib. 1716. B. fol. 113. Note, on the last hearing, the defendant did not appear, and therefore the order was made *nisi*, but no further entry appears. Vide the principal case cited Bishop of *London v. Webb*, 1 P. Wms. 527. *Packington's case*, 3 Atk. 215. Lord *Glenorchy v. Bosville*, Forr. 12. *Aston v. Aston*, 1 Vez. 264. *Piers v. Piers*, *ibid.* 521. et vide on the subject of waste in general *Tracy v. Tracy*, ante 1 vol. 23. and cases cited in not there; and the principal case cited in *Pyne v. Dor*, 1 Term Rep. 55. where it was held that an action of trover cannot be maintained by tenant in tail expectant on the determination of an estate for life, without impeachment of waste for timber which grew upon, and was severed from the estate.



Dux BEAUFORT & Al'. *versus* Dom'. DUNDONALD &  
Duciss'. BEAUFORT, Ux'. ejus.

CASE 648.  
Jan. 26.  
Eq. Ca. Ab.  
201. pl. 11.  
S. C.  
Post case 654.  
One devises to  
his son the  
furniture of  
his house at *D.*  
and orders  
goods to be  
carried from

THE Duke of *Beaufort* by his will made in 1712, devised to his son the plaintiff, the furniture of his houses in the counties of *Gloucester* and *Monmouth*, and all his plate; and leaving several other legacies, made the defendant his wife sole executrix and residuary legatee.

London to his house at *D.* and agrees with carriers for that purpose, but dies before the goods are removed to *D.* These goods shall not pass by the will, as part of the furniture of the house at *D.*

The fact fell out to be, that the *Duke* lived about *two* years after the making of the will, and had before his death caused several rooms at *Badmington* in *Gloucestershire* to be measured, and bought hangings, pictures, and other furniture, designed to be put up there; and had caused the same, with other goods he had here in town, to be packed up, and put into cases, in order to be sent down to *Badmington*, and had agreed with a bargeman for the carriage of them to *Letchlade*; and with carriers and farmers to carry them from *Letchlade* to *Badmington*, by land-carriage; but before they were removed from *London*, the *Duke*, in 1714, died at *Badmington*.

The plaintiff's bill was (amongst other things) to have the goods so packed up, and intended to furnish *Badmington*; and the question was, whether they passed by the devise of the furniture of his houses in *Gloucestershire* and *Monmouthshire*, or belonged to the Duchess as executrix and residuary legatee. [ 740 ]

The cause was heard at the *Rolls*, and the *Duke's* bill dismissed as to that demand; and coming on now before the *Lord Chancellor*, on an appeal, he affirmed the decree: that the testator's intention to remove the goods to *Badmington*, and to place them there, was not sufficient to make them pass by the devise of the furniture of his house at *Badmington*. (1)

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(1) The words of the decree at the *Rolls*, and affirmed as above, are as follow:—"Whereupon, &c. his Honour declared, that as to the said goods claimed by the plaintiff, and alleged to have been bought by the late Duke, as the furniture for his house at *Badmington*, and packed up in order to be sent thither; it appeared " by the will, that the furniture was " given to the plaintiff the Duke of " *Beaufort*, to go along with the house, " and his Honour conceived that the " said late *Duke* intended those goods " for *Badmington*, and that by the " proofs in the cause, it appeared, that " they were packed up and designed to " be sent thither, but the late *Duke*

“ dying, and the goods never having  
 “ been there, and there being no decla-  
 “ ration in writing, touching those  
 “ goods, his Honour was of opinion  
 “ that those goods could not be taken  
 “ as part of the furniture of or belong-  
 “ ing to the house at *Badmington*, but  
 “ that they belonged to the defendant  
 “ the *Duchess*, as claiming the *re-*  
 “ *siduum* of the late *Duke's* personal  
 “ estate, and did therefore order that  
 “ the plaintiff, the said *Duke of Beau-*  
 “ *fort's* bill, as to those goods, do stand  
 “ dismissed.” Reg. Lib. 1716. A. fol.  
 237. Vide *Shaftsbury v. Shaftsbury*,

post 747, decided on the same principle,  
 and in M. S. case, *Grandison v. Pitt*,  
 Hill. 1734, before Lord *Talbot*, Mr.  
*Pitt* had a house at *Swallowfield*, in  
*Berks*, and by his will, gave his goods  
 and furniture, in and at *Swallowfield*,  
 and belonging to *Swallowfield*; and  
 he had bespoke some furniture for  
*Swallowfield*, but it was not carried  
 down, and determined on the authority  
 of the principal case, that the furniture  
 not carried down to this seat, though  
 intended so to be, should not pass by  
 those words.

## CASE 649.

LORD

CHANCELLOR.

Feb. 5.

Pre. Ch. 456.

Gilb. Eq. Rep.

128. S. C.

A. directed his  
 debts and le-  
 gacies to be  
 paid out of the  
 rents of his  
 real estate;  
 and that his  
 executors  
 should re-  
 ceive the rents  
 until his ne-  
 phew comes  
 to the age of  
 25, and to pay  
 the surplus of

DOLMAN versus SMITH & A<sup>l</sup>.

SIR *Thomas Dolman* by his will directed that his debts, lega-  
 cies, and funerals should be paid out of the rents and profits of  
 his real estate, and that his executors should receive the rents  
 and profits of his real estate, until his nephew *Thomas Hum-*  
*phry Dolman*, attained his age of *twenty-five*; and after debts,  
 legacies and funerals paid, they to pay the residue of the rents  
 and profits to his said nephew, at his age of *twenty-five*. (2)  
 As to his personal estate, he devised part to Mrs. *Smith*, and  
 other part to other persons, and other part to go as his *heir-*  
*looms*, and then devises the rest and residue of his goods, chat-  
 tels, and personal estate unbequeathed, to his nephew *Thomas*  
*Humphry Dolman*.

the rents to his nephew at 25, and devises the residue of his personal estate to his nephew.  
 The nephew dies an infant. Cur. If this bequest of the surplus of the personal estate had  
 been to a stranger, or a third person, he should have had the personal estate discharged of  
 the debts; but the surplus of the personal estate and the land being given to the same per-  
 son, the surplus of the personal estate was not intended to be exempt from the debts.

[ 741 ] *Thomas Humphry Dolman* died an infant.

The question was, whether the residue of the personal estate  
 not particularly devised, should go to the administrators and  
 representatives of the said *Thomas Humphry Dolman*, as ex-  
 empt from payment of debts and legacies; or whether the per-  
 sonal estate not particularly devised should be applied to pay  
 debts and legacies in exoneration of the real estate; and if so,

(2) Or such other person to whom  
 the next reversion of the premises  
 should belong at the age of *twenty-five*  
 years, with remainder in default of heir  
 male of the body of the said *Thomas*  
*Humphry Dolman*, to plaintiff, *Lewis*

*Dolman*, and the heirs male of his  
 body, the like remainder to the plain-  
 tiff *Dorothy*, remainder to defendant,  
 remainder to the right heirs of defend-  
 ant *Creamer* for ever. R. L.

the same would be totally exhausted, in payment of debts and legacies, and the devise of the residue of his personal estate idle and vain.

DOLMAN v.  
SMITH.

*Lord Chancellor.* The debts, legacies, and funerals being charged on the real estate, and to be paid out of rents and profits, if the residue of the personal estate unbequeathed had been devised to a stranger, or to a third person, he should have had it free and exempt from payment of debts; but the devisee of the surplus of the personal estate, and the devisee of the land being one and the same person; upon consideration of the whole will, he thought the surplus of the personal estate was not intended to be devised to him, free and exempt from payment of debts. (3)

(3) The words of the decree on this point are: "Which real estate and surplus profits he designed should not be received by his devisee, till his devisee, who should first take, should attain his age of *twenty-five* years, so that his intent was to increase and enlarge the estate of the devisee of his real estate as much as possible, and there not being any express words in the said will, to exonerate the personal estate from the payment of debts, to which by law it is liable in the first place, to construe it to be exempt from payment of debts and legacies, in order to put the larger personal estate into the hands of the first taker of the

" real estate, before that age, whereby it might fall (as it hath done) to an administrator, would not be according to the will, but contrary to the said intent of it, which principally favours the taker of the real estate." Reg. Lib. 1716. A. fol. 238. The bill was by *Lewis Dolman* and *Dorothy Dolman*, infants, the two next in remainder after *Thomas Humphry Dolman*, as to the real estate, who also claimed the residue of the personal estate. Entered *Dolman v. Weston*. Vide on this subject *Trott & Al. v. Vernon*, ante p. 708. *Wainwright v. Bendlowes*, ante p. 718, and cases cited in not. there respectively.

### ONIONS *versus* TYRER.

[ \* 742 ]

CASE 650.

LORD  
CHANCELLOR.  
Feb. 6.

Pre. Ch. 459.  
Eq. Ca. Ab.  
407. pl. 1. S. C.

One devises his land by will attested by three witnesses, and afterwards makes another will of his land, which revokes all former wills; but this

Mr. *Tyrer* in 1707, made a will, duly attested by three subscribing witnesses, and thereby had disposed of his real estate, and being afterwards minded to make some alteration in his will, in the year 1711, he made a second will touching his real estate, and with a clause \* in it of revoking all former wills; but there being no table in the room where the testator lay sick and subscribed his will, the three subscribing witnesses did not attest it in his presence, but went into a lower room out of the testator's sight, and there wrote their names as witnesses to the publishing this latter will; and it was also in proof in the cause that there being two parts of his former will, one whereof will is not duly executed. The last will being no will, and void, will not amount to a revocation of the former.

ONIONS v.  
TYRER.

was in his custody, he called for that which was in his own custody, and directed his wife to cancel it, and the witness swore she heard her tear it; and the question now was, whether the former will was well revoked, or not.

*First.* It was resolved, that although there was an express clause in the latter will of revoking all former wills, yet *that* latter will being void, the witnesses not attesting the same in the testator's presence, *that* would not amount to a revocation, it being intended to operate as a will, and not otherwise as an instrument of revocation: (1) and so it was adjudged in the case of *Eggleston and Speak*, 3 Mod. 258. 1 Sir Bart. Shower's Reports, 89. and in the case of *Hilton and King*, 3 Lev. 86.

Where there are duplicates of a will, and the testator cancels one of them only, and the other part is left intire; yet that is an effectual cancelling of the will.

*Secondly.* Where there were duplicates, and two parts of the former will, in case the testator duly cancelled and tore *that* part, which was in his own custody or keeping, that would be an effectual cancelling of the will, although the other part or duplicate remained whole and uncanceled; and it was so resolved in Sir *Edward Seymour's* case.

*Thirdly.* Lord Chancellor was of opinion, that the former will stood good; for the latter will being void, and not operating as a will, would not amount to a revocation; and as to the actual cancelling of the former will, the evidence was not full and positive, that it was done; the witness thought she heard the wife tear it. It is plain he did it only upon a supposition that he had made a latter will at the same time, and both wills, as to the main, were much to the same effect, and with little variation as to the disposition of the real estate; and he did not cancel it with a design to revoke the devises as to the real estate, but intended to do the same thing by a latter will; and in case it had been a good cancelling of the will at law, it ought to be relieved against, and the will set up again in equity, under the head of accident, and decreed it accordingly. (2)

[ 743 ]

A former will of land is cancelled, the testator supposing a latter will by him made of the same land, to the same effect was good. If that proves not to be duly executed, Equity will set up the former will.

(1) But where a bill was subscribed by three witnesses, before whom testator [having previously signed it] declared it to be his will, but did not sign it in their presence, such declaration is equivalent to signing it before them, and such will is good within the fifth section of the statute of frauds, and is also a good will of revocation within the sixth section of that statute, *Ellis*

v. *Smith*, 11th May, 1754, 1 Ves. 11.

(2) Vide 1 P. Wms. 343. S. C. and very full note there. Et vide observation of *Hardwicke*, Lord Chancellor, on the principal case in *Attorney General v. Lloyd*, 1 Vez. 34. *Burkitt v. Burkitt*, ante p. 499, and cases in not. there. [See also the notes to *Duppa v. Mayo*, 1 Saund. 278. g. et seq. 5th edit.]

CHIR *versus* PHILPOTT.

CASE 651.

LORD

CHANCELLOR.

THE plaintiff, a voluntary devisee of land, brought a bill against the defendant, who was not heir at law, but pretended to claim by some ancient settlement: and the bill was to establish the will, and to be quieted in possession against the defendant's claim and pretended title.

answer claimed under some ancient settlement, which he could not find, and hoped when he could, he should have the benefit of it. It was insisted for the plaintiff, that the defendant might try his title by a certain time, or in default, that the plaintiff might hold and enjoy against the defendant. Bill dismissed with costs.

The defendant by answer said he was informed that there was a settlement made by his grandfather, and the estate thereby entailed upon him, but he could not as yet find or discover in whose hands it was, but hoped when he could discover it, he should have the benefit of it, and to make such use of it as he should be advised.

For the plaintiff it was insisted, that the defendant might be limited to a time to try his right, and make out his title; and in default thereof, the plaintiff might be decreed to hold and enjoy against the defendant, *sed non allocatur*. The Lord Chancellor dismissed the bill with costs.

BIRD & Ux'. *versus* LOCKEY.

CASE 652.

LORD

CHANCELLOR.

Feb. 11.

Mrs. Standish by will gave 1200*l.* to the *four* children of John Lockey by his first wife, to be divided amongst them according to his discretion and pleasure, (1) and made the said John Lockey and Guilsthorpe executors; and in 1697 the testatrix died.

according to the discretion of J. S. whom he makes executor, and wills that he shall not be compelled to pay any of the legacies within a year after the testator's death. A. dies before the testator. B. dies within six months after the testator, and before any allotment or distribution. J. S. pays to C. 900*l.* and takes a receipt from C. in full of his share of the 1200*l.* and by will gives 400*l.* to D. in full of his share.

One of the *four* children died in her life-time, another of them within *six* months after her death, and before any allotment or distribution, made by John Lockey amongst his children (2); but in 1708, John Lockey did pay to his son Edward (3) 900*l.* and took a receipt from him, in full of his share

(1) These are the words of the bequest as stated in the Register's book. after an appointment made by the said John Lockey, pursuant to the power in

(2) Martha Lockey. As to which child the decree declared that she could have no interest vested in her till the said testatrix's will. R. L.

(3) Who also died in the life-time of John Lockey, the father.

BIRD v.  
LOCKEY.

of the 1200*l.* *Abigail*, now the wife of the plaintiff *Bird*, being the other surviving child, *John Lockey*, her father, by will gives her 400*l.* in full of her share of the 1200*l.* She brought her bill stating the case as above, with this, that there was a clause in the will, that the executors should not be compelled to pay any of the legacies within *twelve* months after the decease of the testatrix; she intending to allow *that* time to get in and improve her estate; and the plaintiff by her bill demanded the residue of the 1200*l.* with interest from the end of a year after the testatrix's death.

Adjudged first, that *A.* dying in the life of the testatrix, a fourth part of the 1200*l.* did not become a lapsed legacy; for nothing vested in any of the children before an allotment by the executor.

The first question was, whether by the death of *one* of the *four* children in the life-time of the testatrix, a fourth part of the 1200*l.* became a lapsed legacy.

Adjudged the whole 1200*l.* was a subsisting legacy, the devise being to the *four* children, and a power only to the father to distribute, divide, and apportion; and until a division and apportionment made, no particular interest vests in any one child.

Secondly. For the same reason the administrator of *B.* was not intitled to any part of the 1200*l.*

The second question was, Whether the father, as administrator to the child who survived the testatrix, was intitled in her right to any part or share of the 1200*l.* and adjudged he was not for the reasons *supra*; no allotment or apportionment being made; and also for that she died within the year allowed the executors for payment of the legacies. (4)

Thirdly. *C.* having received 900*l.* and given a receipt in full of his share, his representative could claim no further part of the 1200*l.*

*Thirdly.* *John Lockey*, the father, having in 1708, (*ten* years after the death of the testatrix,) paid 900*l.* to his son, and taken his receipt in full for his share, his representative was barred from claiming any further share, or part of the 1200*l.* and consequently the remainder of the 1200*l.* belonged to the plaintiff, the other surviving child.

Fourthly. The father ought to pay interest for the 1200*l.* from a year after the testator's death; securities having been never wanting in the public funds.

*Fourthly.* That the father ought to answer interest for the 1200*l.* from the end of a year after the testatrix's death. Securities were never wanting in the public funds, and it was his default that he did not make an appointment at the end of the year after the death of the testatrix; and therefore decreed interest to be answered after the rate of 5*l.* per cent. per ann. but the Master in computing of the interest was to take out of the principal so much, as with the interest of it, would make

(4) This question does not appear by the statement in the Register's book. For the principle of this and of the

judgment on the first question, vide the cases cited in not. to *Weld v. Bradbury*, ante p. 705.



up 900*l.* when it was paid to the son in 1708, and then to carry interest for the remaining principal, from the end of the year after the testatrix's death; and decreed such principal with single interest to be paid the plaintiff. (5)

BIRD v.  
LOCKEY.

(5) Reg. Lib. 1716. A. fol. 209. Note. The testatrix by a codicil to her will left 150*l.* to be employed by her executors in incidental expenses as they should see cause, without giving any reason for their so doing to any person

whomsoever. Out of this sum the Court ordered the costs to be paid, so far as the same would go; and so far as the same proved deficient, the parties to bear their own costs.

ATTORNEY GENERAL, at the relation of the Schoolmaster of Wootton Underhedge, *versus* SMITH.

[ 746 ]  
CASE 653.  
LORD  
CHANCELLOR.

THE school of *Wootton Underhedge*, in Com'. *Gloucester*, being founded and endowed by the Lady *Berkley*; Mr. *Smith* the now defendant's great grandfather, having been at great expense, on behalf of the school, to recover the lands belonging to the school, which were got into the hands of patentees as concealed land; in the Lord *Coventry's* time a decree was obtained for setting aside all the leases then in being, but decreed to the then tenants, leases for *ninety-nine* years, determinable on *three* lives under the rent of one-third part of the then improved value; and as to Mr. *Smith*, the defendant's great grandfather, that he should also have a lease for *ninety-nine* years, determinable on *three* lives, at one-third part of the improved value; and to be renewed from time to time for ever, without any fine to be paid for the same, according to the value of the said respective estates settled by a *commission of survey* directed by the court for that purpose.

A decree having been made in Lord *Coventry's* time for granting a lease of charity lands to *J. S.* (who had been at great expense in recovering those lands) for *ninety-nine* years, if *three* lives lived so long, at the rent of one-third of the then improved value, and to be perpetually renewable without fine; it was now decreed the lease should

be renewed, *toties quoties*, without fine, but the rent not to be computed according to the value of the land at the time of the decree, but as it should be, when the lease should from time to time be renewed.

Upon the hearing of the cause, the Lord Chancellor decreed, that the defendant *Smith*, according to the decree made by the Lord *Coventry*, should be admitted to renew his lease, *toties quoties*, for *ninety-nine* years, determinable on *three* lives without any fine, at and under the yearly rent of one-third part of the improved value; but the value was not to be taken, what it was in the Lord *Coventry's* time, or in the survey then taken, but to be a third part of the real improved value, as the estate shall be worth to be let at the time when the lease shall be renewed from time to time; (1) and directed a commission

[ 747 ]

(1) This is not correct: the words "as to the construction of the words of the decree on this point are, "And "in the Lord *Coventry's* decree, re-

ATTORNEY  
GENERAL v.  
SMITH.

to inquire, whether the defendant *Smith* had possession of any lands belonging to the school, that were not according to the said decree to be comprised in his lease, and for such he was to account according to the full value; and as to what were within his lease, to account for them at a third part of the real improved annual value. (2)

“ lating to the improved value upon  
“ renewal of leases, though it is ca-  
“ pable of referring to the improved  
“ value in that survey, yet it is capable  
“ of a more liberal construction of  
“ referring to the improved value  
“ which might afterwards be; and  
“ this being of greater advantage to  
“ the charity, is the better construc-  
“ tion; but such improved value ought  
“ not to be taken as it is at the several  
“ times of renewal, but as it stands at  
“ the time the Court shall call for a  
“ new valuation to be set.” And the  
decree proceeds to direct a new survey,  
and declared, “ that to support the  
“ justice and intent of the said former  
“ decree, the defendant ought to have  
“ the lease renewed according to the  
“ improved value appearing on such  
“ survey.” And then the decree pro-  
ceeds to direct the commission, as in  
the printed report. R. L. Vide *Watson*  
v. *Hinsworth Hospital*, ante p. 596.

(2) Reg. Lib. 1716. A. fol. 508.  
*Note.* In *Saul v. Wilon*, ante p. 118.  
it is said there lies no appeal to the  
*House of Lords*, from a decree on the  
statute of charitable uses, for they  
cannot have any original jurisdiction,  
because these matters are grounded  
upon acts of parliament, and the acts  
give them none; and the note there  
refers to 3 Bl. Comm. 428. as an au-  
thority *contra*, and the following state-  
ment is submitted as the result of a  
further examination into the authori-  
ties adduced by the learned judge on  
this subject. The statute 43 *Eliz.* cap.  
4. is stated by him as giving authority  
to the *Lord Chancellor* or *Lord Keeper*,  
and to the *Chancellor* of the *Dutchy of*  
*Lancaster* respectively, to grant com-  
missions under their several seals, to  
inquire into any abuses of charitable  
donations and rectify the same by de-  
cree, which may be reviewed in the  
respective courts of the several Chan-

cellors upon exceptions taken; the  
learned commentator then proceeds to  
review the several stages of proceed-  
ing upon appeal in the Court of Chan-  
cery, from a decree of the commission-  
ers of charitable uses, and thence in-  
fers, that it is therefore treated as an  
original cause, and that an appeal lies  
of course from the Chancellor's decree  
to the House of Peers, and in support  
of this opinion cites *Duke's Char. Uses*,  
62. 128. *Corporation of Burford v.*  
*Lenthall*, 2 Atk. 551. The case cited  
Duke 62, is *Windsor v. Hilton*, or the  
inhabitants of *Farnham*, and which is  
reported Cro. Car. p. 40. Sir Wm.  
Jones, 147. S. C. and was a reference  
of Chancery to the Ch. Just. *Crew*, Ch.  
Baron *Waller*, and *Jones* and *Croke*,  
Justices; and the question, according  
to those reports, was, whether a bill  
of review would lie upon a decree of  
*Lord Chancellor* on exceptions to a  
decree of the Commissioners of Cha-  
ritable Uses, and it was resolved it would  
not, but that the decree in Chancery is  
conclusive and not to be further exa-  
mined, because it takes its authority  
by the Act of Parliament, which men-  
tions but one examination, and it is  
not as where a decree is made by the  
*Chancellor* by his ordinary authority.  
*Jones*, Justice, however, likened it to  
the case of *Tythes of London*, on ap-  
peal to Chancery from decree of *Lord*  
*Mayor*, under stat. 37 *Henry VIII*,  
cap. 12. where no bill of review would  
lie. But in such case the party grieved  
may petition the King in Parliament,  
and have his complaint examined, and  
so the decree may be confirmed, al-  
tered, or annulled, which is to be final.  
Duke then proceeds to mention the  
case of the *Poor in Eastham v. Lady*  
*Kemp and others*, 20 Car. 1. 1643, in  
which, on an appeal by one of the  
almsmen of *Eastham* against a decree  
of *Coventry*, *Lord Keeper*, the Lords

are stated to have proceeded to examine the *Lord Keeper's* decree, and that they confirmed it; and refers to Cro. Car. p. 40. the above case of *Windson v. Hilton*; but neither in that report of the case, nor in the report of it in Sir William Jones, is any mention made of appeal to the *House of Lords*, nor does any report of the case of *Eastham v. Lady Kemp*, ub. sup. appear in Croke's Reports. In Duke, 128, above, also referred to by Blackstone, mention of appeal to the *House of Lords* certainly appears, but it is upon the authority of the above report of *Eastham v. Lady Kemp*, p. 62. In *Corporation of Burford v. Lenthall*, 2 Atk. 551, the question was upon costs, and there Lord Hardwicke says, 'The Court finding these words in the Act of Parliament, sect. 9. "That the Lord Chancellor or Lord Keeper shall and may take such order for the due execution of all or any of the said judgments, decrees, and orders as to them shall seem fit and con-

venient," have put it in the shape of an original cause, in which the exceptants are considered as plaintiffs, and the respondents as defendants, and put in an answer upon oath; and in the examination of witnesses in the cause, neither side is bound by what appeared before the Commissioners, but may set forth new matter if they think proper;' which could not be, if the hearing before the Lord Chancellor was considered as a final appeal, vide cases cited in note to *Brend v. Brend*, ante 1 vol. p. 213, 214, and in note to *Addison v. Hindmarsh*, ibid. p. 442. [But the case of *the Corporation of Burford v. Lenthall* has no bearing upon the present question, because it appears expressly that that case came on "in the shape of an original cause."] In *Pridgeon's Case*, Cro. Car. 350. it is stated to be the law of the Court, that no bill of review will lie on decree of the *Lord Chancellor* under the statute of Charitable Uses, but nothing said of appeal.

### Comes SHAFTSBURY versus Comitissam SHAFTSBURY.

Case 654.

LORD

CHANCELLOR.  
Feb. 25.

THE late Earl of *Shaftsbury*, before he went to *Naples* for his health, made his will, and thereby (*inter alia*) devised to the defendant his wife all the plate, pictures, household goods and furniture, that should be in his house at *Ryegate* at the time of his death.

Eq. Ca. Ab.  
201. pl. 7. S. C.  
Ant. Case 648.J. S. devises  
all his house-  
hold goods

and furniture which should be in his house at *R.* at his death to his wife, and afterwards going beyond sea, his steward gets the landlord of the house to accept of a surrender of the lease of the house, and removes the goods to another house; and writes an account of this to *J. S.* who approves of it. The goods will not pass by the will to the wife: otherwise, if they had been removed by fraud to defeat the legacy; or by any tortious act without the privity of the testator.

Whilst he was beyond the seas, his steward got the landlord to accept a surrender of the lease of the house at *Ryegate*, and thereupon he removed the goods to another house of the testator's, and wrote to the Earl an account of what he had done, who approved thereof; yet the defendant insisted to be intitled to the goods, that had been at the house at *Ryegate*, the same being removed from thence, not by the direction of the testator, (1) but by accident, upon the steward's prevailing on the landlord to accept a surrender of the lease.

(1) Vide, as to this, decree in not. (2) *infra*.

SHAFTSBURY  
v.  
SHAFTSBURY.  
[ 748 ]

The *Court* decreed the defendant to account and answer the value of the goods to the plaintiff; but withal declared, that if the goods had been removed by fraud or practice, on purpose to disappoint the legacy, or by a tortious act, unknown to the testator, *that* might have intitled her to relief. (2)

And whereas the Countess before marriage had saved out of her maintenance-money 350*l.* which was in the hands of her brother *Henry Ewre*, Esq., who after his sister's marriage gave a bond for it to the Earl; but Mr. *Wheelock*, the Earl's steward, proving that the Earl said his wife should have that money, and that it should be placed out in some public fund for her benefit; and having also a little before his death said, he gave it to his wife; and *three* persons then present put down in writing what he so said, and attested it as witnesses, though the Earl did not direct them so to do, nor knew that what he so said was put down in writing; and although the Earl afterwards made *two* codicils to his will, and in one of them devised several things to the Countess, but took no notice of this money, or of the bond given for it; yet the *Lord Chancellor* decreed it to the defendant the Countess, not as a gift from her husband, but as declared and intended originally for her separate use. (3)

(2) " And as to the goods which were in the house at *Ryegate*, his Lordship declared that nothing passes to the defendant the *Countess of Shaftsbury*, by the words of the said will, but what was in the said house at the time of the testator's death, for as this case is, there was no fraud or wrongful removal, but a general authority to the defendant *Wheelock* (the steward) to do as he thought fit, and that what the defendant *Wheelock* did the testator consented to, which is as sufficient as if there had been an express command for the removal of the said goods, and that the said testator having by his will given the defendant the Countess,

some further bequest in consideration of the said goods that were removed from the house at *Ryegate*, the same ought not to be taken to belong to the defendant, the Countess, but be brought into the account of the said testator's personal estate." Reg. Lib. 1716. A. fol. 428. Vide *Duke of Beaufort v. Lord Dundonald*, ante p. 739. and not. there. [See also *Land v. Devaynes*, 4 Bro. Ch. Rep. 537. *Heseltine v. Heseltine*, 3 Madd. 276.]

(3) Where a feme covert saves money out of her separate maintenance, she may dispose of it as a feme sole, *Bletsow v. Sawyer*, ante 1 vol. 244. and cases cited in not. there.

ATTORNEY GENERAL, ad relationem TRACY and LAP-  
 THORN & Al'. *versus* Dominam FLOYER, CAMPION, COWPER & Al'. CASE 655.  
LORD  
CHANCELLOR.

*EDWARD DENNY*, Earl of *Norwich*, being seized by grant from *Edward the Sixth*, of the scite and demesnes of the dissolved monastery of *Waltham Holy Cross*, and of the manor of *Waltham*, and of the patronage of the church of *Waltham*, and of the right of nominating a minister to officiate there, it being a *donative*, the *abbey* being of *royal foundation*; by his will in 1636, amongst other things, the said Earl devised a house in *Waltham*, and a rent-charge of 100*l. per ann.* and *ten* load of wood to be annually taken out of the forest of *Waltham*, and his right of nominating a minister to officiate in the said church, to six trustees and their heirs, of which *Sir Robert Atkins* was one, in trust for the perpetual maintenance of the minister, to be from time to time nominated by the trustees, and directed that when the trustees were reduced to the number of *three*, they should choose others.

*A.* seized of the manor and patronage of *Waltham*, by will gives 100*l. per ann.* rent-charge, and the right of nominating to the church to six trustees, and those trustees when reduced to three to choose others. *B.* the only surviving trustee assigns his trust to others, who nominate to the church, being a *donative*. Decreed

the assignees of the trust, though the assignment was made by one only who survived, had the right to nominate to the church, and not the owner of the manor.

It so fell out, that all the trustees, except *Sir Robert Atkins*, [ \* 749 ] were dead, and he alone took upon him to enfeoff others to fill up the number, and *Tracy* and the other relators were now the surviving trustees, and they nominated *Lapthorn* to officiate; and the Lady *Floyer* and *Campion*, who were owners of the dissolved monastery, and of the manor, claimed the right of nomination to the *donative*, and had nominated *Cowper* to officiate there, and he was got into possession.

The bill was that *Lapthorn* might be admitted to officiate there, and to be quieted in the possession, and to have an account of the profits.

By the defendants it was, amongst other things, insisted, that the trustees having neglected to convey over to others, when they were reduced to the number of *three*, and the legal estate coming only to one single trustee, he had not power to elect others; but by that means the right of nomination resulted back to the grantor, and belonged to the defendants, who had the estate, and stood in his place; or at least the court ought to appoint such trustees as should be thought proper.

*Lord Chancellor.* It is only directory to the trustees, that [ 750 ] when reduced to *three*, they should fill up the number of trustees; and therefore although they neglected so to do, that

ATTORNEY  
GENERAL v.  
FLOYER.

would not extinguish or determine their right ; and Sir *Robert Atkins*, the only surviving trustee, had a better right than any one else could pretend to, and might well convey over to other trustees : it was but what he ought to have done ; and decreed for the plaintiffs, with costs and an account of profits ; but the Master to allow a reasonable salary to *Cowper*, whilst he officiated there. (1)

(1) And also dismissed a cross bill *Cowper*, with costs. Reg. Lib. 1716. filed by the defendants *Campion* and *A.* fol 494.

CASE 656.  
LORD  
CHANCELLOR.

BOTHOMLEY & A<sup>l</sup>. *versus* DOMINUM FAIRFAX.

March 11.  
Eq. Ca. Ab.  
144. pl. 19. S.C.  
A recogni-  
zance not in-  
rolled to be  
taken as an  
obligation,  
and to be paid  
as a debt by specialty.

THE estate of the late Lord *Fairfax* being by him devised for payment of debts, and decreed to be sold, and the money arising by sale to be applied for that purpose ; and first to pay mortgages, judgments, and recognizances that affected the land, and then other debts ; and all creditors were at liberty to come before the Master and prove their debts.

*J. S.* had a recognizance from the late Lord *Fairfax* for 500*l.* but the recognizance was not inrolled, and the question was, whether *J. S.* was to be considered as a creditor by recognizance, or only as a bond creditor.

It was insisted, that a recognizance at common law need not to be inrolled ; but it takes its force from being acknowledged, and being taken by the proper officer, and for that purpose cited the case of *Hall* and *Winckfeild*, in Lord *Hobart* : and if inrollment was necessary, it might yet be inrolled. A statute staple by the statute of *Acton Burnell*, is to be inrolled within a limited time, but not so of a recognizance at common law ; and although in the case of *Cro. Eliz.* 355. *Hollingworth* ver. *Ascue*, and 2 *Roll. Abr.* 149. a recognizance not inrolled is adjudged to be a bond, *that* seems to be a strain ; because, although under hand and seal, it is not delivered, and delivery is essential to a bond. (2)

(2) The contrary seems to have been held on the first argument, *Cro. Eliz.* 319. nomine *Fulshaw* v. *Ascue* ; but the subject was afterwards twice argued, and adjudged as above, *Cro. Eliz.* 355, 494. on the ground of the words "*teneri et obligari*," which

make a statute, the security in that case, (though void as a statute,) an obligation, and so it was adjudged upon a recognizance on the case of *Attorney General* v. *Richard Waring*, *Hard.* 367. after two arguments.



*Lord Chancellor.* The recognizance not being inrolled is imperfect; and although the Court may permit the inrollment of it after the time elapsed; yet it is always done with caution, that it shall not prejudice any intervening purchaser; and the statute of frauds and perjuries provides, that judgments shall not, by having relation to the first day of the term, bind purchasers nor affect the land, but from the time of signing of them in the margin; but it is silent as to recognizances and pocket securities, which are more dangerous to purchasers, (3) and therefore more reasonable that this recognizance should not bind, but from the time of the inrollment; and it may fairly be presumed, that the debt was otherwise satisfied or secured, when the recognizance was not inrolled; and decreed *J. S.* should be considered as a bond creditor only. (4)

**BOTHOMLEY  
v. FAIRFAX.**

A recognizance may be inrolled after the time is elapsed; but it is done with caution, so as not to prejudice any intervening purchaser.

(3) *Quære tamen.* For the stat. 29 Car. II. cap. 3. sect. 18. expressly mentions recognizances, and says that from the 24th June, 1667, they shall not affect the lands in the hands of a purchaser for valuable consideration, but from the time of the inrollment; the day, month, and year of such inrollment to be set down in the margin of the roll; though the contrary seemed to have been considered as the law, before the statute, *Hall v. Winckfeild*, Hob. Rep. 196.

(4) " Since the said recognizance was not inrolled within the time limited for that purpose, and that by the course of the inrollment office it cannot now be inrolled, it ought to be considered as a bond, and no more." Reg. Lib. 1716. A. fol. 171. Et vide a full note of the decree as to other points there noticed, and note appearing in the printed report in Mr. Cox's note to the report of this case, 1 P. Wms. 334. *Fothergill v. Kendrick*, ante p. 234.

DE

[ 752 ]

## TERM. S. MICHAELIS, 1717.

IN CURIA CANCELLARIÆ.

WILLIAMS *versus* CALLOW, & è contra.

CASE 657.

*WILLIAMS*, a glover, agreed to give his son 1500*l.* and turn over his trade and house to the son, and Mrs. *Callow* was to give 600*l.* portion with her daughter: but Mrs. *Callow* insisted she could give but 500*l.* until the son prevailed, that if she would give bond for 600*l.* he would return 100*l.*

A husband uses his wife with cruelty, and is an extravagant person, wasting all his substance. Court decreed the

interest of a trust-bond given for the wife's portion, to be paid to the wife for her separate maintenance. Ant. Case 598.

**WILLIAMS v.  
CALLOW.**

The marriage took effect, husband proved drunken, rude, and abusive to his wife, and wasting his stock ; his father got him to re-assign back his house for an annuity of 60*l.* *per ann.* for his life ; and afterwards he came to an agreement with Mrs. *Callow*, to take a bond for 500*l.* (1) the interest whereof was to be paid to him during the joint lives of himself and wife, and if he survived, the principal to be paid to him ; and gave a release of the portion to Mrs. *Callow*.

[ 753 ] *Williams*, the husband, brought a bill to set aside the release he had given to Mrs. *Callow*, and to have a legacy of 150*l.* given to his wife by her grandmother, and to have the portion made up 600*l.* although he had delivered up the last bond for 100*l.*

The wife having given a release to the mother before marriage, (2) and the treaty being for 600*l.* portion, and no mention made of the legacy, the bill was dismissed as to that demand, (3) and also as to the 100*l.* which the son promised to remit to his mother, and accordingly after marriage gave up the bond.

Mrs. *Williams*, the wife, brought her cross bill to have the interest of her portion for her separate maintenance ; and the *Chancellor* decreed it accordingly, declaring that this was a stronger case than that of Sir *James Oxenden* ; (4) there only relieved from the ill behaviour and beastliness of Sir *James*, here cruelty mixed with it. Sir *James Oxenden* of substance to have maintained his wife, and lived suitable to his estate ; here the husband has wasted all, and has no fixed habitation, but goes from alehouse to alehouse ; and both cases alike in that the wife's fortune was in trustees, the bond for the 500*l.* being taken in Mr. *Callow*, the wife's brother's name. (5)

(1) Payable to a trustee. R. L.

(2) Of the grandmother's legacy. R. L.

(3) And inasmuch as the release might induce the mother to give so large a portion. R. L. Vide *Macdowell & Ur' v. Halfpenny*, ante p. 484.

(4) Ante p. 493, S. C. quod vide, and cases cited in not. there, *Nicholls v. Danvers & Al'*. ante p. 671.

(5) The 500*l.* was to be brought into Court ; the principal to be paid to the survivor of the husband and the wife, and the interest to be paid in the first place to the husband up to the time of his last separation from his wife ; but

as to the interest accrued due since the separation, and for the future, to be paid to the wife, for her necessary support and maintenance, until the said husband shall have applied himself to some course of business, or some way of living, suitable to receive his said wife, he having put his said wife in danger of her life, by firing a pistol at her, and other rude and cruel treatment, and she having been in a manner turned out of doors by the plaintiff's father. Reg. Lib. 1717, B. fol. 525. [See *Bullock v. Menzies*, 4 Ves. 798. Fonbl. Tr. Eq. Book 1. Ch. 2. § 6. second note n.]

STANTON *versus* PLATT.

CASE 658.

MR. *Platt*, a freeman of *London*, having an only daughter, advanced her in marriage by the settling of a real estate, and the husband and wife separated, and the husband went beyond sea.

Advancement by a freeman of *London* of a child by a real estate, no bar of the orphanage-part.

Mr. *Platt* died, having by his will devised some houses (1) to a trustee, for the separate use of his daughter. (2)

[ 754 ]

*First*. Advancement by land no bar to the custom, any more than if devised or descended. (3)

*Secondly*. If it might go in part, yet it would be the same thing, because there was but one child; and the advancement in part, falls in again to the child's part.

If there is a wife and but one child of a freeman, which is advanced but in part, the child shall not bring that part into hotch-pot. (4)

*Thirdly*. That what was devised to the trustee for the daughter, cannot go in part of *orphanage*, nor any bar to it; but if legatory part not sufficient, the legatees must abate in proportion. (5)

A Leasehold estate devised by a freeman to a trustee for the separate use of his daughter, not Ant. Ca. 107.

to be taken as part of her orphanage-part, but to go out of the legatory part,

(1) Leasehold. R. L.

(2) For her life, and after her decease to *Thomas Stanton*, the plaintiff's son. R. L.

(3) Which was the portion of the plaintiff's wife. R. L. So *Civil v. Rich*, ante 1 vol. p. 216. et vide cases cited

in not. there. And generally on the subject, *Fouke v. Lewen*, ante 1 vol. p. 88, and cases cited in not. there.

(4) Vide *Dean v. Lord Delaware*, ante p. 628, but this point does not appear in the Register's Book.

(5) Reg. Lib. 1717, B. fol. 97.

ELIE *versus* OSBORNE.

CASE 659.

LORD CHANCELLOR. Nov. 15. Eq. Ca. Ab. 385, pl. 3. S. C. Marriage-settlement on the husband for 99 years, if he so long lived,

*JAMES STEER*, on his marriage, settled the lands in question on himself for *ninety-nine* years, if he so long lived, remainder to trustees and their heirs, to preserve contingent remainders, during his life, remainder to his wife for her jointure, remainder to the heirs of his body on the body of *Mary*, his intended wife, remainder to his own right heirs.

remainder to trustees, to preserve contingent remainders, remainder to the heirs of the body of the husband by the wife, remainder to the heirs of the husband. There is issue two sons and a daughter. Husband and trustees, with the eldest son, join in a fine; it is a good bar, and no breach of trust, the eldest son joining.

Issue *John*, *James*, and *Mary*: *James*, the father, and *John*, his eldest son, with the heir of the surviving trustee, join in a feoffment and fine to *Doughty* and his heirs. *John* and

ELIE v.  
OSBORNE.

*James* (1) the sons, died without issue, *James* the father yet living.

[ 755 ]

The question was, whether the purchaser had a good title, or that the trustees joining should be a breach of the trust.

Tenant in tail joining with the trustees for preserving contingent remainders, prevents any breach of trust.

Plea allowed. (2) *Lord Chancellor*. It is absurd to say, that the trustees may not join with the tenant in tail; for although the father was living, he was but barely tenant for *ninety-nine* years, if he lived so long, and the estate-tail vested in the son in equity, but the legal estate in the trustees and their heirs, during the life of the father, and they are trustees purely for the tenant in tail, and to preserve his estate, and not to stand in opposition to him for the sake of those who are to come after him.

(1) *John* only, according to the report, 1 P. Wms. 387, S. C.

(2) Vide 1 P. Wms. 387, S. C. Nomine *Else v. Osborn*, and a statement of the case from the register's Book in the note. Et vide *Pye v. Gorge*, 1 P. Wms. 129. *Basset v. Clapham*, ibid. 358. *Mansell v. Mansell*, 2 P. Wms. 678, and particularly p. 683 there, where the principal case, as above reported, spoken of by the Court with disapprobation, but the report of it 1 P. Wms. 387, is more consistent with the principles laid down on the subject by the authorities: but the Court has in some cases, though sparingly, exercised its discretion in directing trustees to join in destroying contingent remainders, *Platt v. Sprigg*, ante 303. *Frewin v. Charleton*, Eq. Ca. Ab. 386, pl. 4, in which case it was urged, as in the above printed report, that the trustees were trustees only for the tenant in tail; but there being a daughter in that case, the Court, before it ordered the trustees to join in a recovery, would have security given for the portion. In *Townsend v. Lawton*, 2 P. Wms. 379, there were two sons

of the marriage, and the wife dead, and the Court refused to order the trustee to join in suffering a recovery, unless the younger son would consent, and dismissed the bill against him and the trustee, with costs. So whether the settlement be voluntary, for a valuable consideration, or by will, *Symance v. Tattam*, 1 Atk. 613. and where it does order a trustee to join in destroying contingent remainders, it is with a view to effectuate the real purposes of the settlement, or to benefit the family, *Winnington v. Foley*, 1 P. Wms. 536. *Woodhouse v. Hoskins*, 3 Atk. 22. *Barnard v. Large*, Amb. 774. 1 Bro. Ch. Rep. 534, S. C. And it seems unsafe for a trustee to do so in any case without the directions of a Court of Equity. Vide *Marlow v. Smith*, 2 P. Wms. 201, *Mansell v. Mansell*, ibid. 678, 685. [*Moody v. Walters*, 16 Ves. 283. *Biscoe v. Perkins*, 1 V. & B. 485.] Et vide observation of *Willes*, Ch. Just. on the principal case as above reported, *Parkhurst v. Smith*, *Willes Rep.* 339, and considered by him as a very slender authority on the point of breach of trust.

### ATTORNEY GENERAL *versus* BURDET and SMITH & Al'.

CASE 660.  
Rolls.

Feb. 15.

An appointment by a tenant in tail to a charity, shall bind the reversioner, which the donor was capable of making.

AN appointment by tenant in tail to a charity, shall bind the reversioner in fee, and as an authority in point, the case of *Christ's Hospital* and *Hawes* was cited, *Duke's Charitable* reversioner. Statute of charitable uses supplies all defects of assurance,

*Uses* 84. The statute of charitable uses, supplying all defects of assurance, where the donor is of capacity to dispose, and hath such an estate, as is in any way disposable by him, whether by fine or common recovery; and the case also of the *Attorney General* and *Hawley* was cited, that the appointment by tenant in tail, barred the remainder-man. (1)

ATTORNEY  
GENERAL v.  
BURDET and  
SMITH.

(1) So *Tay v. Slaughter*, Pre. Ch. *wick & Al'*. ante p. 453. Et vide cases 16. *Attorney General v. Rye & War-* cited in not. there.

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[ 756 ]

TERM. S. HILLARII, 1717.

IN CURIA CANCELLARIÆ.

SHORT *versus* LONG.

THE testator devised his real estate to his son for life, and to his first and other sons in tail, with remainders over; and by the same will devises specifically a leasehold estate to his daughter, and made his son executor; the assets falling short to pay debts.

first, &c. son in tail, with remainders over, and devises a lease to his daughter, and dies not leaving assets to pay debts. The son and daughter shall contribute in proportion, each estate being liable at law, and the testator's intention equal between both.

Case 661.  
LORD  
CHANCELLOR.  
Feb. 24.  
Eq. Ca. Ab.  
114. pl. 7. S. C.  
*A.* devises his  
real estate to  
his son for  
life, re-  
mainder to his

The question was, whether the deficiency was to be charged upon the real, or upon the leasehold estate.

*Lord Chancellor* decreed the deficiency to be borne equally in proportion to the value of each estate; the fee-simple estate devised to the son, being liable to debts by specialty, by the statute against fraudulent devises; and the leasehold, although specifically devised, is liable to debts, and both being devised, the intention of the testator stands equally between the devi-

[ 757 ]

SHORT v.  
LONG.

sees; and both estates being liable, each ought to contribute its proportion. (1)

(1) Vide S. C. better reported 1 P. Wms. 403, and a full statement of the case and the decree from the Register's Book, by Mr. Cox, in a note to the report of the principal case there. And not. it there appears that the deficiency to fall in average upon the lands of inheritance went only as to specialty debts; and said the real estate shall never be put in average with the personal; *Warner v. Hayes*, W. Kel. 3. 4. Vin. Ab. 463. pl. 9. 8. Vin. Ab. 442, pl. 5. So where settlement to pay 100*l.* per ann. to the heir, and afterwards to raise 100*l.* a-piece for younger children, to be paid to them according to their seniority, yet when deficiency in assets, the younger children shall all be paid in average, *Brathwaite v. Brathwaite*, ante 1 vol. 335. Where issue and jointress claim under the same settlement, jointress shall contribute with the heir to pay off prior incumbrance, *Carpenter v. Carpenter*, ante 1 vol. 440. Et vide as to lands devised to the heir and lands also devised to a stranger, both, it is thought, must contribute in proportion. Secus where some lands descend to the heir, and other lands are devised to a stranger, for there the lands descended, it is thought, must be first applied, that the will may not be disappointed. Note to *Chaplin v. Chaplin*, 3 P. Wms. 367. And where one seized in fee of the manors of A. and B. mortgaged A. for 4000*l.* and by his will charged all his real estates with his debts, and devised A. to C. and B. to D. and died: the devisee of A. shall compel the devisee of B. to contribute to pay the mortgage on A. but if the will proves

void, then no contribution, *Carter v. Barnadiston*, 1 P. Wms. 505. So where bankruptcy, and bankrupts bound jointly and severally, contribution decreed between the joint and separate estates, the former having paid beyond its proportion of a debt to the crown, under an extent. *Rogers v. Mackenzie*, 4 Ves. 752. And it is a general principle of law, that where one surety pays the whole debt, there shall be a contribution, said, arg. Sir Edward Deering v. Lord Winchelsea, in the Exchequer; and *Praed v. Gardiner*, 6th Dec. 1788, cited in *Rogers v. Mackenzie*, ub. sub. So upon the same principle *Wright v. Hunter*, 5 Ves. 792. In the case of tenant in tail of estate subject to incumbrance, prior tenant in tail had suffered a recovery of, and sold part, and had exchanged other part; the land taken in exchange not subject to contribution, but the whole of the incumbrance must be borne by the remainder of the estate. *Kirkham v. Smith*, 1 Vez. 258. So *Lloyd v. Jones*, 9 Ves. 37, 61. As to contribution as between legatees, vide *Brown v. Allen*, ante 1 vol. 31. As between real and personal estate, *Cloudsley v. Pelham*, ibid. 411. *Howel v. Price*, 1 P. Wms. 295. As between tenant for life and remainder-man, *Clyat v. Bateman*, ante vol. 1. p. 404, and cases cited in not. there respectively. And as to the jurisdiction of equity, it is considered as the most conclusive, inasmuch as there may arise great difficulty in settling the proportions; and clear that the jurisdiction of courts of law does not oust that which belongs to equity, *Wright v. Hunter*, 5 Ves. 792.



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## TERM. S. TRINITATIS, 1718.

IN CURIA CANCELLARIÆ.

PINBURY *versus* ELKIN & Al'.

**GILES DAVIS**, a clothier, in *Com. Glouc.* July 18, 1712, having no issue, devised to *Hester*, his wife, all his lands and tenements, money, clothes and yarn, to be freely by her possessed and enjoyed : provided if the said *Hester* died without issue by the testator *Giles Davis*, that then 80*l.* should remain to his brother, *John Davis*, after her decease, and made *Hester*, his wife, executrix.

brother after his wife's death. The brother dies in the life of the wife. Vide *Post* Ca. 665, where it was decreed the legacy good.

The testator died without issue, and had no lands or tenements, either freehold or leasehold, but possessed only of a personal estate, consisting chiefly in money, clothes and yarn. *Hester* married the defendant *Elkin* ; *John Davis* died in the life-time of *Hester*, and made a will, and one *Wright* executor, who assigned the 80*l.* to the plaintiff.

The plaintiff's bill was, to be paid the 80*l.* Defendant, *Elkin*, admitted sufficient assets of his wife ; but insisted the plaintiff was not well intitled to the 80*l.*

*First.* Because *John Davis* died in the life-time of *Hester*.

*Secondly.* Because the devise of the 80*l.* was to arise upon too remote a contingency, viz. upon *Hester's* dying without issue by the testator.

As to the first objection, it was insisted by the plaintiff's counsel, that although *John Davis* had but a possibility or contingent interest, and such as, they admitted, he could not transfer or assign over ; yet such possibility would go to his executors or administrators, and for that purpose cited the case in *2 Ventris*, an anonymous Case 347. 100*l.* devised to *J. S.* at

Case 662.  
LORD  
CHANCELLOR.  
July 12.  
Pre. Ch. 483.  
S. C.  
One by will  
gives all his  
lands, money,  
&c. to his wife,  
provided if  
wife dies with-  
out issue,  
then 80*l.* shall  
remain to his

[ 759 ]

PINBURY v.  
ELKIN.

the age of *twenty-one*, and if he died before that age, to *A.* and *B.* and the survivor of them ; *A.* and *B.* both died in the lifetime of *J. S.* Then *J. S.* dies under the age of *twenty-one*; the administrator of *B.* who survived *A.* obtained a decree for the 100*l.* Although *B.* died before the contingency happened, yet it should go to his administrator.

As to the *second* objection, it was insisted that the will is to be construed according to the vulgar understanding of the testator, who is supposed to be *inops consilii*, and not according to a legal acceptation of the words ; and in common *parlance*, or according to the vulgar acceptation, a man is said to be dead without issue, when he has no issue living at the time of his death ; and it is not to be understood of a future time, when the issue he left at his death might afterwards happen, it may be *one hundred* years after, to die without issue ; and therefore the defendant's counsel would have it to be the same, as if it had been, provided she should die without issue living at the time of her decease ; and a remainder or devise over upon a contingency, that was to happen within the compass of life, was a good devise or limitation over, even of a personalty, or of a sum of money, or chattel personal.

[ 760 ]

*Lord Chancellor* as to the first part seemed doubtful, whether the devise of the 50*l.* was not personal to the brother, if he survived the widow.

As to the second point, not to be maintained, that the devise over was good, after the wife's dying without issue by the testator ; nor can the Court supply the words, *living at the time of her decease* : but the question is, whether there are not words sufficient in the will to show, when he intended the contingency to arise ; the 80*l.* is made payable after her decease ; the word (after) to be taken the same as at her decease, or immediately after her decease.

As to the *first* point, by the civil law it is a rule laid down in *Swinburne*, that when a legacy is payable at a time uncertain, as at the death of the testator's wife or the like, if the legatee be then dead, it is not to be transmitted to the executor, but is a lapsed legacy.

BUTLER *versus* DUNCOMB. (1)

SETTLEMENT to the husband for life, to the wife for life, and to *first* and other sons in tail; in default of such issue, to trustees for *five hundred* years, remainder to the defendant *Duncombe*, the grandfather, who made the settlement, and his heirs.

the first, &c. son, remainder to trustees for five hundred years, in trust after the commencement of the term, to raise 4000*l.* by rents and profits, sale or mortgage, for the portions of younger children, payable at twenty-one, or marriage. Husband dies leaving one daughter, who marries. The portion not to be raised in the life of the mother, nor any interest to accrue during the mother's life, because the trust is to raise the portion after the commencement of the term, which must be intended when it comes into possession.

The trust of the term is declared to be in trust, that after the commencement of the term, the trustees shall by and out of the lands, tenements, and hereditaments, raise for the portions of such younger children, as *George*, the son, should have by *Anne* his wife, the sum of 4000*l.* to be raised and paid out of the rents and profits, (2) or by demising, selling or mortgaging the premises, to be paid to the child or children at *twenty-one*, or marriage, which shall first happen.

The husband died, and left only a daughter, who, when of the age of *fifteen*, married the plaintiff in the life-time of the mother.

The question was, whether the portion should become payable in the life-time of the mother.

The objection relied on was, that it was not to be raised until after commencement of the term, and the term does not properly commence until it comes in possession, but was a vested remainder on the making of the settlement, and was no contingent remainder; and cited the case of *Cotton and Cotton*, where a maintenance was to arise, and be paid at the first feast that should happen after the commencement of the term, heard at the Rolls, and decreed it did not commence until after the death of the wife.

For the plaintiff were cited the cases of *Hellier and Jones*, where a term was sold in the life-time of the father, to raise portions at *twenty-one*, or marriage. *Greaves and Mattison*,

Case 662.  
LORD  
CHANCELLOR.  
July 22.  
Eq. Ca. Ab.  
339. pl. 6. S.C.  
Settlement on  
husband for  
life, re-  
mainder to  
wife for life,  
remainder to

[ 761 ]

(1) 1 P. Wms. 448. S. C.

(2) As to the effect of such a trust, in respect of the words, "rents and

"profits," vide cases cited in not. to *Anon.* ante 1 vol. p. 104.

BUTLER v. T. Jones 201. If he die without issue male of his then  
DUNCOMB. wife. (1)

*Cur advisare vult.*

(1) Also *Gerrard v. Gerrard*, ante p. 458. *Staniforth v. Staniforth*, ibid. 460, and cases cited in not. there respectively: but although these cases have been constantly received as the law of the Court, yet Judges have expressed their opinion of the inconvenience attending those determinations, and have anxiously sought for circumstances to distinguish the cases before them, *Corbett v. Maydwell*, ante p. 640, 655, S. C. *Sandys v. Sandys*, 1 P. Wms. 707, where settlement (husband having received 5000*l.* portion) of lands of 587*l.* per ann. in the usual manner, and then a term of 500 years, limited to trustees in trust to raise 6000*l.* if more than one daughter, to be paid at 21, or marriage; four daughters, and on bill by one of them married, for raising 1500*l.* being her share of the 6000*l.* the Court declaring it would not go one step further than precedents should force; yet, in this case, *the contingencies marked out by the settlement having all happened*, decreed a sale or mortgage of a fourth-part of the term. So *Hebblethwaite v. Cartwright*, Forr. 30. And in *Reresby v. Newland*, 2 P. Wms. 93, a similar limitation, but with a power of revocation in the father; and on the ground that that power was still a subsisting power, the Court would not decree the portion to be raised; and in that case Lord Chancellor said, the case of *Greaves v. Mattison* (Sir Thomas Jones, 201) is a strange one, and not common sense. So *Brome v. Berkley*, 2 P. Wms. 484, where the trust was in like manner to raise a portion payable at 21, or marriage, and also to raise a yearly sum for maintenance, until the portion should be due; the first payment of the maintenance-money to be made at such of the said half-yearly feasts, as should next happen after the said estate, so limited to the trustees as

aforesaid, *should take effect in possession*; and on this dismissed the bill for raising portion in the parents' life-time; and affirmed in Dom. Proc. 3 Bro. P. C. 437. So *Stevens v. Dethick*, 3 Atk. 39. *Churchman v. Harvey*, Amb. 335. But in *Hall v. Carter*, 2 Atk. 354, where maintenance also given, but where it was an actual charge upon the estate, and not postponed till after the term came into possession, the portion ordered to be raised by mortgaging a reversionary term. Note, there was, in the above case, a precedent term for a jointure, to the wife, then subsisting. In *Smith v. Evans*, Amb. 633, the trust was, "That in case the settlor should die without issue male, and leaving one or more daughters living at his death, then" (a word on which the Lord Chancellor in his judgment laid great stress)\* "to raise 120*l.* for his or their portion, by leasing, assigning, or mortgaging;" and decreed the 120*l.* to be raised, with interest, from the filing of the bill. In *Conway v. Conway*, 3 Bro. Ch. Rep. 267, the trust was to raise 1000*l.* for the portion of younger children, at such time or times, and in such manner and proportions, as the said John Conway, by any deed, &c. should appoint. John Conway, by will, devised the 1000*l.* to trustees, to divide the same, as soon as it could conveniently be done, amongst all his younger children, upon the decease of his wife, meaning by such, all of them that did not inherit his real estate, which was relied upon in the argument against raising the portion: decreed the portion to be raised, with interest, from the death of testator, which was the question. And so much is the Court against the construction for raising portions or maintenance out of reversionary terms, that where it was obliged to raise the portion, it refused to charge the difference between the

\* As to the effect of the word "then," in such cases, vide *Beauclerk v. Dormer*, 2 Atk. 311. *Biggs v. Bensley*, 1 Bro. Ch. Rep. 190.

The cause coming on afterwards (1) to be further heard, the Court declared the portion was not payable until after the decease of the jointress, nor would carry interest in the mean time. But Mr. *Butler* being a considerable tradesman in *Guildford*, the Court thought it not reasonable, that the whole money, when payable, should be secured or laid out for the benefit of the wife and children; but decreed, the wife being present in Court and consenting, that Mr. *Butler* might sell or dispose of a moiety of it, as he thought fit.

BUTLER v.  
DUNCOMB.

A woman being intitled to a portion of 4000*l.* after the death of her mother, and no interest payable for it in the mean time, and she having married a considerable

tradesman, decreed, by consent of the wife, that he might sell or dispose of a moiety of the portion, as he thought fit.

sum annually allowed for maintenance, and the sum charged; *Lady Clinton v. Lord Robert Seymour*, 4 Ves. 440, in which the judgment in *Lyon v. the Duke of Chandos*, 3 Atk. 416, is explained: but as to Lord *Thurlow's* judgment, in *Conway v. Conway*, 3 Bro. Ch. Rep. 267, vide judgment of *Eldon*, Lord Chan. in *Codrington v. Lord Foley*, 6 Ves. 364, 378, in which the reluctance of the Court to raise portions by sale or mortgage of reversionary terms is fully recognized; and the rule, as a summary of the cases which are cited and commented upon, is thus laid down—"The rule, upon the whole, depends upon this, whether it is the intention of the parties to the instrument, attending to the

" whole of it, that the portion should  
" or should not be raised in a particular manner; taking it, *prima facie*,  
" to be the intention upon the general rule, if there is nothing more than a  
" limitation to the parent for life, with  
" a term to raise portions at the age of  
" 21, or marriage, if there is nothing  
" more, and the interests are vested,  
" and the contingencies have happened,  
" at which the portions are to be paid,  
" the interest is payable, and the portions must be raised in the only manner in which they can be raised, that  
" is, by mortgage or sale of the reversionary term." [And see *Lyddon v. Lyddon*, 14 Ves. 558.]

(1) Easter Term, 1719.

DE

## TERM S. MICHAELIS, 1718.

IN CURIA CANCELLARIÆ.

Case 663.

LORD

CHANCELLOR.

Eq. Ca. Ab.

143. pl. 10.

S. C.

One dies indebted by mortgage and simple contract: one of the simple contract creditors gets judgment of assets *cum acciderent*. The executor applies the assets to pay off the mortgage.—The simple contract creditors shall stand in the place of the mortgagee, as to what he has exhausted out of the personal assets; and this being only by the aid of equity, all the simple contract creditors shall come in equally with the creditor that got judgment.

WILSON *versus* FIELDING. HILLERSDEN *versus* FIELDING. (1)

THE executrix applies part of the personal assets in paying off a mortgage. (2) The plaintiff *Wilson*, who was a creditor by simple contract, brings his action against the executrix, who pleaded *plene administravit*, and he takes judgment against the executrix, to be satisfied out of assets *quando acciderent*, and now brought his bill against the heir to compel him to refund so much of the personal assets, as had been applied to pay off the mortgage.

And *Hillersden*, and others, the plaintiffs in the other cause, being likewise creditors by simple contract brought their bill to compel the heir to refund and to be paid their debts. (3)

[ 764 ]

And the question was, whether *Wilson*, by virtue of his judgment, was to be preferred to the other creditors in point of payment.

A lease for years or bond taken in a trustee's name, being personal assets, shall be applied in a course of administration, and not to the payment of all debts equally.

Adjudged that the plaintiff *Wilson* being only relievable in equity, all the creditors should be paid in proportion, for the judgment could not avail him at law, no assets coming afterwards to the hands of the executors; but if there had been

applied in a course of administration, and not to the payment of all debts

(1) Cited in Sir *Charles Cox's Creditors Case*, 3 P. Wms. 341. *Hartwell v. Chitters*, Amb. 309.

(2) The executrix had confessed judgment to mortgagee on his mortgage-bond, a large sum having become

due for interest on the mortgage-money. R. L.

(3) The bill charging that the heir at law had received some part of the personal estate. R. L.



personal assets, as a lease for years, a bond, or the grant of an annuity in a trustee's name, then, although a creditor could not come at it without the aid of a court of equity, yet the assets should be applied in a due course of administration: (1) but in this case, the compelling the heir to refund, is a matter purely in equity, and a raising of assets, where there were none at law. (2)

WILSON v.  
FIELDING.  
HILLERSDEN  
v. FIELDING.

(1) *Quære tamen*, for the general direction in the decree, to apply the assets in a course of administration, does not confine such application to a legal course; but is to be taken distributively, and understood of legal or equitable, according to the nature of the assets, per *Hardwicke*, Lord Chan. *Hartwell v. Chitters*, Amb. 308. Said *arguendo* at the bar, to have been considered as over-ruled, as to the point of equity of redemption being held to be equitable assets, *Sharpe v. the Earl of Scarborough*, 4 Ves. 541; [but cited as authority by Bayley, J. in *Clay v. Willis*, 1 B. & C. 372.] On the general subject of marshalling, vide cases cited in note to *Sagittary v. Hyde*, ante 1 vol. p. 454.

(2) As to what are legal, and what equitable assets, vide *Girling v. Lee*, ante 1 vol. 63. *Cole v. Warden*, ibid. 410. *Plunket v. Penson*, 2 Atk. 290, 293, and cases cited in not. there respectively. The decree in the principal case declared, "That the plaintiff Wil-

son, and the rest of the creditors of the said *Edward Fielding*, were equal as to the nature of their demands at the time of the death of the said *Edward Fielding*; the plaintiff *Wilson* not having obtained any judgment in the life-time of the said testator, and the rest of the creditors might have had judgments against the executrix as well as the plaintiff *Wilson*; and in regard the plaintiff *Wilson* had not a superior demand to the rest of the creditors in the life-time of the said testator, he ought not to be first paid, but all equitable assets ought to be equally distributed amongst the said testator's creditors." As to the heir at law, the decree declared, "That so far as the executrix had exhausted the personal estate to satisfy the mortgagee, so far the creditors have a right against the heir at law for satisfaction of their debts, out of the testator's real estate." Reg. Lib. 1718. B. fol. 109.

## TURTON *versus* BENSON. RICHARDSON & Al'. *versus* BENSON.

CASE 664.  
At the Rolls.  
Eq. Ca. Ab. 88.  
(E.) pl. 2. Pre.  
Ch. 522. S. C.

THE plaintiff *Turton*, on the marriage of *Benson's* daughter, was to have 3000*l.* portion, and in consideration thereof, his mother agreed to surrender part of her jointure, to enable her son to make the settlement.

On a treaty of marriage between *A.* and the daughter of *B.* the mo-

ther of *A.* surrendered part of her jointure to enable her son to make a settlement; and *B.* agrees to give his daughter 3000*l.* portion. *A.* without the privity of his mother, gives a bond to *B.* to pay back 1000*l.* at the end of seven years. Decreed the bond to be delivered up, as obtained in fraud of the marriage-agreement. And though *A.* after *B.'s* death had promised to pay the 1000*l.* to *B.'s* creditors, yet that was *nudum pactum*, and not binding. Ant. Ca. 426, 450.

**TURTON v.  
BENSON.  
RICHARDSON  
v. BENSON.**

[ 765 ]

There were no articles in writing, but in the settlement made by Mr. *Turton*, it is mentioned to be in consideration of 3000*l.* portion; but Mr. *Benson*, who was *secondary* of one of the *Counters* in *London*, prevailed on *Turton* to agree between themselves, unknown to his mother, and those who treated for the marriage on his behalf, to give a bond to repay 1000*l.* part of the 3000*l.* at the end of seven years, but without interest. *Benson* being dead, the bill was brought against his widow and administratrix to have the bond delivered up, as unduly gained, and imposed upon him by *Benson* a little before the marriage, without the consent or privity of his mother or friends, that treated on his behalf.

*Richardson* and others, as creditors of *Benson*, brought their bill to have the benefit of the bond, charging a collusion between *Turton* and Mrs. *Benson*, and that she made but a faint defence to their prejudice; and charging that *Turton*, since the death of *Benson*, had promised to pay the money, and in confidence that it would be paid, it was assigned over to the creditors.

A bond is only assignable in equity, and when assigned is liable to the same equity, as if remaining with the obligee. Ant. Ca. 617.

The bond decreed to be delivered up, as obtained in fraud of the marriage-agreement. The assignment to the creditors did not alter the case; a bond, which is assignable only in equity, is still liable to, and attended with the same equity, as if remaining with the obligee. (1)

And as to any promise made by *Turton* that he would pay it, that was but *nudum pactum*, (2) and not binding.

The decree in *Michaelmas*, 1719, affirmed upon an appeal to the Lord Chancellor. (3)

(1) [So *Coles v. Jones*, ante, 691.]

(2) Vide *Fenn v. Harrison*, 3 Term Rep. p. 757.

(3) 1 P. Wms. 496, S. C. Et vide on the subject of a Court setting aside

bonds and other instruments entered into in fraud of marriage-agreement, *Redman v. Redman*, ante 1 vol. p. 348, and cases cited in not. there.

DE  
TERM. S. TRINITATIS, 1719.

IN CURIA CANCELLARIÆ.

PINBURY *versus* ELKIN.

CASE 665.

July 22.

PRE. CH. 483.

S. C.

ANT. CA. 662.

Object. 1. LEGACY is to take effect after the death of *Hester*, the wife, without issue, and therefore void, as on too remote a contingency.

If he die before issue.

If depart not leaving issue.

If died not having a son; all these limitations create an estate-tail.

2. In the case of *Goodyear versus Clarke*, a case cited, as determined in Chancery, and referred to the judges. A father on the marriage of his daughter, provides his son-in-law shall refund 500*l.* if his wife died without issue in *two* years: she had a son, and she and the son died within the *two* years. Adjudged the son-in-law should not refund. 1 Sid. 102.

3. In the vulgar sense, a man is said to be dead without issue, if he has no issue living at the time of his death. If a question is asked, did *J. S.* die without issue? No, he left a son, and that son is dead without issue. [ 767 ]

The words are, *If she die without issue, after her death* (that is immediately after the death) the 80*l.* is to go over; and therefore the *Lord Chancellor* was of opinion, the devise over was good. It cannot be thought that he intended the brother should have it if issue failed *eight hundred* years after.

As to such remainders over, is not a covenant good to pay a man 500*l.* on failure of issue of *J. S.*?

Point 2. *John* was dead before his wife, *Swinburne*, 462, 463. Case in *Ventris*, 347; (1) *è contra*, that although the contingency happen not in the life of the party, yet good.

Adjudged the legacy good, and decreed with interest (2) and costs.

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(1) *Anon.* 2 Vent. 347.

(2) From the death of testator's wife, vide 1 P. Wms. 563, S. C. And for the state of the learning on the effect of the words, "dying without issue," either

alone, or coupled with other circumstances, *Pawlet v. Dogget*, ante p. 86, and cases cited in not. p. 88 there. [See also note to *Deering v. Hanbury*, ante 1 vol. 478.]



# T A B L E

## OF

### THE PRINCIPAL MATTERS

CONTAINED  
IN THE CASES IN THIS VOLUME.

---

#### ABATEMENT.—REVIVOR.

*Who may revive.*

A DECREE is obtained against a man and his wife, as administratrix of *J. S.* for 1500*l.* The wife dies: whether the plaintiff can proceed against the husband, without reviving against the administrator of the wife? 195

Where a mutual account is decreed, the defendant, in case of an abatement, may revive 219

An administrator obtains a decree, and dies; the administrator *de bonis non* may revive this decree within the equity of the statute 30 *Car. 2. cap. 6. Sed vide note* 237

Bill is brought for a legacy against baron and feme, who was executrix of the testator. Defendants answer, and witnesses are examined, and after publication past the husband dies: The suit is not abated 249

A devisee may bring an original bill in nature of a bill of revivor, and shall have the same advantage of a decree, as an heir or executor; and the defendant is not at liberty to make a new defence 548

Upon a bill in nature of a bill of revivor against a devisee, the devisee cannot dispute the justice or validity of the decree; for then a devisee would be in a better case than an heir. 672

Where a decree is for a mutual account, the defendant may revive as well as the plaintiff 219

Mortgagor brings a bill to redeem; an account is decreed, and a report is made, and divers proceedings are had in the cause, and the plaintiff is ordered to pay costs and to deliver possession. The defendant the mortgagee dies; the executor can revive the suit 296

#### ACCOUNT.

Detinue of charters is a good plea at law in bar of an account; and so it is in equity 33

An account decreed of an intestate's personal estate, notwithstanding an account had been before taken, and a distribution decreed in the spiritual court 47

Though length of time is no bar, where accounts have depended a great while between two merchants, yet if dealings between them have ceased for several years, and one of them dies, and the survivor brings a bill for an account, the court will not decree an account, but leave the plaintiff to his remedy at law 276

If an account current is sent by one

## A TABLE OF THE PRINCIPAL MATTERS.

- merchant to another, who receives it, and makes no objections for two or three posts, it is looked upon amongst merchants to be an allowance of the account. *Vide the note* 276
- Where there is a decree for a mutual account, the plaintiff on his own bill may be decreed to pay the balance of the account 297
- A.* is tenant for life of a trust-estate, remainder to his sons. *A.* before a son born, brings a bill against the trustees; and an account is decreed, and afterwards taken. This account shall bind the sons; for all persons, that could be made parties, were parties in the suit 527
- An administrator of a captain of a company of marines is intitled to an account, as well of the pay of the company, as of the personal pay of the captain and his servants 682
- Equity will not decree an account of mean profits, unless in case of a trust, or an infant, where no entry has been made by the person intitled to the profits 724
- ADMINISTRATOR.** *Vide EXECUTOR.*
- ADVANCEMENT.** *Vide RESULTING TRUST., &c. under title TRUST.*
- ADVOWSON.** *Vide PRESENTATION.*
- AFFIDAVIT.**
- In case of a gross fraud the court will give costs to be ascertained by the parties own oath 123
- In what cases, as to matters under 40s. the party's own oath is allowed to be a good proof 176
- AGE.** *Vide INFANT.*
- AGREEMENT.**
- A copyholder for life, where by the custom there is a widow's estate, agrees to sell for his own life, and the life of such widow as he should leave at his death. Whether his widow bound by this agreement 45
- If a person covenants to settle land or an annuity out of land, and has no land at that time, but afterwards purchases land; *that* land shall be liable to the covenant, and that against a voluntary devisee 97
- An agreement for stinting a common between lord and tenants shall be performed, though opposed by one or two humoursome tenants; such an agreement being more favoured than an agreement to inclose a common 103
- Where an agreement made by a scrivener on behalf of his client to compound a debt, shall bind the scrivener, though not the client 127
- What arises from the agreement of the party not to be relieved against as a penalty 134, 244
- Subsequent agreement with *A.* by a factor of a merchant for freight at 6*l.* 10*s.* per ton, good, though *A.* took no notice he had made a former agreement with the merchant at 3*l.* 10*s.* per ton, *that* agreement having been obstructed by an embargo 242
- A.* on the marriage of his daughter to *B.* covenants that *B.* should have his land called *C.* for 1500*l.* less than any other would give for it, and afterwards devises the premises to his grandson for life, with remainders over, and dies: court refused to decree a specific execution of this agreement, by reason of the uncertainty of it, and it not being mutual 415
- Equity will not carry a voluntary covenant beyond the letter 693
- Parol agreement.*
- Statute of Frauds and Perjuries.*
- Whether a letter wrote during a treaty of marriage, and there are subsequent treaties and proposals, is an agreement within the statute of frauds, &c. 34
- Lessee for years having agreed to surrender his lease to the lessor, delivers up the key, which the lessor accepts, but afterwards refuses to take the surrender. Lessee decreed to be discharged of the rent 112



## A TABLE OF THE PRINCIPAL MATTERS.

Marriage agreement is reduced into writing, but not signed by either party; yet decreed to be performed 200  
 One, by letter under his hand, promised 1000*l.* with his niece, but in his letter dissuaded her from marrying the plaintiff; and though he was afterwards present at the marriage, and gave her in marriage; yet the court would not decree the payment of the 1000*l.* but left the plaintiff to his action at law 202

One by letter says, he will give 3000*l.* with his daughter; the daughter marries, and the father is privy to it, and seems to approve of it. The daughter dies, and the husband takes administration. The father decreed to pay the the 3000*l.* portion 322

A marriage is treated between the plaintiff and defendant's daughter, and the articles are signed by the plaintiff, but not by the defendant, who tears the articles on pretence of being dissatisfied, though not on material objections. Defendant permitting the plaintiff to court his daughter, and not declaring his dislike to the marriage, and permitting the young couple to live with him, decreed the defendant to pay the portion according to the articles 373

A public survey is held for sale of an estate, and A. offering 1250*l.* for it, it is accepted and agreed to, and conveyances are ordered to be got ready, and A. is put into possession; but disputes arising about settling the conveyance, A. gets an assignment of a mortgage, to which the estate is subject, and antedates it, and refuses to go on with the purchase: though the agreement was only by parol, yet on the circumstances of the case, A. is decreed to proceed in the purchase 455

An agreement, though not in writing, yet being executed on one part, and an enjoyment accordingly, equity will establish it 456

Agreements since the statute of *frauds*, &c, are not to be part parol, and part in writing; yet a deposit for performance of a written agreement, though there is no writing declaring the deposit to be a security, is not within the purview of the statute 617

A. and B. being severally in treaty to purchase a house and toft of land, they agree by parol, that A. shall desist, and that B. shall purchase and let A. have part of the ground, which he wanted, at a proportionable price. B. purchases and refuses to perform the agreement. This being a parol agreement, is within the provision of the statute of *frauds* 627

### *Underhand Agreement.*

Tradesman failing compounds, but makes an underhand agreement with some of his creditors to pay them the whole. This is a fraud, and on a bill brought by him against some of the creditors, who refused to take the composition, after the time of payment was passed, the court would not relieve the plaintiff 71

A. entrusted by B. to receive interest on tallies, receives the principal, and fails, and afterwards compounds with his creditors; but B. would not come in without having a greater composition than the rest, which A. agrees to give. A. brings a bill to be relieved against this underhand agreement; but he having been guilty of a great fraud and breach of trust, and having agreed to make some satisfaction, the court would not relieve him; but dismissed the bill. *Vide the note* 602

### *Agreement, when to be performed in specie, and when not.*

A. having taken a lease of a brewhouse, and covenanted to repair, assigns it by way of mortgage to B. The premises being out of repair, the lessor brings his bill against B. to compel him to perform the covenant. B. having never been in possession, the court would not decree him to perform the covenant *in specie*, but left the plaintiff to recover at law as he could 275

A. articles on behalf of B. to purchase some houses in *Jamaica*, and covenants to pay 800*l.* for the same, and the houses are afterwards destroyed by an earthquake. Though A. had no effects of B's. in his hands; yet

## A TABLE OF THE PRINCIPAL MATTERS.

decreed him to pay the 800*l.* *Vide the note* 280

One is bound to transfer 300*l.* *East-India* stock before the 30th of *Sept.* then next. Though the stock was much risen, yet, the defendant decreed to transfer the 300*l.* stock in specie, and to account for all dividends from the time it ought to have been transferred 394

*A.* on the marriage of his daughter to *B.* covenants that *B.* shall have his land called *C.* for 1500*l.* less than any other person would give for it, and dies. The court refused to decree a specific performance of this agreement, by reason of the uncertainty of it, and it not being mutual 415

As a beneficial bargain ought to be decreed in equity, so by the same reason a losing one ought 423

*A.* makes a lease for three years, and in consideration of the lessee's laying out 100*l.* in improvements, covenants at the end of the term to grant a new lease, at the same rent. Purchaser of the inheritance decreed to make good the covenant 447

*A* man on his marriage makes a settlement, whereby the lands were limited in remainder after his and his wife's death, to the heirs of his body begotten on the wife, and covenants not to bar the intail, nor suffer a recovery; and having one daughter, to whom on her marriage he had given a good portion, he suffers a recovery, and by will devises the estate to his daughter for life, and to her first, &c. sons in tail, with remainders over. On a bill for a specific performance of the covenant, the court would not decree it, but left the party to recover damages at law for breach of the covenant 635

### *Unreasonable Agreement,*

*A.* articles to sell lands to *B.* for 15,000*l.* the whole to be paid in money, or so much land returned, as would make up what he paid short of 15,000*l.* *A.* conveys part of the lands to *B.* and by his persuasion values that part at an under-value; and then, *B.* sells this part to

*C.* and afterwards would have returned so much of the lands as would make up the 15,000*l.* Articles set aside as unreasonable; but the sale to *C.* to stand 186

### *Agreement on Marriage.*

Marriage articles for settling lands varied, by decreeing an estate to one for life, with remainder in tail to his issue, instead of an estate-tail to him 13

*A* woman on her marriage agrees to have no part of her husband's personal estate, but what he should give her by will. This bars her of her *paraphernalia*, and from jewels given to her by her husband in his life-time 83

An inhabitant within the province of *York*, makes a settlement on his wife, in bar of what she might claim out of his personal estate, by the custom of the province of *York*, or otherwise, and dies intestate, leaving his wife and two children. Whether the whole personal estate shall be divided between the two children, as if there was no wife? 263

*A.* on the marriage of *B.* his son, settles a lease on *B.* for life, to the wife for life, and then to the issue of the marriage; and *B.* covenants from time to time to renew the lease, and assign it on the same trusts. *B.* renews the lease, but does not assign it, and dies indebted. This lease is bound by the marriage-agreement, and is not assets for payment of debts 289

Money by marriage-articles is agreed to be laid out in land, and settled on the husband and wife, and their issue, remainder to the right heirs of the husband: though the money at first is bound by the articles, yet when the husband and wife are dead without issue, the money is in the disposal of the husband, and will be assets, and go to his executor or administrator, and *a fortiori* to his residuary legatee 295

*A.* on the marriage of his son with *B.* a widow, articles to make a settlement in consideration of the marriage, and 2600*l.* portion to be paid

## A TABLE OF THE PRINCIPAL MATTERS.

- to him, 1000*l.* of the portion being tied up by articles on *B*'s. first marriage, it could not be paid. On a bill brought by the father, decreed at the *Rolls*, that the articles should be performed in six months, or be delivered up. On an appeal to the Lord Keeper, decreed the son to make good the 1000*l.* he being party to the articles, and bound by his wife's covenant, who while sole, had covenanted by the articles for payment of the portion. *Vide the note* 448
- A** widow on the marriage of her son, agrees to release her jointure, that he might make a settlement, and the son privately agrees to assign a leasehold estate to his mother. This agreement of the son set aside as fraudulent 466
- B**ond given to the wife before marriage to leave her son 1000*l.* though extinguished at law, yet good in equity, and shall bind the real assets; and decreed the wife after her husband's death to redeem a mortgage, and to hold over: though copyhold as well as freehold included in the security 480
- O**ne, on the marriage of his son, covenants for himself, and his executors, without naming his heirs, to settle lands of 150*l.* a year on the son, and the issue of the marriage, but dies before any settlement made. The son enters on the real estate, as heir to his father, and settles it for the jointure of a second wife, who has no notice of the articles. Decreed the articles to be a lien on the lands, whereof the father was then seised, though no particular lands are mentioned in the articles 482
- A.** having jointure in part, and 10*l.* *per ann.* charged on other part of her son's estate, upon the marriage of the son, joined in the settlement, and accepted 15*l.* *per ann.* in lieu; but privately the day before takes a security from her son for 10*l.* *per ann.* more out of a leasehold estate, which was not comprised in the son's marriage-settlement, and the son covenants to pay it. *A.* after the death of her son brings action of covenant against his widow and administratrix for non-payment of the 10*l.* *per ann.* 484
- O**n a bill to be relieved against the action, decreed for the plaintiff 499
- T**hat which is the open and public treaty and agreement on marriage, shall not be lessened or infringed by any private agreement 500
- A**rticles and a settlement mentioned to be made in pursuance thereof, were both made before the marriage; but the settlement varied from the uses in the articles. Decreed to go according to the articles 658
- I**f by the marriage-articles lands are agreed to be so settled, as that the husband would be tenant in tail, the court will direct them to be settled on the husband for life, and to his first, &c. sons in tail in strict settlement 671
- O**ne upon his marriage, covenants to levy a fine of his freehold lands, and to surrender his copyhold to the use of himself and his wife for their lives, remainder to the heirs male of their bodies, and dies, leaving issue a son and daughter, before any fine levied, or surrender made. The son for securing money, covenants to levy a fine of the freehold, and to surrender the copyhold, and by will devises his lands for payment of his debts, and dies without issue, having surrendered his copyhold, but levied no fine of the freehold. On a bill by the daughter to have the lands settled according to the marriage-agreement, the Lord *Harcourt* was of opinion, that the deed of the father was in nature of articles, and when to be carried into execution in a court of equity, the lands might be settled in a stricter manner than in the words of the deed, and so as the son's fine should not bar the daughter; and decreed both freehold and copyhold to the daughter 702
- U**pon a 're-hearing before the Lord Chancellor *Cowper*, he confirmed decree as to the freehold, but for different reasons; and as to the copyhold, there appearing no particular custom within the manor for suffering a recovery, was of opinion the surrender would bar the intail, in case the copyhold had been well settled; and dismissed the bill as to the copyhold 704

## A TABLE OF THE PRINCIPAL MATTERS.

A man by marriage-articles covenants to pay his wife, if she survives him, 1500*l.* in full of dower, thirds, custom of *London*, or otherwise, out of his real and personal estate. *A.* dies intestate. The wife is barred of her share by the statute of distributions

724

On a treaty of marriage between *A.* and the daughter of *B.* the mother of *A.* surrendered part of her jointure to enable her son to make a settlement; and *B.* agrees to give his daughter 3000*l.* portion. *A.* without the privity of his mother, gives a bond to *B.* to pay back 1000*l.* at the end of seven years. Decreed the bond to be delivered up, being obtained in fraud of the marriage-agreement

764

ALIMONY. *Vide* BARON AND FEME.

AMBASSADOR. *Vide* PRIVILEGE.

### AMENDMENT.

Defendant by answer consenting that an award made by her father should be confirmed, prayed she might amend her answer, having made an affidavit that she never read the award, and that her answer was prepared by her father, who had wronged her in the award. Motion denied

344

A mistake in the title of an order amended, though to charge a surety that gave a recognizance to abide the order of hearing

376

The plaintiff's christian name being mistaken in the title of the interrogatories, the depositions could not be read, nor would the court permit the title to be amended though most of the witnesses since their examination were gone to sea

435

### ANSWER.

If a man charges himself by answer; whether his answer shall be allowed as a good discharge?

194

Defendant by answer consented that an award made by her father might be

confirmed, prayed she might amend her answer, she having made oath, that she never read the award, and that her answer was prepared by her father, who had wronged her in the award. Motion denied *per cur.*

344  
A defendant's answer directed to be read as evidence at a trial at law

555

### APPEALS.

No appeal lies to the House of Lords from a sentence in the *delegates*, nor from a decree on the statute of charitable uses. *Vide note* p. 747.

118

Upon an appeal from the *Rolls* to the Lord Chancellor or Lord Keeper, the cause is entirely open

464

If upon a *certiorari* bill the cause is brought on to hearing, the court, if they think fit, may make a decree, or send it back to the Mayor's court to be determined there; and sometimes the court sends it back after publication passed, and a *subpoena* to hear judgment, and before the cause comes to hearing

491

### APPOINTMENT.

*A.* by will devises his lands to *B.* in fee, paying 400*l.*, whereof 200*l.* is to be at the disposal of his wife by her will, to whom she should think fit; the wife dies intestate; her administrator shall have this 200*l.* the property being absolutely vested in the wife

181

2500*l.* is provided by settlement for the issue of the marriage, in such proportion as the husband shall appoint; he dies leaving a daughter only, and makes no appointment, she shall have the 2500*l.*

665

APPORIONMENT. *Vide* AVERAGE.

APPRENTICE. *Vide* MASTER AND SERVANT.

ARBITRATORS. *Vide* AWARD.

ASSENT AND CONSENT.  
*Vide* LEGACY.

## A TABLE OF THE PRINCIPAL MATTERS,

### ASSETS.

#### *Vide* HEIR, EXECUTOR.

- A.** on his marriage demises lands to *B.* who redemises them to *A.* for a lesser term, paying a peppercorn rent during his life, and after his death an annual sum to his wife for her jointure, and a peppercorn for the remainder of the term. The redeemed term shall not be assets to pay any debts of *A.* but what affect the inheritance, that term being raised for a particular purpose 52
- A.** having a lease for three lives, mortgaged it for ninety-nine years, if the three lives lived so long, and died after the mortgage was forfeited. The mortgaged term, though not assets at law, decreed to be sold for payment of *A.*'s debts 54
- Legal assets shall be applied in a course of administration; but equitable assets amongst all the creditors proportionably 62
- A.** purchases a walk in a chase, and takes the patent to himself and his wife and *J. S.* during their lives, and the life of the survivor, and dies indebted. This patent shall not be assets during the life of the wife 67
- Land is devised to executors for payment of debts, the value of the land cannot be given in evidence, as assets at law in the hands of the executors; but when the land is sold, the money will be legal assets 106
- One makes *A.* his nephew executor, and devises all his lands to *A.* and his heirs in trust to sell, and pay all his debts and children's portions, and gives his children 100*l.* a-piece. The money arising by sale of the lands is not legal assets; and the debts and portions shall be paid in equal proportions 133
- In case judgment is recovered against an heir, who has a reversion in fee descended upon him, which is only assets *cum acciderit*, the court will not decree a sale of the reversion, but the creditor must wait till it falls 134
- By the statute of *frauds and perjuries*, the trust of a fee is assets at law; but the trust of a term is not 248
- A.** devise to trustees to pay debts and legacies, and the trustees are made executors. The debts must be first paid; because the trustees being made executors, the money is legal assets. 248
- A.** man assigns a personal estate, which his wife was intitled to as executrix of her former husband, to trustees for such uses, as he by deed or will should appoint, and for want of appointment, in trust for himself, his executors, &c. and afterwards devises this estate to his wife and children. This shall be assets, and liable to his debts, and the devise to the wife and children is only a legacy 287
- A.** on the marriage of *B.* his son settles a lease on the son for life, to the wife for life, and then to the issue of the marriage, and *B.* covenants from time to time to renew the lease, and assign it on the same trusts. *B.* renews the lease, but does not assign it, and dies greatly indebted. This lease is bound by the marriage-agreement, and is not assets for payment of debts 289
- Where a man has a power to dispose of money by his will, and accordingly gives it by will; this is assets, and liable to his debts 319, 465
- A.** by marriage-settlement having a power to charge the estate with any sum not exceeding 3000*l.* for such purpose as he thought fit; by deed appoints the 3000*l.* as a collateral security for the quiet enjoyment of an estate which he had sold, and if no incumbrance did appear, then the appointment to be void; and by will appoints the 3000*l.* to his daughter. Upon a bill by the creditors of *A.* the 3000*l.* subject to the said collateral security, is decreed to be applied to pay his debts 465
- A.** purchases a lease in the name of *B.* who declares it to be in trust to permit *A.* to receive the rents during his life, and then for one, who was his reputed wife. This lease is not assets of *A.* nor liable to his creditors after his death; for when a man purchases, he may settle the estate as he pleases 490
- A.** seaman assigns his wages, as a se-



## A TABLE OF THE PRINCIPAL MATTERS.

- curity for money, and dies. The assignment specifically binds the wages, and the money secured thereby shall be paid thereout preferable to all other debts. *Vide the note* 595
- A.** seised of a leasehold estate to him and his heirs for three lives, settles it on his daughter and her husband for their lives, remainder to the use of his own executors and administrators. The daughter and her husband die; and *A.* devises this estate to his wife. The use of this being limited to the executors and administrators of *A.* this makes it personal estate; and being personal estate, *A.* could not devise it exempt from his debts, though due but by simple contract 719
- Estate *pur auter vie***, if limited to executors, was assets before the statute of frauds and perjuries 720
- A** lease for years, or a bond taken in a trustee's name, being personal assets, shall be applied in a course of administration, though the creditors cannot come at it without the aid of equity. *Quære.* 764
- Marshalling of Assets, and in what Order Debts are to be paid.*
- An administrator pays away all the assets in satisfying debts on speciality. Decreed to pay a debt due by decree, though he had no notice of the decree before he paid away the assets. *Vide the note* 37, 88
- A** debt by decree in equity is equal to a judgment 89
- A** contingent security shall not stand in the way of a debt by simple contract, as to the administration of assets 101
- One** dies indebted both by bond and judgment. The judgment-creditor levies his debt out of the personal estate. Whether the bond-creditor shall stand in the place of the judgment-creditor, and charge the land with his debt 182
- Debts** on simple contract shall be paid before a voluntary judgment 202
- A** man in consideration of his wife's parting with her jointure of 40*l.* a-year, gives her trustee a bond to settle other lands of like value on the wife for life, remainder to the heirs of his body by her. He dies intestate, and the wife takes administration, and confesses a judgment to her trustee. On a bill by another bond-creditor, decreed the wife's bond as to herself only, to be performed before the plaintiff is paid; but the children to be postponed to the other bond-creditors 220
- Lands** are devised to trustees for payment of debts and legacies, and the trustees are made executors. The debts must be first paid; for the trustees being made executors, the money is legal assets 248
- Otherwise** if the trustees were not made executors. *Vide the note* 405
- Debts** on bonds for payment of sums certain, shall be preferred in payment to demands on articles sounding in damages 272
- A** seaman assigns his wages to *J. S.* as a security for a debt he owed to *J. S.* and died intestate. It was insisted this was only an agreement in nature of a letter of attorney, and determined by the seaman's death, and that there were bond-debts. Decreed *J. S.* shall be paid in the course of administration. *Vide the note* 391
- After** creditors have joined in a bill and obtained a decree for payment of their debts out of legal and equitable assets; none of them shall be admitted to obtain a preference of the other by obtaining judgment against the executors 435
- Where** there are legal and equitable assets, the creditors who will take their satisfaction out of the legal assets, shall have no benefit of the equitable assets, until the other creditors, who can only be paid out of those assets, have thereout received an equal proportion of their respective debts 436
- One** dies indebted by mortgage and simple contract. The executor applies the assets in discharge of the mortgage; and one of the simple contract creditors brings an action, and takes judgment to be paid, *quando assets acciderint*. The simple contract creditors shall stand in the place of the mortgagee, so far as



## A TABLE OF THE PRINCIPAL MATTERS.

the personal assets were exhausted in paying the mortgage, and this being by the aid of equity, the creditor who had taken judgment, *quando, &c.* shall not have a preference, but all the simple contract creditors shall be paid in proportion 763

*Assets by descent, and in the hands of the heir.*

The heir, claiming under a voluntary settlement, sells the land. If the money in the hands of the heir shall be assets to pay the ancestor's bond? 44

An equity of redemption of a mortgage in fee is not assets at law, but is so in equity; and if alienated or released by the heir, he shall be answerable for the value 61

Whether an heir, being a creditor by bond or judgment, may retain as well as the executor may? 62

One dies indebted both by bond and judgment. The judgment-creditor levies his debt out of the personal estate. Whether the bond-creditor shall, in equity, stand in the place of the judgment-creditor, and charge the land with his debts? 182

*Assets by devise for payment of debts. Vide trust for payment of portions and debts, under Title TRUST.*

*As touching the applying the personal assets to exonerate the real estate, vide Title REAL ESTATE.*

### ASSIGNMENT AND ASSIGNEE.

*Vide LEASE.*

One settles lands so, that in case his eldest daughter paid 6000*l.* within six months after his death to the use of his other daughters, she should have the lands; but if she failed, the second daughter to have the like privilege. The six months being past without payment, whether the eldest daughter can assign over this privilege 166

Assignee of a lease, by way of mortgage, not having entered, shall not

he compelled in equity to repair, or perform the covenants in the lease 275

Lessor having recovered at law the rent reserved on the lease against an assignee by way of mortgage, though he had never entered; he brought his bill to be relieved; but the court would not relieve him, it being his fault to take an assignment of the whole term; whereas he should have taken a derivative lease, and then he would not have been liable to the rent 374

A seaman assigns his wages to *J. S.* as a security for a debt he owed to *J. S.* and died intestate. It was insisted, this was only in nature of a letter of attorney, and died with the person, and that there were bond-debts. Decreed *J. S.* shall be paid in course of administration. *Vide the note* 391

Husband assigns a mortgage in fee, or a *chose en action*, which he has in right of his wife, this will not bind the wife, if she survives 401

A possibility cannot be assigned; but it may be released. *Sed vide note* 563

A *chose en action* is assignable in equity, upon a consideration paid 595

An assignee of a bond must take it subject to the same equity, as it was in the obligee's hands 692, 765

### ASSURANCE. *Vide DEEDS.*

### ATTACHMENT. *Vide under Title PROCESS.*

### ATTORNEY, SOLICITOR, SCRIVENER.

A scrivener lends his client's money to *J. S.* and takes a bond and warrant of attorney to confess judgment in the client's name, to whom he delivers a copy of the judgment, but keeps the bond, and afterwards receives the money, and delivers up the bond. Whether *J. S.* is liable to pay the money over again? 265

## A TABLE OF THE PRINCIPAL MATTERS.

### AVERAGE AND CONTRIBUTION.

*Vide* ASSETS.

*Vide* PROPORTION.

A lessee for years makes several under-leases; the estate is out of repair, and the original lease avoided for non-payment of the rent, and some of the under-lessees bring a bill to be relieved against the forfeiture. Equity will not apportion the rent, nor relieve the plaintiffs, but on payment of the whole rent in arrear, and repairing the premises; but having so done, they may compel the rest of the under-tenants to contribute 103

One devises lands to his son by his second wife, in tail male, remainder to his eldest son, by his first wife, provided if the land should come to his eldest son, that then he or his heirs should pay 1000*l.* to the testator's daughter within four months after the estate should come to him or them, and in default of payment, trustee to enter and raise the money. The son by the first wife dies leaving a son: the son by the second wife suffers a recovery of a moiety of the lands, and dies without issue, so that only a moiety of the premises came to the son of the son by the first wife; yet the moiety of the lands shall pay the whole 1000*l.* without any apportionment, in regard the 1000*l.* was a legal subsisting charge; and the daughter does not claim under the son by the second wife, who suffered the recovery 359

One conveys lands to the use of himself for life, with power to mortgage what part he pleased, remainder to trustees to sell to pay all his debts, and dies indebted by judgments, bonds, and simple contract. This deed is fraudulent as to the judgment-creditors, and they shall not be compelled to take a satisfaction in average with the other creditors, having no notice thereof 510

One devises his real estate to his son for life, and to his first, &c. sons in tail, with remainders over, and devises a lease to his daughter, and dies not leaving assets to pay debts. The

son and daughter shall contribute in proportion, each estate being liable at law, and the testator's intention equal between the devisees. *Vide the note* 756

### AVERMENT.

No averment will be admitted contrary to the consideration expressed in the deed 399

### AWARD AND ARBITRATORS.

An award, though *extra-judicial*, and not binding in strictness of law, yet decreed to be performed in specie 93  
Submission to an award, so as the arbitrators make their award at or upon the 27<sup>th</sup> of March then next; and if they make no award, then if the umpire make his umpirage on the same day. The umpire cannot make his umpirage on the 27<sup>th</sup> of March, the arbitrators having all that day to make their award 100

Submission to a reference, and the award to be confirmed by decree of the court, without appeal or exceptions; yet exceptions to the award allowed 109

If a submission to an award is conditional *ita quod* the award is made *de præmissis*, and the award is not made of the whole, it is void. But if the submission is not conditional, then the award, though made but of part of the premises submitted is good *pro tanto* *ibid.*

An award set aside, it appearing the arbitrators were interested in the cargo, touching which the award was made 261

Arbitrators promise to hear witnesses, but make their award without doing so. Award set aside *ibid.*

A bill is brought to be relieved against an award, and the arbitrators being made defendants, they demurred to the whole bill, because the plaintiff could have no decree against them, and the plaintiff might examine them as witnesses. Demurrer allowed without putting them to answer matters of fraud 380

An award is made a rule of court according to a submission for that purpose, and an attachment is taken out

## A TABLE OF THE PRINCIPAL MATTERS.

- for not obeying the award, and then the party dies, against whom the attachment issues. The Act of Parliament directing awards to be carried on by attachment as in other cases of contempt, the attachment is gone, and the remedy lost 444
- Arbitrators, if they could not agree, were to choose an umpire. They make no award, and not agreeing about the person to be umpire, they throw *cross and pile* who should choose him. The umpire made his award, and it was set aside by reason of his being chosen in that manner 485
- The submission is to three, or any two of them. After all the arbitrators had had several meetings, and heard the parties, two of them made an award privately, without notice to the other arbitrator. Award set aside 514
- If a submission is to three, or any two of them, and two by fraud or force exclude the other, *that* alone is sufficient to vitiate the award 515
- Private meetings of the arbitrators with one of the parties, and admitting him to be heard to induce an alteration in the intended award, is partiality 515
- If arbitrators go upon a plain mistake, either as to law or fact, equity will relieve against the award 705
- B.
- ### BANKRUPT.
- Devise of 800*l.* to be invested in land for the benefit of the wife of *J. S.* for her life, and afterwards for her children, and the interest of the money to go as the profits of the lands, if bought. *J. S.* becomes a bankrupt. The interest of the 800*l.* shall not be liable to satisfy the creditors. This not being a trust created by the bankrupt, but by the wife's relation, and intended for her benefit 96
- Lessee for years becomes a bankrupt. The assignee under the commission is not intitled to the benefit of a covenant in the lease for renewal at the end of the term 97
- Assignees under a commission of bankruptcy shall have the benefit of an equity of redemption, though this was long doubted 97, 161
- One lends money to bankrupt after a commission sued out, but without notice of the commission. By two Lords Commissioners against one, who doubted, he cannot come in as a creditor under the statute 157
- A.* makes a mortgage, and afterwards a commission of bankruptcy is taken out against him, and the Commissioners make an assignment of his estate, and then he makes a second mortgage to *B.* who has no notice of the bankruptcy. *B.* shall not protect his mortgage by getting an assignment of the prior mortgage 157
- Whether a distribution made by the Commissioners of Bankrupt upon a supposed value of the bankrupt's estate, when they had no money to distribute, is fraudulent, and to be set aside 158
- Every one is bound to take notice of a commission of bankruptcy 161
- Fraudulent distributions by Commissioners of Bankrupt, may be set aside by the Lord Chancellor on a petition. 162
- Whether trading or committing acts of bankruptcy beyond sea, is within the statute against bankrupts *ibid.*
- One *Anderson*, who traded in *Ireland*, adjudged a bankrupt within the statutes; but there it was proved, he sometimes came over to *Chester*, to buy goods *ibid.*
- A man on his son's marriage covenants during his own life to pay his son an annuity. The son becomes a bankrupt. The assignee under the statute shall not have the benefit of this covenant 194
- A.* being beyond sea consigns goods to *B.* then in good circumstances, who afterwards becomes a bankrupt. If *A.* can prevent the goods coming into the hands of *B.* or the assignees, it is allowable, and the assignees shall have no relief in equity 203
- An award is made in an adversary suit between *A.* and *B.* and confirmed by the court. *A.* being then a bankrupt, but not known to be so. A commission is afterwards sued out. This award shall bind the assignee under the commission 229

## A TABLE OF THE PRINCIPAL MATTERS.

- A. and B. are partners in trade. A. embezzles the joint stock, and contracts private debts, and becomes bankrupt; and the partnership goods are assigned by the Commissioners. Whether the assignees are intitled to any more than A's. share of the partnership effects amounts to, clear after debts paid, and a deduction for his embezzlement. *Vide the note*** 293
- A. is bound in a bond to B. for payment of money. B. assigns it to C. in satisfaction of a debt. B. becomes bankrupt, and a commission is taken out against him. C. in equity is well intitled to the bond, for as the bankrupt himself was bound by his assignment; so those claiming under the commission cannot be in a better case than the bankrupt himself was** 428
- A. owes money to B. by bond; B. owes money to A. for rent; B. assigns the bond for a valuable consideration to C. B. becomes bankrupt. Whether A. shall retain the rent due to him from the bankrupt, out of the bond** *ibid.*
- A legacy given to a bankrupt before his bankruptcy, may be assigned by the Commissioners for the benefit of the creditors** 432
- If a bankrupt has released and assigned all his estate to the assignees, he may be examined as a witness for them** 637
- A. on his marriage gives bond to leave his wife 500*l.* or a third of his personal estate at her election. A. becomes bankrupt. Decreed the wife to come in as a creditor on her bond, and what shall be paid in respect thereof, to be put out at interest, and the interest to be paid to the creditors during the bankrupt's life, and the principal to the wife, if she survived her husband** 662
- If a bankrupt having his certificate allowed, has slipped his time of pleading it at law to an action brought for a debt precedent to the bankruptcy, equity will not relieve him** 696
- Statutes relating to bankrupts bind the courts of equity, as well as at law** 697
- If a bankrupt is taken in execution, pending a reference of his certificate to the Judges, the court will not discharge him; but put him to his *audita querela*. *Vide the note*** 697
- Separate creditors allowed to come in under a joint-commission against two partners; but the joint effects are to be applied, first to pay the partnership debts, and then the separate debts: and as to the separate effects; first the separate creditors are to be paid thereout, and then the partnership-creditors** 706
- ### CATCHING BARGAINS. *Vide under Title HEIR.*
- ### BARON AND FEME.
- A wife is not to be examined as a witness against her husband** 79
- A wife whose husband is by Act of Parliament banished for life, may make a will, and in every thing act as *feme sole*, and as if her husband was dead** 104
- A. purchases a copyhold estate, and takes the surrender to the use of himself and his wife, and daughter and their heirs. The husband and wife, as one person, take a moiety by *intireties*, and the daughter the other moiety** 120
- Baron and feme bring a bill for a demand in right of the wife; the defendant answers, witnesses are examined, and after publication passed the husband dies. The wife may bring a new bill, and examine witnesses, as if no examination had been in the former cause, for she is not bound by the proceedings in that cause** 197
- A term is assigned by the husband, for the separate use of the wife, who, after his death, marries a second husband, who sells the trust of this term. The trustees decreed to assign the legal estate to the purchaser, though the second husband had made no provision for his wife** 270
- One dies intestate leaving a daughter, the wife of J. S. The daughter dies intestate, and after the husband dies intestate: whether the share of the daughter shall go to her own admi-**

## A TABLE OF THE PRINCIPAL MATTERS.

- nistrator, or to the administrator of her husband. *Vide the note* 302
- A bill is brought against baron and feme for a demand out of the separate estate of the wife, and the husband is beyond sea, and not amenable by the process of the court: if the wife is served with a *subpœna*, she must appear, and answer the bill 613
- Estates and Interests of the Wife.*
- Settlement made by a woman before her marriage for her separate use, without the husband's privity, will not bind the husband 17
- Where a feme covert agrees to join with her husband in making a surrender, or levying a fine, and he dies before it is done, equity will compel her to perform the agreement. 61
- A man marries an executrix. He shall answer for so much of the personal estate as she possessed, though he took it as a portion *ibid.*
- A feme covert agrees to sell her inheritance, so as she may have part of the money. The land is sold, and her part of the money put into trustees' hands. This money not liable to the husband's debts, though the wife afterwards agreed it should be so 64
- A. purchases a walk in a chase, and takes the patent to himself and his wife, and J. S. during their lives, and the life of the survivor. The husband dies indebted. The wife decreed the benefit of the patent during her life, though A. had not left assets to pay his debts; but after her death J. S. to be a trustee for the executor. 67
- The wife's portion, consisting of *choses en action*, shall not, upon the husband's death, be liable to his debts, the husband having made no alteration in the security, and an inadequate settlement on his wife 68
- Copyhold land is surrendered to the use of the husband and wife and their daughter, and their heirs. The husband mortgages it and dies. Mortgage void for the whole 120
- A. by will gives his daughter 400*l.* and devises lands to her, until B. his son, should pay her this 400*l.* She marries C. whose father covenants to settle lands of 100*l.* *per ann.* and B. covenants to pay the 400*l.* to the husband; and upon payment, the lands devised to the daughter were to be discharged. The husband dies, decreed the 400*l.* to the wife, and not to the executor of the husband 190
- One conveys lands in trust out of the rents to pay 6*l.* *per ann.* for the separate use of his wife, and to be at her disposal, then to the use of himself for life, remainder to the heirs of the wife, until the heirs or assigns of the husband shall pay to the executors, administrators, or assigns of the wife 100*l.* with interest from the death of the husband, then to the wife for her life, for her jointure, remainder over. The wife dies first, having by her will disposed of this 100*l.* Held, the wife dying in the life-time of the husband, had no power to dispose of this money 328
- If a wife has a power to dispose of money in the life of her husband, she may dispose of it, by a writing, in nature of a will, though not so provided 329
- An agreement for the husband and wife's parting, and the terms thereof established by a decree. *Vide note* 386
- A. on the marriage of his son B. settles lands to the use of B. for life, remainder to the wife for life, remainder to the heirs of their two bodies, remainder to B. in fee. B. and his wife, by deed and fine mortgage in fee, and subject to the mortgage, the lands are settled to the use of B. for life, and after his and his wife's death, to the heirs of her body by him begotten, remainder to his right heirs. The wife after her husband's death suffers a common recovery. Whether the estate of the wife for her life by the first settlement, and the limitation to the heirs of her body by the second, did consolidate; and if it did, whether the estate of the wife was alienable within the statute of the 11 Henry VII. *Vide note, p. 489.* 486
- When a man comes into a court of equity for his wife's portion, the court will oblige him to make a settlement upon her, or secure her a



## A TABLE OF THE PRINCIPAL MATTERS.

- maintenance, in case she survives him 494
- On the marriage of two infants an Act of Parliament is obtained for settling a jointure in bar of dower; provided that the jointure shall cease, if the wife, when of age, did not settle her land; but nothing is said as to that part of her fortune, which was in money, part of which was a mortgage for 1300*l.* taken in a trustee's name. The wife, when she came of age, settled her own land, and then the husband dies. Decreed the mortgage to the executors of the husband, and that it should not survive to the wife as a *chose en action* 501
- In all cases, where the husband makes a settlement equivalent to the wife's portion, it shall be intended, that he was to have the portion. *Vide note*, p. 503. 502
- Where a woman on her marriage reserves a power to dispose of her personal estate, all that she dies possessed of is to be taken to be her separate estate, or the produce of it, unless the contrary can be made appear; and as she has power over the principal, she may dispose of the interest 535
- A woman seized in fee of lands charged with specific debts, marries. The husband receives the rents, but does not pay the interest of the debts. The wife dies without issue. On a bill by her heir, decreed the husband ought to have kept down the interest. *Quære. Vide note*, p. 567 566
- A. and his wife mortgage the wife's estate, and A. covenants to pay the money, but the equity of redemption is reserved to them and their heirs. A. dies, and his wife survives. The mortgage shall be discharged out of the husband's estate 604
- Where the husband and wife bring a bill for the execution of a trust of a real estate devised by will for the benefit of the wife, it must be decreed according to the will: but where the husband comes for a personal demand in right of his wife, the court may impose terms upon him 626
- A. devises the surplus of his personal estate to his daughter, the wife of B. for her separate use, and makes her executrix. Surplus being devised to the wife, and not to trustees, when it comes to the wife, it belongs to the husband: but whether equity will not interpose? *Vide the note* 659
- The wife joins with her husband in a fine to raise 400*l.* by mortgage of her own estate, to buy him a place. Husband dies. The mortgage shall be paid out of his personal estate, if there are assets to pay his other debts; but all other debts shall be first paid 689
- A man pays contribution money upon a commission of bankruptcy for a debt due to his wife, and dies before a dividend made, and then the wife dies. The executors of the wife are intitled to the dividend; for the husband's paying contribution money does not alter the property of the debt 707
- A woman being intitled to a portion of 4000*l.* after the death of her mother, and no interest being payable for it in the mean time, and she having married a considerable tradesman, it was decreed by the wife's consent, that the husband might sell or dispose of a moiety of the portion, as he thought fit 762
- In what Cases the Act of the Husband shall bind the Wife, and not.*
- A copyholder for life, where by the custom there is a widow's estate, agrees to sell for his own life and the life of such widow, as he should leave, and dies. Whether his widow is bound by this agreement. *Vide the note* 45
- Bill is brought for a legacy against baron and feme, who was executrix of the testator. The defendants answer, witnesses are examined, and after publication passed the husband dies. The wife shall be bound by the answer and depositions; but it might be otherwise if the wife's inheritance was in question 249
- A man marries a woman intitled to a mortgage in fee, and after marriage assigns his interest in the mortgage to trustees to call in the money, and lay it out in land, to be settled upon the husband and wife, and their issue, remainder to the heirs of the husband.



## A TABLE OF THE PRINCIPAL MATTERS.

The husband dies without issue, and after the wife dies. This mortgage is a *chose en action*, and the husband has only a power to reduce it into possession, and the wife surviving, it shall go to her executor, and not to the executor of the husband 401

A copy of a deed to lead the uses of a fine, and inrolled for safe custody only, allowed to be read as evidence on a trial at law, and against the wife, though the husband only acknowledged the deed 471

*How far the Husband is answerable for the Acts of the Wife.*

Feme administratrix wastes the assets, then marries and dies. The husband is liable to no more than the value of the assets, which came to his or his wife's hands after the intermarriage 118

*Alimony and Separate Maintenance.*

An agreement for the husband and wife's parting, and for the husband's returning his wife's portion to the father, and for the father's indemnifying the husband from the maintenance and debts of the wife, established by a decree, though the husband offered to receive and maintain his wife. *Vide the note* 386

By articles before marriage 6000*l.* part of the portion is agreed to be invested in land, and settled to the husband for life, then to the wife for life, remainder as a provision for younger children, remainder to the husband in fee. The husband having by his cruelty and ill treatment forced his wife to separate from him, the court decreed the interest of the 6000*l.* to be paid the wife for her separate maintenance till cohabitation 493

A woman having been used with cruelty by her husband, becomes entitled to 3000*l.* as her share of her mother's personal estate, who died intestate. Decreed the money to be put out, and the interest to be paid to the wife for her separate use, and then to the husband for life if he survived her, and the principal to be paid to the issue, and if no issue, to the survivor of husband and wife 671

A husband having used his wife with cruelty, and being an extravagant person, and wasting all his substance, the court decreed the interest of a trust-bond given for the wife's portion, to be paid to the wife for her separate maintenance. 752

### BILL.

*Who must be parties. Vide Title*  
**PARTIES.**

An executor being desirous to apply the assets, as far as they would go, in satisfying the debts, brings a bill against all the creditors, that they might, if they pleased, contest each others debts, and that their preference might be settled. Adjudged on a demurrer to be a proper bill. *Vide the note* 27

Bill by executor to avoid bonds given by the testator, suggesting they were gained by threats and undue means. The defendant by answer says, they were given for money lent and debts due. It appeared by the proofs, that the defendant was a common harlot, and that the testator had unlawful conversation with her. Though this was not laid in the bill, yet it was sufficiently put in issue by the defendant's answer, which said the bonds were given for money lent 187

A bill will not lie for quieting one in the possession of a pew in a church, though the plaintiff has a decree before the ordinary for this pew 226

Whether a bill will lie against churchwardens after they are out of their office, for refusing to make a rate to reimburse the plaintiff according to an order of vestry. *Vide the note* 262

Bill is brought to have the benefit of a former decree. Plaintiff cannot examine witnesses, much less the same witnesses, to the matters in issue in the former cause; but on such bill, the court may examine the justice of the former decree; but then it must be on the proofs taken in the cause, wherein that decree is made 409

A bill may be brought on behalf of a child in *ventre sa mère* for an injunction to stay waste. 711

## A TABLE OF THE PRINCIPAL MATTERS.

### *Bill of Discovery.*

*For discovery of Deeds. Vide under Title DEEDS LOST OR CONCEALED.*

*A. having lands contiguous to B. brings his bill, that B. may discover the boundaries of his estate, as they appear by his deeds. B. is not obliged to make this discovery. Vide the note* 38

*A bill may be brought against an executor for the discovery of the personal estate, before the will is proved, or during the litigation thereof in the spiritual court* 49

*African company hire the defendant's ship to freight, and the defendant covenants not to trade in any of the goods in which the company dealt, and if he did, to pay double the value for such goods, with liberty to the company to deduct the same out of the freight. The company bring a bill to discover, whether the defendant traded in any of the said goods. Though this be a penalty, yet the defendant shall discover, it being his own agreement* 244

*A bill lies to discover who was the owner of a wharf or lighter, to enable the plaintiff to bring an action for the damage his goods had sustained by the neglect of the lighterman* 442, 443

*So bill of discovery lies to discover the part-owners of a ship, to enable one of the freighters, that suffered by neglect of the master, to bring his action* 443

*Bill for discovery, whether in a mortgage, which had been assigned to the defendant, there was not some trust declared for the benefit of the plaintiff. Defendant by answer denied there was any such trust. The answer being replied to, the question at the hearing was, whether the defendant should be obliged to produce the deed? The court would not compel him so to do, for by this method purchasers may be blown up. Q. Vide the note* 463

### *Appeals and Certiorari Bills.*

*Vide Title APPEALS.*

### *Bill of Revivor. Vide ABATEMENT.*

*Bill to examine Witnesses in perpetuum rei Memoriam. Vide Title WITNESS.*

### *Bill of Review.*

*Where a demurrer to a bill of review is allowed, it may be inrolled; but if over-ruled, that cannot be inrolled, to prevent the demurrer's being re-argued* 120

## BOND.

*A bond is given in common form for payment of money; but proved, the agreement was, that the obligor should marry such a man, or pay the money in the bond. Obligor relieved against the bond. Marriage ought to be free. Vide the note* 102

*Bond is given to a common harlot by one who had unlawful conversation with her. If the obligor himself comes to be relieved against this bond, the court may refuse to interpose; yet if his executor comes for relief, it may vary the case* 187

*A. being a widow, gives a bond to pay B. 100*l.* if she married again, and B. gives A. a bond to pay her executors the like sum, if she did not marry again. A. marries soon after. Her bond decreed to be delivered up* 215

*A man settles land on his son in tail, and takes a bond from him, that he shall not dock the intail. Bond decreed to be good. If the son would not have given the bond, the father might have made him only tenant for life. Vide note, p. 234* 233

*Bond to a house-keeper for secret service. Equity will not relieve: otherwise if the bond was given to a common strumpet* 242

*One settles land on his daughter in tail, and takes a bond from her not to commit waste. An idle bond, and decreed to be delivered up* 251

*Bond for 400*l.* given by A. to B. for B's. quitting his pretence, and procuring A. to be admitted purser to one of the king's ships. Court relieved on payment of principal without interest or costs* 308

*Bond extinguished at law decreed good*

## A TABLE OF THE PRINCIPAL MATTERS.

in equity, and to bind the real assets  
480  
One has judgment for the penalty of a  
bond. Though the principal and in-  
terest exceed the penalty, yet he shall  
recover no more than the penalty.  
*Quære.* 509

### BONDS FOR MARRIAGE BRO- CAGE. *Vide* MARRIAGE.

#### BOTTOMRY-BONDS.

One lends 300*l.* on a bottomry-bond,  
and insures 450*l.* on the ship, but  
had no interest in the ship or cargo.  
Policy decreed to be delivered up  
269. *Contra* 717

#### BOROUGH ENGLISH.

An estate *pur auter vie* of lands in  
*Borough English* shall descend to  
the customary heir 226

### C.

#### CHARITY, AND CHARITABLE USES.

No appeal lies to the House of Lords,  
from a decree upon the statute of  
charitable uses. *Vide the note, and*  
*also note p. 747* 118

Whether a decree made upon exceptions  
taken to a decree of commissioners  
for charitable uses be final: and  
whether the court can grant a re-  
hearing? *Vide note* *ibid.*

If a charity is given to a superstitious  
or illegal use, though it cannot take  
place, yet it shall be performed *cy*  
*près, &c.* 266

A school-house being erected by volun-  
tary contributions of the inhabitants  
of *A.* on the waste of the lord of  
the manor, the lord enfeoffs trustees  
in trust, that the inhabitants of *A.*  
may for ever have a school, &c. as  
of the gift of the lord. Whether the  
trustees or the inhabitants are to no-  
minate the schoolmaster? 387

Ground was granted to trustees, where-  
on to erect a chapel for the cele-  
bration of divine service, for the use  
of the inhabitants. Decreed in the

*Dutchy*, that the nomination of the  
minister was in the inhabitants 387  
If the school be not a free-school, the  
inhabitants have no right to sue in  
the Attorney General's name *ibid.*  
The reversion in fee of divers lands let  
on leases, in which in all 70*l.* *per*  
*ann.* rent was reserved, was granted  
by King *H. 8.* to the Corporation of  
*Coventry*; 400*l.* of the purchase-  
money was paid by the Corporation,  
and 1000*l.* by Sir *Thomas White*,  
but in the grant the Corporation was  
said to be the purchaser; and it  
was by the deed declared, that the  
whole 70*l.* *per ann.* should be applied  
to the several charities therein men-  
tioned. The lease expiring, the value  
of the lands was greatly improved,  
but the surplus had been all along  
received by the Corporation of *Co-*  
*ventry*. The lands themselves, not  
being given to the charities, but par-  
ticular rents out of the lands; de-  
creed the Corporation should have  
the surplus of the profits. But this  
decree was reversed by the House of  
Lords 397

By the rules made on the foundation of  
an hospital, no lease was to be made  
for above twenty-one years. The  
hospital makes a lease for twenty-  
one years, with a covenant by re-  
newal, to make it up sixty years.  
This covenant not binding in equity,  
as being equally prejudicial to the  
hospital, as a lease for sixty years  
411

A corporation for a charity are but  
trustees for the charity, and may im-  
prove; but cannot do any thing to  
the prejudice of the charity, or in  
breach of the rules of the founder  
412

Charity lands being let at a great un-  
der-value, the lease set aside, and the  
lessee decreed to pay the arrears of  
rent according to the full value of  
the land; and to deliver up the pos-  
session 414

Issue at law directed upon a re-hearing  
of exceptions taken to a decree made  
by commissioners of charitable uses,  
after that decree had been twice con-  
firmed 507

In the constitutions for founding an  
hospital, it was ordained, that no

## A TABLE OF THE PRINCIPAL MATTERS.

lease should be made for above twenty-one years, and the rent not to be raised, nor above three years' rent to be taken for a fine. Though the tenant of the hospital lands is intitled to a beneficial lease on renewal, yet this constitution is not to be followed according to the letter, but as times alter, and the price of provisions increases, so the rent ought to be raised in proportion 596

### *Devise and Appointment to a Charitable Use.*

Tenant in tail devises lands for maintenance of a school-master, and other charitable purposes. Decreed to be a good appointment, within the statute of charitable uses, though no fine was levied or recovery suffered 453

Devise to a college, though *mortmain* and void at law, yet allowed good within the statute of *Eliz.* 454

Feme covert administratrix devises to a charity, held good *ibid.*

Devise of a copyhold to a charity, without surrendering the use of the will, good *ibid.*

Devise of a manor held *in capite* to a charity, though it had been void for a third part, if not for a charity; yet good for the whole *ibid.*

Misnomer supplied in case of a gift to a charity *ibid.*

Freehold lands were devised to a charity, but the will was not executed in the presence of three witnesses. Adjudged the will being void as a will, it could not operate as an appointment within the statute of 43 *Eliz.* 597

But such a will may operate as an appointment of copyhold lands, where there is a surrender to the use of the will, they passing by the surrender, and not by the will 598

An appointment by a tenant in tail to a charity, shall bind the reversioner in fee 755

The statute of charitable uses supplies all defects of assurance, which the donor was capable of making *ibid.*

### CHARTER-PARTY.

Though a charter-party is so penned,

that no freight can be recovered upon it at law, yet, if the owners of the ship have a just demand, equity will relieve 210

### CHILDREN.

Where a devise is to children, the grandchildren cannot come in to take with the children, but, if there be no child, grandchildren may take by a devise to children 108

A devise to the issue of *J. S.* who had a daughter living, and afterwards a son born, all the children shall take, and even grandchildren 545

One devises the surplus of his estate to his grand-children living at his death, grandchildren born after his decease shall not take 711

### CHOSE EN ACTION.

Is assignable in equity upon a consideration paid 595

### COMMISSION.

A commission to examine witnesses returnable *sine dilatione*, must be executed before the second return of the next term, and if executed afterwards it is void, and the depositions ought to be suppressed 197

### COMMON RECOVERY. *Vide RECOVERY.*

#### COMMON.

An agreement between lord and tenants to stint a common, more favoured than an agreement to inclose a common; and one or two humoursome tenants opposing, shall not hinder the performance of an agreement for stinting a common 103

A man grants to *J. S.* common in his down for one hundred sheep. The grantee brings a bill against the grantor, for that he had overstocked the common, and praying he might be enjoined from so doing. Bill dismissed 116

The lord enfranchises a copyhold with all common thereunto belonging.

## A TABLE OF THE PRINCIPAL MATTERS:

Though the common is extinct at law, yet it subsists in equity 250  
 Lord of a manor incloses part of the common, insisting it was an improvement within the statute of *Merton*. The Court continues the injunction, and directs a trial, whether sufficient common was left for the tenants 301, 356.

The greatest part of the landholders intitled to right of common, agree to a stint of the common. This will not bind the rest 575

### TENANTS IN COMMON. *Vide* JOINT TENANTS.

#### CONCEALMENT.

A counsel having a statute from A. advises B. to lend A. 1000*l.* on a mortgage, and draws the mortgage, with a covenant against all incumbrances, and conceals his own statute. The statute shall be postponed to the mortgage 370

A. lends money to B. on mortgage, but before he does so, sends C. to inquire of D. who had a prior mortgage, whether he had any incumbrance on B.'s estate, who denied he had any. This was proved by C. D. by answer confessed C. inquired of him what money B. owed him; but denied C. told him that A. was about to lend B. any money. Decreed at the *Rolls*, the estate should stand charged in the first place with A.'s debt: but upon an appeal, issue directed to try whether C. told D. that A. was about to lend money on B.'s estate 554

#### CONDITION.

One devises lands to his eldest daughter upon condition, that within six months after his death she pays certain sums to his two other daughters, and if she failed, he devised the land to the second daughter on the like condition. The Court may enlarge the time of payment, though the lands are devised over 222

In all cases that lie in compensation, the Court may dispense with the time of payment; even in case of a condition precedent *ibid.*

One devises lands to his son by his second wife in tail male, remainder to his eldest son by his first wife. Provided, that if the land should come to his eldest son, then he or his heirs should pay 1000*l.* to the testator's daughter within four months after the estate should come to him or them; and in default of payment, the trustees to enter and raise the money. The son by the first wife dies leaving a son: the son by the second wife dies without issue.— Though the estate never came to the eldest son by the first wife, he dying in the life of his half-brother, yet the proviso being that the eldest son or his heirs should within four months after the estate came to him or them, pay, &c. The land is liable to pay the 1000*l.* 359

Legacies are given by a will to A. B. C. and D. on condition, that as they come of age, they shall release all claims to the testator's estate. This condition must be taken *distributively*; and such only as refuse to release, shall forfeit their legacies 478

A. gives some lottery-tickets amongst her servants, on condition if any of them came up a prize of 20*s.* or more, they should give one half to her daughter. The ticket given to the foot-boy came up a prize of 1000*l.* On a bill by the daughter, a moiety of the 1000*l.* was decreed her 560

A gift to an infant on condition. The infant is bound by the condition 561

One devises lands to trustees, in trust for his daughter till marriage, and then to convey to her and her heirs, if she married with consent of the trustees; but if she married without such consent, then to convey to others. She marries with the consent of her father in his life-time. The condition is dispensed with 721

#### *Condition precedent and subsequent.*

One devises lands to trustees and their heirs, in trust to pay such of his debts and legacies as his personal estate should fall short to pay; then in trust for his niece *Elizabeth* (his



## A TABLE OF THE PRINCIPAL MATTERS.

heir at law) for her life, in case she within three years after his death should be married to the Lord *Guildford*, remainder to her first, &c. son, by the Lord *Guildford*, in tail male; in default of such issue, or in case the marriage should not take effect within the three years, then in trust for the Lord *Falkland* for life, remainder to his first, &c. son in tail male, remainder to the testator's own right heirs. The niece's marriage with the Lord *Guildford* does not take effect, and after the three years she marries Mr. *Bertie*, with the trustees' consent. This is a condition precedent, and equity cannot relieve against the non-performance 333

Equity cannot relieve against the breach of a condition precedent, nor can it give an estate that never vested, by reason of the non-performance of a condition precedent 339

Equity cannot relieve against the breach of a condition subsequent as to the forfeiture, where there is a devise over 453

*Condition or Covenant broken, and how far relievable.*

If the remainder-man by practice or contrivance, prevents the performance of a condition, equity will relieve 344

One having issue a daughter, devises his land to his kinsman, paying 1000*l.* to his daughter. The kinsman makes default in payment; the daughter, who is heir, brings ejectment, and recovers. Devisee relieved on payment of principal, interest, and costs, though to the disinherison of an heir, and in favour of a voluntary devisee 366

*A.* by will gives his grand-daughter 30,000*l.* to be paid by 1000*l.* a-year, and devises his lands to *B.* on condition that he pays his debts and legacies. The 1000*l.* a year not being paid, the grand-daughter enters. If *B.* will be relieved against the breach of the condition, it must be upon payment of interest for each 1000*l.* from the time it became due, without any deduction for taxes, together with costs 595

CONTRIBUTION. *Vide* AVERAGE.

CONVEYANCE. *Vide* DEEDS.

### COPYHOLD.

A rent out of a copyhold aliened by surrender and admittance for a valuable consideration, good in equity 16

A copyholder for life, where by the custom there is a widow's estate, agrees to sell, and dies: his widow not bound by this agreement 45

A copyhold estate of the nature of *gavel-kind*, is devised to the eldest son, paying a legacy thereout to his younger brother, but no surrender to the use of the will. Equity will supply the want of a surrender, as well in favour of an elder, as a younger son 163

Equity will supply the want of a surrender to the use of a will, when it is devised as a provision for younger children, or in favour of creditors, or a purchaser 164

The lord enfranchises a copyhold with all common thereunto belonging. Though the common is extinct at law, yet it subsists in equity 250

A copyhold is granted to three for their lives *successive*. If there is no custom within the manor, that the first taker may dispose of the whole, this shall go in succession, and not to the executor of the first taker 264

An estate in a copyhold *pur auter vie*, shall go to executors or administrators, as well as a freehold *pur auter vie* 265

One devises a copyhold of the tenure of *Borough English* to his eldest son, but had made no surrender to the use of his will, and devised some houses to his youngest son. The houses being soon after burnt down, and the youngest son, who was an infant, having never entered thereon, the court, as this case was circumstanced, would not supply the want of a surrender *ibid.*

By a marriage-settlement, a freehold estate is settled on husband and wife for their lives, remainder to their first, &c. son in tail, remainder to trustees, for five hundred years, to raise portions for daughters, remainder over; and the husband covenants to settle



## A TABLE OF THE PRINCIPAL MATTERS.

his copyhold estate to the same uses. A surrender is made, but no provision is made for daughters. The freehold estate not being sufficient for raising the daughters' portions, decreed the copyhold estate should be liable thereto 321

Copyholder in fee makes a conditional surrender, for securing a sum of money, at the end of six months. The money is not paid, and the mortgagee being willing to continue his money, they desired the Lord that the old surrender may be taken up, and a new one made for six months longer; but the Lord insists the mortgagee should come in to be admitted, and pay a fine of two years' value. Equity will not relieve against the Lord, but gave the parties liberty to go to law. 367

A copyhold estate in mortgage, cannot be redeemed by a bond-creditor, yet if the freehold and copyhold be in one mortgage, a bond-creditor will be intitled to redeem both 481

A man, tenant in tail of the trust of a copyhold estate, devises it by will. The estate will pass to the devisee, the will being sufficient to bar the intail of a trust 585

Where there is no particular method in the Lord's Court to bar intails, a common surrender is sufficient, though the intail is of a legal estate 585, 705

The widow of a *cestuy que trust* of a copyhold estate shall have her *free bench*, as well as if her husband had had the legal estate 585

Copyholds may be devised by a will not attested by three witnesses, in regard they pass by surrender 598

One who is *cestuy que trust* of a copyhold estate may devise it, without making a surrender to the use of his will 680

### CORPORATION.

Bill to be relieved against an award made by some of the members of the *East India* Company, and the arbitrators, and some of the particular members are made defendants. They may demur to the whole bill, without answering to the fraud  
VOL. II. PART. II.

charged; for the plaintiff can have no decree against them, nor can the answer be read against the company; but they ought to be examined as witnesses 380

After a decree against a Corporation for a sum of money, and a *distringas* had issued out against them for the duty decreed, the court refused to give them any time, or to let them be examined on interrogatories 395

Private members of a company made liable to the company's debts, where the company had no goods 396

### COSTS.

In cases of gross fraud, the court will give costs, to be ascertained by the parties own oath 123

The second mortgagee brings a bill to redeem the first mortgagee, who had been put to great charge in foreclosing the mortgagor. *Cur.* The costs which the first mortgagee has been put to, shall not be taxed, as in case of an adversary suit, but he shall be allowed all his costs and charges; as is done where a solicitor lays out money for his client; and the profits of the mortgaged premises shall be applied to pay off those costs, before they go to sink the principal 185

### COVENANT. *Vide* AGREEMENT.

Covenant to settle lands on marriage, of such a value, although no particular lands are mentioned, will yet affect the lands of which the covenantor was then seised, and this against a purchaser without notice 489

*Covenant broken, and how far relievable. Vide under Title* CONDITION.

### COURTS. *Vide* JURISDICTION.

#### COURT OF CHANCERY.

Fraud in obtaining a will relating to personal estate only, is not examinable in Chancery, after the will is proved in the Spiritual Court, so long as that probate is in force 8

An account decreed of an intestate's  
S B

## A TABLE OF THE PRINCIPAL MATTERS.

personal estate, notwithstanding an account had been before taken, and a distribution decreed in the Spiritual Court 47

In the Court of Chancery, there were several things that belonged to the King as *pater patriæ*, and fell under the care and direction of this court, as charities, infants, idiots, lunatics; and afterwards such of them, as were of profit and advantage to the King, were removed to the Court of *Wards* by the statute; but upon the dissolution of that court, they came back again to the Chancery 342

Court of Chancery will not examine the *quantum* of the King's debt, nor how far extents that are sued out are necessary; the Court of Exchequer being the King's Court of Revenue, and the proper court for that purpose 426

Otherwise, if the defendant who has sued out the extent in aid, confesses by answer that he has sufficient estate of his own to pay the King's debt *ibid.*

Or where it appears to be a fraudulent contrivance by an extent in aid to gain a preference to a debt of an inferior nature *ibid.*

### COURT OF EXCHEQUER.

The Court of Exchequer is the King's Court of Revenue, and bill for an account will not lie in Chancery at the suit of *A.* whose estate is extended by virtue of extents; one at the suit of the King, and the other an extent in aid, this matter being properly cognizable in the Court of Exchequer 426

### STANNARY COURT.

Stannary Court, a court of law, but not of equity 483

### SPIRITUAL COURT. *Vide Title SPIRITUAL COURT.*

### TENANT BY CURTESIE.

Tenant by curtesie shall have the aid of equity against a trust-term assigned in trust to attend the inheritance 324

*A.* devised 300*l.* to be laid out in land, and settled to the use of his daughter and her children, and if she died without issue, to go over. She married *B.* and had a child by him, and she and the child being dead, and the money not laid out; on a bill brought by *B.* decreed the money to be considered as land, and *B.* to be tenant by the curtesie 536, 585, 681  
A man shall be tenant by the curtesie of a trust, as well as of a legal estate 585, 681

### CUSTOMS OF LONDON. *Vide Title LONDON.*

#### D.

### DEBTS, CREDITOR, AND DEBTOR.

*Vide Trust for Payment of Debts, under Title TRUST.*

A judgment or sentence recovered in *France*, for money due, must be considered here only as a debt on simple contract, and the statute of limitations will run upon it. 540

*In what Cases one Debt shall be set off in Equity against another.*

A clothier sends cloth to the factor to sell for him, and dies. The administrator brings an action against the factor for the cloth. The factor cannot in equity deduct out of the value of the cloth, a debt owing to him from the clothier 117

Where there are mutual dealings between two persons, and one becomes bankrupt, the balance of the account only shall be answered to the bankrupt's estate *ibid.*

*The Order and Priority in which Debts are to be paid. Vide under Title ASSETS.*

*Debt to the Crown. Vide PREROGATIVE. Vide EXTENT.*

### DECREE.

A debt by a decree shall be paid before bonds. *Vide note* 37, 88

## A TABLE OF THE PRINCIPAL MATTERS.

It is equal to a judgment 89  
 After a writ of execution, and an attachment returned for not performing a decree, the court will not give the defendant leave to be examined, unless he gives security to perform the decree 91  
 Money paid in pursuance of a decree, though it happened to be paid to a wrong hand, allowed to be a good payment 142  
 An administrator obtains a decree, and dies, the administrator *de bonis non* may revive this decree, within the equity of statute 30 Car. II. cap. 6, which gives him leave to revive after a judgment obtained 237  
 In a bill brought to have the benefit of a former decree, the plaintiff cannot examine witnesses, much less the same witnesses to the matters in issue, in the former cause, the court must examine the justice of the decree on the former proofs 409

### DECREE. PARTIES BOUND BY IT.

A decree was made 5 Car. I. that all the miners within the parish of *D.* as well for the time being as to come, should pay to the vicar for tithe, the tenth dish of lead ore cleaned. All miners within the parish held to be within the decree, though not parties to it, nor claiming in privity under any that were 184  
*A.* is tenant for life of a trust-estate, remainder to his sons. *A.* before a son born, brings a bill against the trustees, and an account is decreed, and afterwards taken. This account shall bind the sons; for all persons, that could be made parties, were parties in the suit 527  
 Subsequent incumbrancers may redeem the first mortgagee, though he has foreclosed the mortgagor by a decree: and the account taken under that decree will not bind the subsequent incumbrancers 663

### DEEDS, CONVEYANCES, AND ASSURANCES.

#### *Construction and Operation of them.*

A woman covenants to stand seised to

the use of herself in tail, remainder to such uses as she, by writing, should appoint; for want of appointment, to the use of her kinsman in fee. Whether this remainder to the kinsman is good, being on a covenant to stand seised 7  
 Bill for a discovery, whether in a mortgage made by *A.* to *B.* which had been assigned to the defendant, there was not some trust for the benefit of the plaintiff; defendant by answer denied there was any trust declared for the plaintiff. The answer being replied to, the question at the hearing was, whether the defendant was obliged to produce the deed? Court would not compel the defendant to produce the deed, saying that by this method all purchasers may be blown up. *Vide the note* 463

#### *Deeds lost or concealed.*

A remainder-man in tail in a voluntary settlement, brings a bill for discovery of the deed; and it appearing that the entail was discontinued, the court would not relieve him 35  
 One claiming under a voluntary conveyance from tenant in tail, not compellable by the issue in tail to discover the settlement 50  
 Equity will not aid the issue in tail against a discontinuance, though by a voluntary conveyance. *Vide the note. ibid.*  
 If a lease of lands by deed is lost, the lessor may declare on a demise in general, without saying it was by deed; otherwise of a thing which lies in grant 98  
 Defendant suppresses a marriage-settlement, whereby a remainder in tail is limited to the plaintiff's father, all prior estates being spent. Decreed the plaintiff to hold and enjoy the estate 380  
*A.* by answer confessed he had in a passion burnt his marriage-articles; but it being proved, that he had produced them after the time he said they were burnt, he was committed; and though he made oath he had them not, and could not produce them, yet the court would not discharge him, until he consented to

## A TABLE OF THE PRINCIPAL MATTERS.

admit the articles to be as set forth in the bill 561  
 Upon an issue at law, whether a deed to lead the uses of a fine levied by a man and his wife was duly executed; the deed having been inrolled for safe custody, and afterwards lost, a copy of the inrollment was allowed at the trial, to be given in evidence 471, 591

### *Deeds cancelled.*

*A.* being displeased with his son, makes an additional settlement for his wife's jointure, but keeps the deed in his own custody; and being afterwards reconciled to his son, cancels it. The wife after her husband's death finds the cancelled settlement, and recovers by virtue thereof 476

### *Deeds obtained by Duress, Compulsion, &c.*

If a bond is obtained by force or terror, though not so as to make it *perdures*, it ought to be set aside, or at least not carried into execution in a court of equity 497

### *Deeds fraudulent. Vide FRAUD.*

### *Defective Conveyances, Securities, &c. made good in Equity.*

### *Vide VOLUNTARY. Vide COPY-HOLD.*

Whether equity will supply the defect of a fine, where the conusor dies after the caption, and before the fine is perfected 3

*A.* and his wife being assignees of a lease mortgage to *B.*, *A.* becomes insolvent, and the title not being good, *C.* who had the real title, in compassion to *A.*'s wife, makes a lease in trust for her. Decreed the trustees to make a new mortgage to *B.* 11

Equity may supply an informal or defective revocation, though it has not all the formalities and circumstances mentioned in the power of revocation; but cannot make a revocation where there is none 69

A defective common recovery, as to a tenant to the *præcipe*, will bar an estate-tail in a trust only 132

One borrows 70*l.* and as a security gives a warrant of attorney to confess judgment in ejectment, on a feigned demise for twenty years. This is a defective security, but a good agreement in equity to charge the land 151

Equity will supply a defective execution of a power, in favour of younger children 164

One buys a reversion of an estate expectant on the life of *J. S.* Though *J. S.* had no title to the estate for his life, yet he shall hold it in equity against the purchaser 279

One devises his land to his brother, and makes him his executor, and wills, that his brother, out of his personal estate and half a year's rent of his real estate, shall pay his legacies, and gave an annuity to his nephew upon parol evidence, that the brother promised the testator to pay the annuity, or otherwise he would have charged the real estate therewith. The real estate was decreed to be charged with the annuity 506

*A.* mortgages copyhold lands to *B.* but the surrender, not being presented within the time limited by the custom, became void. Afterwards *A.* becomes bankrupt. On a bill by *B.* against the assignees, this defective surrender was made good 564

A defective surrender of copyhold land for securing a sum of money, which was become void, for not being presented in due time, made good against a subsequent purchaser with notice 609

### DEMURRER.

One is made a party to a bill, against whom there can be no decree, but may be examined as a witness. He may demur to the bill 380

### DEPOSITIONS.

The creditors of the Lord *Lovelace* obtained a decree for payment of their debts, and to set aside some conveyances gained by fraud, and Sir *Henry*

## A TABLE OF THE PRINCIPAL MATTERS.

*Johnson* and the legatees are made defendants. The legatees having brought their bill against Sir *Henry Johnson*, the question was, if the depositions in the former cause, touching the fraud, could be read in this. *Per Cur.* The question being the same in both causes, and Sir *Henry Johnson's* defence the same, the depositions ought to be read 447

A witness was examined before the hearing, while she was interested, but after the hearing she released her interest, and was examined again before the Master. Her depositions before the Master allowed to be read 472

DEVASTAVIT. *Vide* EXECUTOR.

DEVISE. *Vide* WILL.

*Devise for Payment of Debts. Vide Trust for raising Portions, and Payment of Debts under title TRUST.*

### DISCRETION.

A. gives 400*l.* to his two daughters his executrixes, to be distributed amongst themselves, and their brothers and sisters, according to their necessity, as in their discretion they thought fit. The court settled the distribution, and decreed a double share to one of the children 421

A man gives legacies to his children to be paid at twenty-one or marriage, and if any of them died before twenty-one or marriage, the legacy of such child to be disposed of to one or more of the surviving children, as his wife, whom he made executrix, should think fit. One of the children died under age and unmarried. The mother appoints the whole legacy of such child to one of the other children. A good appointment 513

Where an executor has a general power to distribute a sum of money amongst children at discretion; an unreasonable or indiscreet disposition may be controlled by a court of equity *ibid.*

A. disinherits his son, and by will gives the greatest part of his estate to *B.* and tells *B.* if his son behaved well, he might give him 20*l.* a quarter, and

if he used that well, he might make it up 40*l.* a quarter. Decreed the 40*l.* a quarter to the son 559

### DISMISSION.

A dismission upon an election to proceed at law is not peremptory, but the plaintiff, after he has failed at law, may bring a new bill 32

### DISTRESS.

A grazier driving a flock to *London*, is encouraged by an inn-keeper's servant to put his sheep into grounds belonging to the inn. The landlord of the inn seeing the sheep, consents they shall stay there one night, and then distrains them for rent. Grazier relieved against this distress 129

If cattle escape into the next ground, and are there distrained for rent, equity will relieve against such distress 131

### DISTRIBUTION.

Money is bequeathed to *A.* for life, and then to go to the children of *B.* in such shares as *A.* shall advise. *A.* dies without making any appointment. Decreed the money to be distributed amongst the children of *B.* and their representatives *per stirpes*, and not *per capita* 50

But this decree was afterwards reversed, and the money decreed to the testator's only child, and that the grandchildren should not take 106

The sister of the half blood shall share equally with those of the whole blood, in the distribution of an intestate's estate upon the statute 124

One dies intestate, leaving an uncle, and an uncle's son. Whether the uncle's son shall come in for a share upon the statute of distributions? *Vide the note*, p. 170 168

The clause in the statute, which says, there shall be no representative among collaterals beyond brothers' and sisters' children, must be intended, that none shall take by representation, but the children of brothers and sisters to the intestate 233



## A TABLE OF THE PRINCIPAL MATTERS.

One dies intestate, being an inhabitant of the province of *York*, leaving a son and daughter, and no wife, and having given his daughter on marriage 1000*l.* in satisfaction of what she might claim by the custom of the province. This shall not bar her of her distributory share under the statute, nor shall she bring the 1000*l.* into hotch-pot 274

A legacy of 15*l.* a-piece given to each of the relations on the testator's father and mother's side. Whether restrained to relations within the statute of distribution? 381

One makes a will, and his son executor, but makes no disposition of the surplus. The son dies without proving the will. The testator is dead intestate as to the surplus, and the same shall be distributed amongst the next of kin of the testator 634

The son and heir intitled to 500*l.* under a marriage-agreement, decreed to bring it into hotch-pot upon the statute of distributions, though in nature of a purchaser 638

A man dies intestate before the statute of distributions takes place; but administration is granted after. His personal estate shall be distributed according to the statute 642

### DOWER.

Where there is a fine by way of render, there shall be no dower 58

One by will devises to his wife part of his real estate during her widowhood, and devises the residue of his whole real estate to *J. S.* for life, remainder to his first son. Whether the wife is bound to elect as between her dower and the devise 365

A collateral satisfaction may be a good bar to dower in equity, though not pleadable at law 366

Devise of lands to executors till debts paid, remainder to his son in tail. The son marries and dies before debts are paid. This is but a chattel interest in the executors, and cannot hinder the son's widow of dower. But the dower cannot commence in possession, till the debts are paid 404

A. purchases land in his eldest son's

name, and puts him in possession, and the son falling sick, the father takes a declaration of trust from the son; and after the son's recovery he is permitted to continue in possession. The son marries and dies. The father gets a conveyance from his younger son. The elder son's wife shall be endowed 436

The widow of the *cestuy que trust* of a copyhold estate shall have her *freebench*, as well as if her husband had had the legal estate 555

Whether a dowress shall be relieved in equity against a term for years 690

### E.

### ELECTION.

A dismissal upon an election to proceed at law is not peremptory; but the plaintiff after he has failed at law, may bring a new bill 32

A. on his marriage covenants to purchase, and settle 20*l.* a year on his wife for her life, and if he died before it was done, to leave her 300*l.* out of his personal estate for her better livelihood. He died without making any settlement. Decreed the wife was intitled to the 300*l.* by the articles, and that the executors were not at liberty to settle 20*l.* a year on her for her life 506

A man on his marriage covenants to purchase and settle lands of 400*l.* a year to the use of himself for life, then to his wife for life, remainder to the heirs of their two bodies; and if he died before a settlement was made, the wife might elect either to have the 400*l.* a year, or 3000*l.* in money in lieu of dower. The husband dies without making a settlement. On a bill by the creditors, the wife elects the 3000*l.* and the children insist on having a settlement made according to the articles expectant on their mother's death, by which means all the assets would be exhausted. Decreed a settlement to be made on the wife for life, remainder to the children *nunc pro tunc*, notwithstanding her election. 605



## A TABLE OF THE PRINCIPAL MATTERS.

### EMBLEMENTS.

Baron and feme are joint-tenants for their lives. Baron sows the land, and dies before severance. Who shall have the corn? 322

*A.* and *B.* joint-tenants of land, and the land is sown with corn, and one of the joint-tenants dies. The survivor shall have the corn 323

Husband seised in fee in right of his wife, sows the land, and dies. His executor shall have the corn *ibid.*

ENROLMENT. *Vide* INROLMENT.

### ENTRY.

A person is intitled to mesne profits, but from the time of his entry 519

An injunction does not prevent an entry. *Vide note* *ibid.*

And where a person intitled to mesne profits does not enter, equity will not relieve him unless in case of a trust or infancy 724

### EQUITY.

As a beneficial bargain may be decreed in equity; so if it happens to be a losing one, it will be no objection against its being decreed 423

If a man having a good plea to an action at law, slips his opportunity of pleading, equity will not relieve him 696, 697

### ESTATE.

#### *In Fee-simple.*

A devise of land to *A.* paying out of the rents, or out of the land in general, is not a devise in fee; but a devise paying a certain sum at the end of two years, or any certain time, and the profits are not sufficient, will pass a fee-simple 106

#### *In Fee-tail.*

*Estate-tail by Devise.* *Vide* under Title WILL.

Tenant in tail dying after the caption of a fine and before the return was

perfected this court would not make it good 3

*A.* is tenant in tail, subject to the payment of 250*l.* a year to *B.* for four years, till 1000*l.* be paid. *A.* receives the profits during the four years, but does not pay all the 1000*l.* and dies, leaving a daughter, and no personal assets. The lands shall be liable in the hands of the daughter to pay the arrears of the 1000*l.* with interest, though the term was expired 178

An estate *pur autre vie* may be entailed 184

Lease *pur autre vie* is not within the statute *de donis* 226

Bare articles a bar to an intail of an equity. *Vide note*, p. 226 344

A partition between tenants in tail, though but by parol, shall bind the issue 233

One settles land upon his daughter in tail, and takes a bond from her not to commit waste. Bond not binding in equity 251

Tenant in tail enters into a recognizance not to suffer a recovery. Recognizance decreed to be delivered up, as creating a perpetuity *ibid.*

Tenant in tail having sold for full value, and received the money, and covenanted to levy a fine, was afterwards decreed to levy this fine, and died in prison for not performing the decree. His issue is not bound 306

Devise of land to a man for life, remainder to the heir of his body in the singular number, is an estate-tail 325

Devise to *A.* for life, remainder to the heir of his body, (in the singular number,) and to the heirs of the body of such heir, is but an estate for life to *A.* *ibid.*

A house with the furniture thereof, is limited to a woman, and such heir of her body as shall be living at her death, and in default of such, remainder over. She has an estate-tail in the house, and an absolute property in the furniture 324

Trustees joining with the *cestuy que trust* in tail in a feoffment, will bar the estate tail in the trust. *Vide note*, p. 345 344

Tenant for life, remainder to his first

## A TABLE OF THE PRINCIPAL MATTERS.

and every other son, &c. with power for tenant for life to make a jointure; he executes that power, but imperfectly; the court will supply that defect, even against the issue in tail. *Contra* where tenant in tail covenants to settle a jointure and dies, the issue in tail not bound by the covenants 379

Defective execution of a power, made good in equity against the issue in tail, if for a valuable consideration *ibid.*

Devise of lands to *A.* for life, remainder to his first, &c. son in tail, provided if *A.* dies without issue male, then to *B.* These latter words raise no estate-tail by implication to *A.* he having before an express estate for life 449, 546

### *For Life.*

*Estate pur auter vie.* Vide OCCUPANT.

*Estate pur auter vie* may be limited to a man and his heirs, and may be entailed 184

*Quære tamen* whether it be within the statute *de donis*, and consequently, whether a remainder limited upon it be good, or if it be, whether it may not be barred by deed, surrender, or other conveyance? 226

*Estate pur auter vie* of lands in *Borough English*, shall descend to the customary heir *ibid.*

*A.* by deed grants a term for years for payment of debts, and by will devises the reversion to *B.* for life *sans waste*, remainder to his first, &c. son in tail. *B.* being in want, the court gave him leave to cut timber for his support not exceeding the value of five hundred pounds 218

A tenant for life of lands charged with debts, decreed to pay two-fifths of the debts, and *B.* the remainderman in fee three-fifths, and *A.* to account for the timber he had cut down, which was to go in part of *B.*'s three-fifths. *Vide note p. 268* 267

*A.* by will devised land to trustees and their heirs, in trust that the profits should be equally divided between his wife and daughter during the

wife's life, and after her death he devised the same, to the use of the daughter in tail, with remainders over. The daughter dies before the mother. Decreed this to be a tenancy in common between the mother and daughter during the mother's life, and that on the daughter's death, her moiety did not descend or result to the heir during the mother's life, but was an interest undisposed of, and in nature of a tenancy *pur auter vie*, and belongs to the executor of the daughter. 430

### *For Years.*

Devise of lands to executors till debts paid, remainder to his son in fee. This is but a chattel interest in the executors, and when debts are paid, the son's wife shall have her dower 404

One seised in fee may create a term for years to commence after his death without issue: but one possessed of a term for years cannot out of that term carve a future term to commence after the determination of an estate-tail 684

### *Term attendant on the Inheritance.*

Tenant *per curtesie* shall have the aid of equity against a trust-term attendant on the inheritance 324

Where a term is attendant on the inheritance, if the King extends the inheritance, he shall have the term 390

A woman, who is *cestuy que trust* of a term, having the inheritance in her, marries and dies. The term shall attend on the inheritance, and not go to the husband as administrator of his wife. 520

### *Limitations of Terms for Years, Money, &c.*

*A.* on his marriage assigns a long term of years in trust for himself for ninety-nine years, if he lived so long, then in trust for his wife for her life, remainder to the heirs of the body of *A.* begotten on his wife. The whole term does not vest in *A.* but after the

## A TABLE OF THE PRINCIPAL MATTERS.

- death of him and his wife, shall go to all their children equally 23
- A term is assigned to a woman for life, and then to her issue. Adjudged the issue took by purchase 24
- Interest of money is devised to A. for life, and if he died without issue, then the principal to go over to another. The remainder over is good 38, 60
- A term is assigned in trust for baron and feme for their lives, remainder to the heirs of the body of the wife by the baron. If the whole term vests in the wife, or shall go to the heir of her body? *Vide the note.* 43
- Devise of 1300*l.* to the testator's granddaughter; provided if she died before twenty-one and without issue, then the legacy to go over. The devise over is good, the contingency being to happen before the legatee attains twenty-one 86
- Devise of a term to J. S. and his assigns for ever; but if he dies without issue before twenty-one, then to go over. The devise over is good 151
- A term is assigned in trust for baron and feme for their lives, remainder in trust for the heirs of the body of the feme by the baron. The baron and feme die. Adjudged the heir of the body took by way of purchase, and as a person well described. 195
- Devise of a personal thing to one for life, remainder to another. The remainder is good, it being the same as the devise of the use of a thing for life, with remainder over 245, 332
- A house, with the furniture thereof, is limited to a woman, and such heir of her body as shall be living at her death, and in default of such, remainders over. She has an estate-tail in the house, and an absolute property in the furniture 324
- Where a personal chattel is devised for a limited time; this is to be intended only of the use of it, and not of the thing itself, and therefore such devise over is good 331, 332
- One possessed of a term for years, on his marriage assigns it to trustees, in trust for himself for life, remainder to his wife for life, remainder to the heirs of the body of the wife, by the husband. This is a good limitation to the heirs of the body of the wife, and they are words of purchase, and not of limitation 362
- One possessed of a term, in consideration of marriage assigns it to trustees, in trust for himself for life, then to his wife for life, remainder in trust for the children of the body of the wife. This shall be intended for the children of the wife by this marriage, and not to let in her children by another husband 363
- A. demises lands for a long term of years in trust for B. for life, then to his first son for the remainder of the term, and in default of issue of such son, to the second and other sons of B. and for want of issue male to the daughters of B. for the remainder of the term. There having never been a son, the limitation to the daughters was held good 600
- A. on his marriage assigns a term for one thousand years, in trust for himself for life, remainder to the heirs of the body of the husband and wife during the residue of the term. The wife dies leaving issue. The whole term vests in the husband, and he may dispose of it, and the heirs of the body of the husband and wife cannot take as purchasers 668
- A. possessed of an Exchequer annuity for ninety-six years, on marriage of his natural daughter covenants to pay it to the wife for her separate use, and then to the survivor of the husband and wife for life, and after to their children, and if no child, then to be for the benefit of A. Husband and wife die leaving a child, who soon after dies. A. shall keep the annuity, and it shall not go to the administrator of the child 692
- There is a difference between an actual assignment and only a covenant to pay. The latter (when voluntary) not to be carried in equity beyond the letter. *Quære.* 693
- One by will gives all his lands, money, &c. to his wife; provided if she died without issue, then 80*l.* should remain to his brother after her death, and made the wife executrix. The brother died in the life of the wife, who died without issue. Decreed the executor of the brother intitled to the legacy. *If she died without*

## A TABLE OF THE PRINCIPAL MATTERS.

issue must be understood in the vulgar sense, viz. leaving no issue at her death 758, 766

*Tenants in Common and Joint-Tenants.*

Vide Title JOINT-TENANTS.

### EVIDENCE.

- A legacy is presumed to be paid after a great length of time 21
- Where a devise of land parol proof not to be admitted to explain 98
- But such proof may be admitted to explain a surrender of copyhold land, to shew a mistake either in the land or uses *ibid.*
- One makes his will, and *A. B.* and *C.* executors in trust, and gives them 20s. a-piece for a remembrance above their charges. Parol proof admitted to prove, that this was a trust for the wife only 99
- One by will subjects his real estate to pay his debts, and makes his wife executrix. Parol proof admitted to prove testator's declarations, that his wife should have his personal estate exempt from his debts 252
- A third mortgagee gets in the first, and brings a bill to foreclose the second mortgagee, if he does not pay both. He need not prove the actual payment of the money lent on the third mortgage, the producing an acquittance being sufficient 279
- No regard is to be had to parol declarations in case of a devise of lands 337, 339
- One devises his lands to his brother, and makes him executor, and wills that his brother out of the personal estate, and half a year's rent of the real estate, shall pay his legacies, and gives an annuity to his nephew. Upon parol evidence that the brother promised the testator to pay the annuity, or otherwise he would have charged his real estate therewith; the real estate was decreed to be charged with the annuity 506
- A copy of a deed, to lead the uses of a fine, and inrolled only for safe custody, allowed to be read as evidence at a trial at law, and against the wife, though the husband only acknowledged the deed 471, 591
- There being a devise in a will of all the testator's household-stuff, as brass, pewter, linen, and woollen, except a trunk; the person who drew the will was examined, to prove the testator directed him to insert all the testator's goods, except the trunk, and his deposition was allowed to be read 517
- An entry in the steward's book, and a parol proof of the foreman of the jury, admitted as good evidence, that a feme covert surrendered her whole estate; although the surrender on the roll, and the admission thereupon, was but of a moiety 547
- A defendant's answer directed to be read as evidence at a trial at law 555
- Collateral proof may be allowed to make certain a person or thing described in a will 593
- Parol proof allowed as to a man's intention in a will, where the question was, whether a legacy should go in satisfaction of a debt due from the testator to the legatee *ibid.*
- Copy of a note taken by one, who had been intrusted with the note, and was since dead, under which note was wrote an acknowledgment that nothing was due, allowed to be read as evidence, though not proved to be a true copy, and though the defendant had sworn there was no such acknowledgment under the note, it appearing when the note was produced that the bottom of it was torn off 603
- No parol proof ought to be received to supply the words of a will 624
- If a devise is to one of the sons of *J. S.* who hath several sons, the devise is void, and shall not be supplied by any parol proof 624
- A.* devised 50*l.* to the wife of *B.* after which the testator gave a note for the same sum to *B.* payable on demand, and it appearing, by proofs, that the note should be in lieu and satisfaction of the legacy, and this being a testamentary question, in which evidence might be received, the bill for the legacy was dismissed 647
- Surplus not being disposed of by the will, parol proofs were allowed to be read, that the testator intended to give the surplus to his executor, it being to oust an implication or rule in equity 648, 736

## A TABLE OF THE PRINCIPAL MATTERS.

### EXAMINATION.

Baron and feme exhibit a bill for a demand in right of the wife. Witnesses are examined, and after publication passed the baron dies, and the wife and her second husband bring a new bill. They may examine the same witnesses again, as were examined in the former cause 197

#### *In perpetuam rei memoriam.*

The court will not give leave to examine witnesses to perpetuate testimony, in case of a purchase of a reversion, where there can be no trial at law during the estate for life 159

#### *After Publication.*

In a bill brought to have the benefit of a former decree, plaintiff cannot examine witnesses, much less the same witnesses to the matters in issue in the former cause; but on such a bill the court may examine the justice of the former decree, but then it must be upon the proofs taken in the cause wherein that decree is made 409

### EXCEPTIONS.

When the court on hearing a cause refers the matter in controversy to gentlemen in the country, no exceptions lie to their certificate 79

Submission to a reference, and the award to be confirmed by the decree of the court without appeal or exception; yet exceptions to the award admitted 109

### EXECUTION.

Where the sheriff returns *nulla bona* upon a *fi. fa.* and there is a recovery against him for a false return, *that* vests no property of the goods in him; but they remain in the party, and are liable to any subsequent execution 239

### EXECUTOR AND ADMINISTRATOR.

In what case executor relieved, where

his testator would not have been intitled to relief 188

#### *In what Priority Debts are to be paid.* *Vide under Title ASSETS.*

An executor being desirous to apply the assets as far as they would go, in satisfying the debts, brings a bill against all the creditors, that they might, if they pleased, contest each other's debts, and that their preference might be settled. Adjudged on a demurrer to be a proper bill 37

After a bill brought by creditors against an executor, and the rest of the creditors, the executor cannot, by confessing a judgment, or suffering judgment to go by default, prefer one creditor before another 62

An executor makes a voluntary assignment of part of the assets. Whether a creditor can follow the assets in the hands of the assignee. *Vide the note* 75

If there be a grandfather, father, and son, and the father dies intestate, the son shall have the administration, and not the grandfather 125

Bill against an executor for a debt due from the testator, and though the debt was proved, yet the plaintiff was sent to law: but the bill was retained till after the trial, in order to take the account of assets, if there should be a verdict for the plaintiff. *Vide note* 192

An administrator *de bonis non cum test. annex.* upon a suggestion of insolvency, ordered to give security for a legacy payable at a future day 249

Bond-creditor brings a bill against an executor for the recovery of his debt, and pending the suit, the executor confesses a judgment to another bond-creditor. The executor may pay this judgment before the bond-debt 299

But a voluntary payment after an original filed, or bill exhibited, shall not be allowed: but in the case of a voluntary payment, if the suit at law be not by original, but upon a *latitat* in the *King's Bench*, the payment shall stand good, though after an action brought 300

In an action at law against an executor



## A TABLE OF THE PRINCIPAL MATTERS.

- or administrator by a creditor, defendant by mistake of his attorney, pleads a false plea, and a verdict passes for the plaintiff. Though the merits were never tried, yet equity will not relieve 325
- A.* having a term in the printing-office for twenty-one years, by his will directs that 2000*l.* should be raised out of the profits for his daughter, and made *B.* executor. *B.* mortgages the term. Decreed the mortgagee not liable to the legacy charged by the will on the term. But this decree was reversed by the House of Lords 444
- Administration is granted to two, and one dies, it will survive to the other 514
- If executors join in receiving money, both are answerable, for they may act severally, if they think fit, 504, 515, 570
- A.* purchases a leasehold estate of an executor, having notice a debt of the testator's was unpaid; and out of the purchase-money, he has an allowance of 200*l.* due to himself from the testator, and of 550*l.* due to himself from the executor, and pays the remainder in money. This sale not good against an unsatisfied creditor. *A.* being a party, and consenting to and contriving a *devastavit* 616
- In what Cases the Executor shall be only a Trustee.*
- One by will gives several legacies, and makes two persons, not related to him, executors, and afterwards increases his estate, and has children, and dies without new publishing or altering his will. Equity will not make the executors trustees for the children, as to the surplus 104
- A.* by will gives legacies to his relations, amounting to near the value of his estate, and makes *B.* and *C.* executors, and gives them 20*l.* and intreats them to take the trouble of getting in his estate. He lives ten years after and increases his estate, and dies without new publishing his will. Decreed the surviving executor but an executor in trust, and that the new acquired estate should go to the legatees in proportion to their legacies 148
- Vide Surplus, and residuary Legatee under Title LEGACIES.*
- How to account, and how to be charged.*
- One devises 1200*l.* to *A.* *B.* *C.* and *D.* children of *J. S.* to be divided amongst them, according to the discretion of *J. S.* whom he makes executor. *A.* dies before the testator, and *B.* six months after the testator's death. *J. S.* pays *C.* 900*l.* for his share, and by will gives *D.* 400*l.* in full of his share. Decreed the estate of *J. S.* to answer interest for the 1200*l.* from a year after the testator's death, securities having never been wanting in the public funds; but the Master in computing the interest was to take out of the principal so much, as with the interest of it would make up 900*l.* when it was paid to *C.* and then compute interest for the remaining principal, from the end of the year after testator's death 745
- Devastavit.*
- A.* clothier trusts a factor with cloth to sell for him, and dies. In an account for these cloths, if the administrator of the clothier pays or discounts a debt due from the clothier to the factor, and there are debts of a higher nature, it will be a *devastavit* 117
- If an executor loses a bond due to the testator, whether he is chargeable with the debt to the creditors of the testator. *Vide note* 999
- ### EXECUTORY.
- As to court complying with the intention of parties in things executory 526
- ### EXPOSITION OF WORDS.
- Vide under Title WILL.*
- Where a devise is to children, the grandchildren cannot come in to take with the children; but if there is no child the grandchildren shall take 106



## A TABLE OF THE PRINCIPAL MATTERS.

Word (or) taken for (and) 389

*A.* by virtue of several settlements, being tenant in tail after possibility of issue extinct, of some lands, with remainder in fee to trustees, in trust for him and his heirs; and as to some other lands being tenant for life, remainder to his first, &c. sons in tail, remainder to trustees and their heirs, in trust for the right heirs of *B.* whose heir he was; and as to other lands being tenant in tail, remainder to the right heirs of his father, and having no issue, by will devised to his nephew all his lands, tenements, and hereditaments *out of settlement.* Decreed all the lands to which the testator was so intitled, did pass by this devise 621

But lands settled with power of revocation, will not pass by this devise 624

*Hæredibus de corpore procreatis*, shall include issue after born; *procreandis*, issue already born 711

### EXTENT.

If the King's receiver is seised of the inheritance, and there is a term for years attending thereon; if the King extends the inheritance, he shall have the term 390

But if the King's receiver is possessed of a term in gross, and it is assigned before an actual extent, the assignment is good against the crown *ibid.*

Assignees under a commission of bankruptcy, bring a bill for an account against some persons who had seised the bankrupt's estate by virtue of three extents, the one for the King, and the other two were extents in aid. Bill dismissed, the matter being properly cognizable in the Court of *Exchequer*, which is the King's Court of Revenue 426

But it is otherwise, where the defendant who has sued out an extent in aid, confesses by answer, that he has sufficient estate of his own to pay the King's debt *ibid.*

Or where it appears to be a fraudulent contrivance by an extent in aid to gain a preference to a debt of an inferior nature *ibid.*

### EXTINGUISHMENT.

A rent or recognizance shall not be extinguished by levying a fine to the party 58

*A.* by will gives his daughter 200*l.* and afterwards gives her a portion in marriage more than the legacy. The legacy is extinguished by the portion after given. *Vide the note* 115

A woman takes bond in the name of a trustee, and afterwards marries one of the obligors. The marriage is no release or extinguishment of the debt 290

Bond extinguished at law, decreed good in equity, and to bind the real assets 480

### F.

### FACTOR.

*A.* employs *B.* as his factor to sell cloth; *B.* sells it on credit, and before the money is paid, dies indebted by specialty more than his assets will pay. This money shall be paid to *A.* and not to the administrator of *B.* as part of his assets; but thereout must be deducted *B.*'s commission 639

A factor is in nature of a trustee only for his principal *ibid.*

### FEE-FARM RENTS. *Vide* RENTS.

### FREE SCHOOL.

A school, if not a free school, is not a charity within the provision of the statute of Queen *Elizabeth*, and consequently the inhabitants have not a right to sue in the name of the *Attorney General* 387

### FINE.

Whether equity will supply the defect of a fine, where the conusor dies after the caption, and before the fine is perfected 3

Where a fine is levied for a particular purpose pursuant to a decree, the court will not permit any other use to be made of that fine 56

A rent or recognizance shall not be

## A TABLE OF THE PRINCIPAL MATTERS.

extinguished by levying a fine to the party 58  
Where there is a fine by way of render, there shall be no dower *ibid.*

### *Fine and Non-claim.*

A fine and non-claim a good bar to an equity of redemption. So it is to a bill of review 189  
*A.* devises lands to trustees, in trust to pay debts, and then to an infant and his heirs. A third person enters and levies a fine, and five years pass. Though the fine bars the trustees, yet equity will not suffer the infant to be barred by the laches of the trustees, nor to be barred of the trust-estate during her infancy, but she shall be relieved against the fine, and recover all the mesne profits 368  
*A.* devises lands to *B.* in tail, remainder to *C.* in tail, subject to the payment of legacies. *C.* levies a fine and five years *non-claim* pass, and then *C.* mortgages the lands. Fine and *non-claim* no bar of the legacies. *C.* claiming only under the will, the mortgagee was supposed to have notice of the legacies 662

### FORFEITURE.

A legacy is given on condition, not to dispute the will. The legatee commences a suit, whereby he disputes the validity of the will. This is no forfeiture of the legacy, if there was *probabilis causa litigandi* 91  
A lessee for years, makes several under-leases. The premises are out of repair, and the lease is avoided for non-payment of the rent. Some of the under-lessees bring a bill to be relieved against the forfeiture. They shall not be relieved but on payment of the whole rent in arrear, and repairing the premises; but having so done, they may compel the other under-lessees to contribute 103  
A lessee under a jointress at 40*l.* *per ann.* had committed waste *sparsim*, so that at law the estate was forfeited, but insisted he had improved the estate to 60*l.* a year, and offered to take a lease at that rent for fifty years, and to pay for the timber cut.

Whether equity will relieve against this forfeiture 263

Legacies are given by a will to *A. B. C.* and *D.* on condition, that as they come of age they shall release all claims on the testator's estate. This condition must be taken *distributively*, and such only as refuse to release shall forfeit their legacies 478

*A.* having two copyholds held of the manor of *B.* cuts timber on the one, and employs it in repairing the other. After a verdict on an ejectment by the Lord for the forfeiture, *A.* brings a bill, and is relieved against the forfeiture; but ordered to pay costs at law, and in equity 537

*A.* by will gives his grand-daughter 200*l.* on condition she continued with his executors, till she was twenty-one; but if she was taken from them by her father, who was a papist, before twenty-one, or married against the consent of his executors, then he gave her but 10*l.* The daughter was placed by the executors with a clergyman, who, before she was twenty-one, with consent of one of the executors, permitted her to make a visit to her father; and he took that opportunity to marry her to a papist. Decreed she should only have the 10*l.* *Vide the note* 572

A copyhold is forfeited for not repairing. Whether equity will relieve 664

### FRAUD, COLLUSION, COVIN, CONCEALMENT, IMPOSITION.

#### *Vide* DEEDS.

*Vide Underhand Agreements, under Title* AGREEMENTS.

*Vide Catching Bargains, under Title* HEIR.

Fraud in obtaining a will relating only to a personal estate, is not examinable in Chancery, after the will is proved in the Spiritual Court, so long as that probate is in force 6

Relief against a bill of exchange mentioned to be for value received, but gained by fraud, and for a fictitious consideration 123

In case of a gross fraud, the court will

## A TABLE OF THE PRINCIPAL MATTERS.

- give costs to be ascertained by the parties' own oath 123
- A mother to encourage a marriage of her son, releases her dower, and shews the release to the wife and her relations. This release shall bind the mother, though the son got it from her by a fraudulent suggestion 133
- A mother, being absolute owner of a term, is present at a treaty for her son's marriage, and hears him declare the term was to come to him at her death, and is a witness to the deed, whereby the reversion of the term is settled on the issue of the marriage after her death. The mother is decreed to make good the settlement, and to settle the reversion of the term accordingly after her death 150
- One stands by and suffers a purchaser to go on, without disclosing his title. Purchaser relieved 151
- A prior incumbrancer is a witness to a subsequent mortgage, and does not disclose his own incumbrance. Decreed he should be postponed *ibid.*
- An honest debt may be lost by playing a trick to come at it, as one by adding a seal to a note, which was good without it, lost his security 162
- A. being a weak man, was prevailed on by two of his relations to give bond to one of them, to settle his estate to the use of himself in tail male, with remainder to his two brothers successively in tail male. A. marries, and makes a settlement on his marriage, and brings a bill for delivery up of his bond; and it would have been decreed, but that he offered to settle part of his estate in tail on one of his brothers. *Vide the note* 189
- Policy of insurance for insuring a life gained by fraud set aside, with costs both at law and in equity, and the money received for the premium to go in part of the costs. *Vide the note* 206
- A man makes a settlement on trustees to pay his debts therein mentioned, and portions for his younger children, reserving to himself 50*l.* a-year for his life, remainder as to the whole to son, &c. He continues in possession, and twelve years after contracts other debts by bond. Whether this settlement is fraudulent as to the bond-creditors 261
- A deed not fraudulent at first, may afterwards become so, by being concealed or not pursued 262
- A conveyance by deed and fine is gained without consideration and indirectly. Court relieved against it 307
- Conusee of a statute from A. advises B. to lend A. 1000*l.* on mortgage, and draws the mortgage, with a covenant against all incumbrances, and conceals his own statute. The statute shall be postponed to the mortgage 370
- A. makes a bill of sale of his goods to a trustee, for one who lived with him as his wife, and was so reputed. Bill of sale set aside as fraudulent against creditors 490
- But if he purchases a lease in the name of a trustee; who declares the lease was made in trust to permit A. to receive the rents during his life, and then for his reputed wife; this will not be assets of A. nor liable to his creditors after his death; for when a man purchases, he may settle the estate as he pleases. *Vide note*, p. 491 490
- A. conveys lands to the use of himself for life, with power to mortgage such part as he shall think fit, remainder to trustees, to sell to pay all his debts, and then dies indebted by judgments, bonds and simple contract. This deed is fraudulent as against the judgment creditors, and they shall not be compelled to take a satisfaction in average with the other creditors 510
- A. intrusted by B. to receive interest on tallies, receives the principal, and fails, and afterwards compounds with his creditors; but B. would not come in without having a better composition than the rest, which A. agrees to give. A. brings a bill to be relieved against this underhand agreement; but he having been guilty of a great fraud and breach of trust, and having agreed to make some satisfaction, the court would not relieve him; but dismissed the bill. *Vide note*, p. 603 602
- An agreement for a purchase being ob-

## A TABLE OF THE PRINCIPAL MATTERS.

tained from a woman of ninety years of age, and several suspicious circumstances appearing, the court would not decree it to be carried into execution against the heir at law, but would not order it to be delivered up 632

Sales at a great undervalue from one that was afterwards a lunatic, set aside: but the conveyances to stand as a security for what was really paid. *Vide note* 678

A will concerning land may be set aside in equity for fraud in obtaining it. *Vide the note* 700

A. having a mortgage of a leasehold estate, the mortgagor borrows the original lease of A. and by that means borrowed more money on the premises, but pretended he wanted it for another purpose. If A. was privy to the mortgagor's intention of borrowing more money on the premises, A.'s mortgage shall be postponed to the subsequent mortgage, he being accessory to the fraud: but otherwise it will be, if he innocently lent the lease to the mortgagor 726

### G.

#### GAMING.

Excessive gaming discouraged by the courts, both at law and in equity 70

One apprentice gives a bond to another apprentice for 50*l.* won at play. Bond decreed to be delivered up 291

By the custom of *London* a master may justify turning away his apprentice for gaming *ibid.*

### GRANT.

One possessed of a term for two thousand years, grants the land to J. S. without mentioning any term. It is void for uncertainty 684

### GUARDIAN.

An infant being seised in fee of lands subject to a mortgage, the guardian takes an assignment of the mortgage. Although the mortgagee had never entered, yet the Lord Keeper was of an opinion, that as to the profits re-

ceived out of the mortgaged lands, the defendant should be taken to be in possession as a mortgagee, and not as guardian. *Vide the note* 471 Q.

A guardian is not compellable to apply the profits of lands descended on the infant heir, to pay off the bond-debts of the ancestor 606

### H.

#### HEIR AND ANCESTORS.

##### *Vide* ASSETS.

Whether an heir, being a creditor by bond or judgment, can retain, as well as the executor may 62

Land is settled for raising portions for daughters. On a bill for a sale, the heir shall be compelled to join, though he has no legal interest 99

Where judgment is obtained against an heir, who has a reversion in fee descended upon him, the judgment is only of assets, *quando acciderint*; and equity will not decree a sale of the reversion, but the creditor must wait till it falls 134

When a term is raised for a particular purpose out of the inheritance, and *that* purpose is satisfied, the heir shall have the benefit of the surplus of the term 138

A. is tenant in tail, subject to the payment of 250*l.* a-year to B. for four years. A. receives the profits during the four years, and dies, leaving a daughter, and no personal assets, and having not paid all the annuity. The lands shall be liable to answer the arrears of the annuity in the hands of the daughter, though the term was expired 178

In case of doubtful words in a will, an heir is to be favoured, and there shall be no strained construction to work a disinheritance: but where there is no doubt, the plea of heirship must not control a plain will 340

A son's daughter cannot take by limitation to the heirs female of the body of the father, for such heirs female must derive by females only 409

There must either be express words in a will, or a necessary implication, to disinherit an heir at law 571

## A TABLE OF THE PRINCIPAL MATTERS.

A guardian is not compellable to apply the profits of lands descended on the infant heir, to pay off the bond-debts of the ancestor 606

### HEIR.

#### *Matters controverted between the Heir and Executor.*

The wife's portion, and the like sum of the husband's money, is agreed to be laid out in lands, to be settled to the use of them and the heirs of their bodies, without mentioning how the remainder over should be limited; they both die without issue, and before any purchase made. The wife survived. The money shall be paid to the heir of the husband, and not to the administrator of the wife 20

The heir of the mortgagee forecloses the mortgagor, the executor being no party. Upon a bill by the executor, against the heir of the mortgagee, and against the mortgagor, the land was decreed to the executor 67

But if the executor of the mortgagee, after a foreclosure by the heir, brings a bill to have the benefit of the mortgage, the heir, if he think fit, may take the benefit of the foreclosure to himself, paying the executor the mortgage-money and interest *ibid.*

By marriage-articles, money is agreed to be laid out in land, and settled on the husband and wife, and their issue, remainder to the heirs of the wife. The husband and wife die without issue, and the money is not laid out. The heir, and not the administrator of the wife, shall have the money 101

Committee of a lunatic invests part of the lunatic's personal estate in a purchase of lands in fee. This shall be taken as personal estate, and in case of the lunatic's death, go to his next of kin, and not to his heir 192

A woman as guardian of her infant son, out of his personal estate, pays off a mortgage upon his land. The infant dies, and the land descends to a remote heir. The money shall not be

brought back into the personal estate 193

Mortgagor releases to the heir of the mortgagee in fee. The executor or administrator of the mortgagee shall have the benefit of the mortgage, though there are no debts *ibid.*

If a mortgagee in fee dies, and the mortgagor will not redeem; yet the executor or administrator of the mortgagee shall have the benefit of the mortgage 193

So he shall, though the mortgagor is foreclosed, or is of so ancient a date, as not to be redeemable, unless the mortgagee is actually in possession *ibid.*

A man articles to sell lands, and dies before a conveyance is made. The heir decreed to convey, and the purchase-money to be paid to the executors 215

By marriage-articles the wife's portion is agreed to be laid out in land, to be settled on husband and wife for their lives, remainder to the heirs of their two bodies, remainder to the heirs of the body of the wife, remainder to her brother in fee. The wife dies without issue, and then the husband dies, the money not being laid out. Whether this money shall be considered as land, and go to the wife's brother; or as money, and go to the administrator of the husband 227

Dean and Chapter make a lease to a man, his executors and administrators, for three lives. This was held to be a descendible freehold, and to belong to the heir, and not to the executor; as it is in its nature an inheritable estate 320

One seised in fee of lands, articles to pay 1000*l.* to *J. S.* to build an house on the premises, and dies before the house is built. The heir may compel *J. S.* to build the house, and his father's executor to pay for it 322

An old mortgage, though two descents cast, and though more upon it than the value, and though the mortgagee by answer says he will not redeem, yet shall go to the executor and not the heir; the equity of redemption not being foreclosed, or released 367

One devises lands to his executor to be



## A TABLE OF THE PRINCIPAL MATTERS.

- sold, and thereout to pay 500*l.* to his nephew *A.* if he return from beyond sea, and the residue to *B.* *A.* died before the testator. This 500*l.* legacy being given on a contingency, that never happened, is as no legacy, and falls into the devise of the *residuum*; and the 500*l.* or land to that value, shall not go to the heir as resulting to him. Otherwise it would have been, if it had been an absolute legacy of 500*l.* 394
- Portion charged by will on a real estate, payable to a daughter at twenty-one or marriage. Daughter dies at the age of six years. Her portion shall sink in the land for the benefit of the heir, and not be raised for the benefit of her administrator 416
- Lands are devised to trustees to sell, and out of the money arising by the sale, among other sums, to pay 100*l.* to the testator's heir-at-law, and no disposition is made by the testator of the surplus of his estate. The land shall not be turned into personal estate, nor more sold than is necessary to pay the legacies 425
- Pictures and glasses put up instead of wainscot, or where wainscot would otherwise have been put, shall go to the heir, and not to the executor 508
- A woman who is *cestuy que trust* of a term, having the inheritance in her, marries and dies. The term shall attend on the inheritance, and not go to the husband as administrator of his wife 520
- A man having several mortgages, one of which was a mortgage in fee of lands in *D.* on which he had entered, devises those lands to his two daughters and their heirs, and the other mortgages to them, their executors, &c. One of the daughters dies without issue. Her share of the lands in *D.* shall go to her heir, and not to her administrator; it being the intent of the testator, that those lands should pass as real estate to his daughters; though as between him and the mortgagor, they were but a mortgage 582
- Catching Bargains.*
- An unconscionable bargain got from a heir in the life of his father set aside 14
- A purchase from a heir at an under-value in the life of his father set aside 27
- A heir is drawn in with other young heirs to buy goods at extravagant prices, and to join with them in giving securities for the monies agreed on. He shall be relieved on paying the value of the goods, which came to his own hands, and shall not be answerable for his companions 77
- A.* tenant for life, remainder to his first, &c., son in tail, remainder to his nephew *B.*—*B.* enters into several statutes to *C.* for payment of ten for one, in case *A.* died without issue male in the life of *B.*—*C.* in the life of *A.* brings a bill to compel *B.* either to pay principal and interest, or be foreclosed of any relief against the bargain. *B.* by answer declares the bargain fairly made, and says he intends to abide by it, and would seek no relief against it. *A.* dies, and *B.* brings a bill against the executors of *C.* and notwithstanding *B.*'s former answer, he is relieved on payment of principal and interest, without costs 121
- One just come of age, intitled to an estate of 3000*l.* *per annum*, being drawn into a statute for 1000*l.* on which he received only 300*l.* is relieved on the circumstance of fraud 346
- Incumbrances bought in by the Heir or a Purchaser. Vide under Title SECURITIES.*
- HOTCH-POT. *Vide* LONDON. *Vide* DISTRIBUTION.
- I. & J.
- IMPLICATION.
- Estate by Implication.*
- An estate by implication cannot be against the plain intent of the party expressed in his will 60
- No estate-tail in a deed can be raised by implication. *Vide the note* 451
- An express estate for life, cannot be



## A TABLE OF THE PRINCIPAL MATTERS.

enlarged by implication, but may by express words 449, 546  
A devise of lands to the heir after the death of the wife, by a necessary implication gives an estate for life to the wife: otherwise, where the devise is to a stranger 572  
One having a wife, and four daughters, devises lands to one of his daughters, after the death of his wife.—This is a devise to the wife for life by implication, though the devisee was only one of the four co-heirs 723

INCLOSURE. *Vide* COMMON.

INCUMBRANCES. *Vide* SECURITIES.

### INFANT.

Court of equity often decrees building-leases of infants' estates, where it is for their benefit 225

One gives her son other lands in lieu of lands which were intailed on him, and then makes her will, and gives the intailed lands to her daughter, and takes a bond from her son to permit his sister to enjoy the intailed lands. The son dies leaving an infant son, who being in possession of the lands, which came in recompense, brings an ejectment for the intailed lands, and by reason of his infancy the bond could not be put in suit against him. On a bill brought by the daughter, she is decreed to be quieted in possession until six months after the infant comes of age, and then he may shew cause, if he will 232

Where an infant recovers by decree of the court, the court may with the approbation of the infant's relations, allot him a maintenance, though there is no provision in the trust; for this is founded on natural equity 236

How the care and direction of infants came into the Court of Chancery 342

No decree shall be made against an infant, without having a day to shew cause after he comes of age *ibid.*

An infant being *cestuy que trust*, a stranger enters and levies a fine, and five years pass: the infant is barred

at law; but equity will relieve, and not suffer him to be barred by the laches of his trustee, nor to be barred of a trust-estate during his infancy. And the infant in this case shall have all the mesne profits 368

A guardian borrows money of *A.* to pay off an incumbrance on the infant's estate, and promises to give *A.* a security for his money, but dies before it is done. Though *A.*'s money was applied to pay off the incumbrance, yet the court would not decree him a satisfaction out of the infant's estate 480

A gift to an infant on condition. The infant is bound by the condition 561

A child in *ventre sa mère* is capable of taking, may be vouched, a bill may be brought on its behalf, and an injunction may be had to stay waste; and the mother may justify detaining charters on behalf of such a child 711

*What acts by an Infant shall be good and binding.*

An infant is bound by the offer made by him in his answer, if he does not immediately after his coming of age apply to the court, in order to retract his offer, and amend his answer 224

An infant exchanges lands, and continues in possession of the lands given him in exchange, after he comes of age. He shall be bound by the exchange 225

*In what cases an Infant is favoured or privileged.*

No decree shall be made against an infant, without giving him a day to shew cause after his coming of age 342

An infant may by his *prochein amy* call his guardian to an account, even during his minority *ibid.*

If a stranger enters and receives the profits of an infant's estate, he shall in equity be looked upon as trustee for the infant *ibid.*

If an estate is given to an infant upon condition, the condition will bind the infant, and infancy is in such case no excuse 343

## A TABLE OF THE PRINCIPAL MATTERS.

Bill to foreclose an infant. By decree it is sent to a master, to see what is due, who reports what is due for principal, interest, and costs. Whether upon a subsequent order to carry on interest, the former interest during the infancy shall carry interest

392

Though infancy may be an answer to the objection of length of time in not coming to redeem a mortgage; yet where the time begins upon the ancestor, it shall run even upon infants, as it is at law in the case of a fine

419

Lands are devised to be sold for payment of debts. They may be decreed to be sold for that purpose, without giving an infant heir a day to shew cause when he comes of age; for by the devise of the land there is nothing descends to the heir, therefore an immediate sale may be decreed; but if the heir be decreed to join in the sale, then he must have a day, after he comes of age, to shew cause

429

Lands are given by will to a woman and the heirs of her body; and it is declared, if she left no sons, and only two daughters, the eldest should pay the younger 300*l.* and have the estate. There being only two daughters, and the 300*l.* not being paid, the younger brought her bill for an account of profits, and possession of half the estate. The court may decree the defendant, though an infant, to pay the 300*l.* in six months, with interest from the mother's death; or in default, to account for a moiety of the profits, and that a moiety of the estate be set out by commissioners: but the defendant must have a day to shew cause, when she comes of age

479

Mortgagee in case of infant mortgagor not like others who have real securities, obliged to stay till the infant comes of age before he can reach the estate, but may enter presently

713

INFRANCHISEMENT. *Vide* COPY-HOLD.

### INJUNCTION.

*A.* grants to *B.* common in his down.

*B.* brings a bill against *A.* complaining he had overstocked the common, and praying he might be enjoined not to overstock, &c. Bill dismissed.

*Vide the note*

116

Lessee for years covenants not to plough pasture land, and if he does, then to pay after the rate of 20*s.* per ann. for every acre ploughed. The court will not grant an injunction against the tenant's ploughing, the parties themselves having agreed the damage for ploughing

119

An injunction does not prevent an entry. *Vide the note*

519

### INQUISITION.

Grant by the crown of an estate, &c., forfeited, before any inquisition finding the forfeiture, is illegal

173

In case of an inquisition finding a forfeiture by the warden of the Fleet, whether it ought to find what estate the warden had in the office

174

### INROLMENT.

Where a demurrer to a bill of review is allowed, it may be inrolled; but if over-ruled, *that* cannot be inrolled, to prevent the demurrer's being re-argued

190

A copy of a deed inrolled for safe custody only, leading the uses of a fine, allowed to be read as evidence at a trial at law, and read against the wife, though the husband only acknowledged it. *Vide the note*

471

### INSURANCE.

Policy of insurance, how far it extends

176

One lends 300*l.* on a bottomry-bond, and insures 450*l.* on the ship, but has no interest in the ship or cargo. Policy decreed to be delivered up

269

If a man insures on a ship, and has no interest therein, the insurance is void, although it is expressed in the policy *interested or not interested.* *Vide the note*

*ibid.*

But if he is interested in the ship, he may insure beyond the value of his interest

*ibid.*

If one insures a ship, which is lost, he must renounce his interest in the

## A TABLE OF THE PRINCIPAL MATTERS.

ship, if he would have any benefit of the insurance 269

Goods insured are by agreement valued at 600*l.* and the insured not to be obliged to prove any interest. Ship being lost, it was ordered that the insured should discover what goods he had put on board, and that a deduction should be made for the value thereof out of the 600*l.* though he offered to renounce all interest to the insurers 716

One lends money on a bottomry-bond, and then insures on the same ship. He shall have both the money on the bond, and also the benefit of the insurance 717

Paying the premium, intitles the party to the benefit of the insurance *ibid.*

### INTEREST OF MONEY.

Statute reducing interest of money, whether it affects precedent securities 42

A mortgage is made at 5*l.* per cent. with a covenant to pay 6*l.* if the interest is unpaid for sixty days after it is due: this being the agreement of the parties, equity will not relieve against it as a penalty 134

A. in 1650, makes a mortgage at 8*l.* per cent. In 1660, interest is reduced to 6*l.* per cent. A. for several years after pays interest at 8*l.* per cent. Whether the interest paid after 1660, above 6*l.* per cent. shall go to sink the principal. *Vide the note* 145

Interest is reserved at 5*l.* per cent. but if not duly paid, then to pay interest at 6*l.* per cent. Though there was a great arrear of interest, yet mortgagor decreed to pay but 5*l.* per cent. the reservation at 6*l.* per cent. being only as *nomine pœnæ*. *Vide the note* 289

But where interest was reserved at 6*l.* per cent. and if duly paid, then agreed to take 5*l.* Interest not being duly paid, the court allowed 6*l.* per cent. 290

For if the party will take the benefit of lowering the interest, he must comply with the times of payment 316

Bill to foreclose an infant, and by decree referred to a master to see what is due, who reports what is due for

principal, interest, and costs. Whether upon a subsequent order to carry on interest, the former interest during the infancy shall carry interest. *Vide the note* 392

Bond executed in *England* for a debt in *Ireland*, shall carry but 6*l.* per cent. interest. *Vide the note* 395

### INTERROGATORIES.

The plaintiff's christian name being mistaken in the title of the interrogatories, the depositions could not be read, nor would the court permit the title to be amended, though most of the witnesses, since their examination, were gone beyond sea 435

### JOINT-TENANTS AND TENANTS IN COMMON.

#### *Vide* SURVIVOR.

Agreement by one joint-tenant to sell does not bind the survivor 63

Devise to two equally to be divided, and to the survivor of them; they are joint-tenants by reason of the express gift to the survivor 323

A. and B. joint-tenants for their lives; A. makes a lease for years of his moiety, to commence from his death, if B. so long live. This lease shall bind the survivor *ibid.*

The plaintiff's husband and defendant had enjoyed a church lease in moieties, under an agreement there should be no benefit of survivorship: upon the last renewal the lease was taken in both their names, and no express agreement against survivorship. The plaintiff's husband being sick, by deed assigns his moiety to his wife, and by will devises it to her. The grant to the wife is void, and the devise will not sever the joint-tenancy. *As to the devise, vide note* 385

A. by will devises lands in trust that the profits should be equally divided between his wife and daughter, during the wife's life, with remainders over. The daughter died in the life of her mother. Decreed this to be a tenancy in common between the mother and daughter, and that during the mother's life, the daughter's

## A TABLE OF THE PRINCIPAL MATTERS.

- moiety should go to her administrator 430
- A devise to *two* and the heirs of their bodies. It is a joint-estate for life, and several inheritances; and so it is, if there is a devise to two and their issue, and in default of such issue to *J. S.* and one of them dies without issue, a moiety shall go over to the remainder-man 545
- A.* and *B.* are joint-tenants of the trust of a term; *A.* dies. *B.* shall have the whole by survivorship 556
- A man lends money in the names of himself and his wife, upon mortgages and bonds, and dies. The wife is intitled to the money by the survivorship, if there are other assets sufficient to pay debts 683

### JOINTURE.

- A jointress is not bound to answer, whether her husband had any other title than as assignee of a mortgage, she denying that she had any notice of the mortgage, and insisting she was a purchaser without notice, and that her husband alleged he was in by descent 701

### IRELAND.

- Bond executed in *England* for a debt in *Ireland*, shall carry but *6l. per cent.* interest. *Vide the note* 395

### JUDGMENT. *Vide under Title* SECURITIES.

### JURISDICTION.

#### *Vide* COURTS.

- An account decreed of an intestate's personal estate, notwithstanding an account had been before taken, and a distribution decreed in the spiritual court 47
- If the party insists the Court of Chancery has not jurisdiction of the matter in question, he must plead to the jurisdiction of the court. and not object it at the hearing 484
- Bill that the defendant might redeem a mortgage of the island of *Sarke*, or be foreclosed. Defendant pleaded to

the jurisdiction of the court, that the island was part of the duchy of *Normandy*, and had laws of their own, and were under the jurisdiction of the courts of *Guernsey*, Plea over-ruled, because the mortgage was of the island, and for that the defendant was served here; for *equitas agit in personam* 491

### L.

### LACHES. *Vide* INFANT.

### LANDS CHARGED.

- One by will devises that his debts and legacies should be paid in the first place; and then devises his lands to his sister for life, remainder to her issue, remainder over; and made the sister executrix. Decreed the lands to be charged with the debts. *Vide the note* 708

### LEASES AND COVENANTS THEREIN.

- Lessee for years covenants not to plough pasture land, and if he does, then to pay *20s. per ann.* for every acre ploughed. The court will not grant an injunction to stay the tenant's ploughing, the parties themselves having agreed the damage for ploughing 119
- Nor will the court relieve the lessee against the penalty if he ploughs *ibid.*
- Bill for a specific performance of articles for a lease of lands in *Norfolk*, where by custom the landlords repair: but the rent reserved on the lease appearing to be under the value, decreed the tenant should covenant to repair 231
- Lessee of a church-lease, makes an under-lease, and would have the under-lessee to surrender in order to enable the original lessee to renew with the church. There being no covenant in the tenant's lease to surrender, equity cannot compel him to do it 383
- Rules are made at the foundation of an hospital, that no lease should be made for above twenty-one years. The hospital make a lease for twenty-

## A TABLE OF THE PRINCIPAL MATTERS.

one years with a covenant by renewal to make it up sixty years. This covenant is not binding in equity, as being equally prejudicial to the hospital, as a lease for sixty years 411

Equity will decree the assignee of a lease to pay the rent which becomes due since the assignment, and which shall become due while he continues in possession; but not during the continuance of the lease; for he may, if he can, get rid of the lease, by assigning it to another 421

Upon a bill brought against an assignee of a lease, to pay the rent, and perform the covenants in the lease: the original lessee ought to be a party, because he is still liable; but if the assignee has divided his interest in the lease, into a great number of shares, it is not necessary to make all the sharers parties 422

In the constitutions for founding an hospital it was ordained, that no lease should be made for above twenty-one years, and the rent not to be raised, nor above three years rent taken for a fine. Though the tenant of the hospital lands is entitled to a beneficial lease upon renewal; yet this constitution is not to be followed according to the letter; but as times alter, and the price of provisions increases, so the rents ought to be raised in proportion 596

A decree having been made in the Lord *Coventry's* time for granting a lease of charity-lands for ninety-nine years, if three lives lived so long, at the rent of one-third of the then improved value, and to be perpetually renewable without fine; it was now decreed the lease should be renewed *toties quoties*, without fine, but at the rent of one-third of the improved value: not as it was in the Lord *Coventry's* time, but according as the estate shall be worth, when the lease shall from time to time be renewed 746

### LEGACIES AND LEGATEES.

*Legacies to be applied at Discretion.*  
Vide Title DISCRETION.

*Legacies given on Condition to marry with Consent; &c. Vide Restraints on Marriage, under Title MARRIAGE.*

A Legacy presumed to be paid after a great length of time 21

A legacy is given on condition not to dispute the will. The legatee commences a suit, whereby he disputes the validity of the will. This is no forfeiture of the legacy, if there was *probabilis causa litigandi* 91

A. by will gives his daughter 200*l.* and afterwards gives with her in marriage a portion greater than the legacy. The portion is an extinguishment of the legacy 115

One gives legacies of 15*l.* a-piece to each of his relations of his father's and mother's side, and gave the surplus of his personal estate to A. and makes B. his executor. B. the executor paid 15*l.* to the testator's cousin german, and 15*l.* a-piece to her four children. The court allowed the payment to the children, and would not restrain the devise to the relations within the statute of distribution. *Vide the note* 381

Lands are devised to A. to be sold to pay debts and legacies, and A. is made executor. The money raised by sale is legal assets, and debts must be first paid. Otherwise if the devisee were not made executor. *Vide the note* 405

Where lands are subjected by will to pay debts and legacies, whether debts are to have a preference, or both to be paid equally? 248, 302, 405

Legacy of 500*l.* given to the eldest son of A. to be begotten, to place him out apprentice. A. has a son born after the testator's death, who brings a bill for the 500*l.* and it is decreed to him, though born after the testator's death, and though the legacy is given him for a particular purpose 431

Legacies are given to A. B. and C. to be paid at their respective marriages, as well principal as interest, and if any of them died unmarried, her legacy to go to the survivors. One of them dies unmarried, the survivors shall not receive her legacy before



## A TABLE OF THE PRINCIPAL MATTERS.

their respective marriages. *Vide the note* 620

One devises lands to his son and his heirs; and if his son died without issue, then he gives 200*l.* to his daughter. The son left issue, which died without issue. The 200*l.* did not become due; the legacy not being intended to arise upon any remoter contingency, than the son's dying without issue living at his death 686

A legacy is given upon a contingency, and the legatee dies before the contingency happens. It shall go to his executors 758, 766

### *Specific Legacies.*

A. living in *Antigua*, and having a plantation there, devises 50,000 weight of sugar to the children of B. to be paid by his executors in ten years after his death. The executors not delivering the sugars within the time, on a bill brought by one of the children, decreed the value of the plaintiff's legacy to be computed according to the medium rate of sugars in *Antigua*, at the end of the ten years, and paid with interest from the time it became due 553

One devises to his wife all his personal estate at W. This is a specific legacy, and to be preferred to pecuniary legacies, in case of deficiency of assets 688

### *Legacies or portions vested, lapsed, or extinguished.*

A legacy is given to A. when he should be twenty-four; at twenty-one the executors pay him part, and give bond to pay the remainder at a future day, being the time when he would be twenty-four. A. dies under twenty-four. Whether the money received shall be repaid, and the bond delivered up? *Vide note* 31

By marriage-settlement it is provided, that if there be no issue male of the marriage, and one or more daughters living at the death of the father, the trustees should stand seised to the intent such daughter or daughters should receive out of the rents 10,000*l.* and 100*l.* *per ann.*

each, for maintenance, but no time is limited for payment of the portions. The father dies leaving a daughter only, who lives to seventeen, and by will disposes of her portion. Decreed the portion to be vested, and well disposed of by the will, and the rather, because no time was appointed for the payment 72

A portion for a daughter by will is charged upon land, payable at twenty-one. The daughter dies under age, the portion shall sink in the land. Otherwise, if no time had been limited for payment of the portion 92

No difference where the portion is secured by a settlement or a will, if charged on a real estate, and the party dies before it is payable. In either case it sinks in the land *ibid.*

One devises to his sister 350*l.* on condition that at or before her death she gives 200*l.* thereof to her children. The sister dies in the life of the testator. The whole legacy is lapsed 116

A. by will devises his land to B. in fee, paying 400*l.* whereof 200*l.* to be at the disposal of his wife by her will, to whom she should think fit. The wife dies intestate. Her administrator shall have this 200*l.* the property thereof being absolutely vested in the wife 181

A legacy is given to a child, payable when twenty-one. The child dies under age. The legacy shall go to the administrator; but he shall not have it, till such time as the child, if he had lived, would have come to the age of twenty-one 199

If the legacy is payable with interest, the administrator shall have it presently, and he shall not wait till such time as the child would have attained twenty-one *ibid.*

A legacy is given to A. to be paid when he shall attain twenty-one, and legacies are given to B. and C. in the same manner; and if one or more of them should die, before his, her, or their respective legacy or legacies became due, then his, her, or their legacy or legacies should be equally divided among the survivors. A. dies in the life of the testator. His legacy shall go to the survivors. *Vide note* 207



## A TABLE OF THE PRINCIPAL MATTERS.

One charges his lands with 6000*l.* for the child, of which his wife was *privement ensient*, if it proved a daughter. A daughter is born and dies. The 6000*l.* shall not go to her administrator. *Vide note* 208

A legacy is given to *A.* to be paid at his age of twenty-three, and if he dies before, to go over to *B.* *A.* dies before twenty-three; *B.* shall have the legacy presently. *Vide the note* 283

By marriage-settlement on failure of issue male, a term is limited for raising 5000*l.* for daughters' portions, payable at eighteen, and a maintenance until portions payable. There is one daughter only, upon whom the inheritance of the lands descends. She dies, and by a *nuncupative* will gives all she could devise to her mother, who took administration with the will annexed. The trust of the term is not extinguished in equity, but is a subsisting charge on the estate, and ought to be raised, and paid to the administratrix 348

Divers legacies are given by a will, and if any legatee died before his legacy was payable, it should go to his brothers and sisters. A legatee dies in the testator's life-time. This is no lapsed legacy, but shall go over to his sister 378

One devises lands to his executor to be sold, and thereout to pay 500*l.* to *A.* if he returns from beyond sea, and the residue to *B.* *A.* dies before the testator. The heir shall not have this 500*l.* or so much of the land as is of that value, as a resulting trust, as undisposed of: but this 500*l.* shall fall into the *residuum*, as a legacy given upon a contingency that never happened; and consequently as no legacy. Otherwise, if it had been an absolute legacy of 500*l.* 394

A devise of a legacy to one at twenty-one, or to be paid at twenty-one, is all one 417

A daughter's portion secured by a trust-term, not extinguished by a devise of lands to the daughter in tail, in remainder, after a term for sixty years devised for payment of debts and legacies 457

*A.* by will gives 300*l.* to *B.* and declares her will and desire, that he give the 300*l.* to his daughter at his death, or sooner, if there be occasion for her advancement. *B.* dies three days before *A.* and the daughter dies at sixteen, unmarried. The 300*l.* decreed to the administrator of the daughter 466

If a devise is of any thing to *A.* for life, directing him at his death to give it to *B.* this amounts to a devise of the use of the thing to *A.* for life, remainder to *B.* 467

*A.* devised 4000*l.* to his son, to be paid at his age of twenty-five, and interest in the mean time, out of which the son was to have maintenance; and directs the 4000*l.* to be raised out of a trust-estate. The son dies under twenty-five. This is a vested legacy, and shall go to his executors 508

*A.* devises to *B.* 400*l.* which he owed *A.*, provided he paid thereout several particular sums to his wife and children, and the rest he freely gave to him, and directs his executor to deliver up the security, and not to claim any part of the debt, but to give such release, as *B.* his executors, &c. should require. *B.* dies in the life of the testator. Decreed the legacies given out of the 400*l.* to be paid, and the residue of the debt to be paid to the executor of *A.* 521

If one says in his will, *I forgive such a debt*, or *My executor shall not demand it*, or *shall release it*, this is a discharge of the debt, though the debtor dies in the life of the testator 522

But if a debt is devised by will to the debtor, without words of release or discharge, and the debtor dies in the life of the testator, the legacy is lapsed, and the debt subsists *ibid.*

*J. S.* devised 300*l.* a-piece to his three daughters at twenty-one, or marriage, and if any died before, to go to the survivors. One of them died in the life of the testator. Her legacy shall go to the surviving daughters. *Quære.* 611

*A.* devises lands to his son and his heirs, and declares that out of the lands he shall pay 200*l.* to his sister, at her

## A TABLE OF THE PRINCIPAL MATTERS.

- age of twenty-one. She marries, and dies under age. Legacy not vested 617
- Surplus devised to four persons, and if any of them died before the estate was got in and divided, his share to go to his children. One of them died in the life of testator, leaving children. Whether they shall take their father's share 653
- A term is limited to raise portions for daughters, if no sons, payable at eighteen or marriage; provided such daughters survive their father. A daughter marries, and dies in the life of her father. Her portion shall not be raised 655
- A legacy is devised to *J. S.* when of the age of sixteen, and interest in the mean time. *J. S.* dies before he attained the age of sixteen. The legacy vested, and shall go to his executor 678
- One devises 1200*l.* to the four children of *J. S.* to be divided amongst them according to the discretion of *J. S.* whom he makes executor. One of the children died in the life of the testator. Decreed a fourth part of the 1200*l.* did not become a lapsed legacy; for nothing vested in any of the children before an allotment by the executor; and for the same reason the administrator of the deceased child could not be intitled to any part of the 1200*l.* 744, 745
- A legacy is given upon a contingency, and the legatee dies before the contingency happens; the legacy is not lapsed, but shall go to the executor of the legatee 758, 766

### *Abatement and Refunding.*

- A freeman of *London* having devised a leasehold estate to *J. S.* he is evicted of a moiety by the testator's widow, who claimed by the custom. *J. S.* shall not have satisfaction made him for what was so evicted, either against the legatees in general, or the residuary legatee; for the testator had power only to dispose of a moiety 111
- A specific legatee is not to abate in proportion with other legatees, where there is a deficiency to pay debts 111
- As where one devises to his wife all his personal estate at such a place, this is a specific legacy, and to be preferred to pecuniary legacies, in case of a deficiency of assets 688
- Where assets fall short, legatee shall refund to unsatisfied creditors; but where an executor voluntarily pays a legacy, and assets prove deficient, neither he nor the other legatees shall compel him to refund. Otherwise if the executor pays a legacy by compulsion 205
- A legacy is given to executors for care and pains. If there is a deficiency of assets, they shall abate in proportion 334
- In what cases a legacy shall be a satisfaction of a debt, or other demand on the testator's estate.*

### Vide Title SATISFACTION.

- A man by his marriage-settlement provides 4000*l.* for daughters' portions, and having two daughters, by will gives them 2000*l.* a-piece for their portions, without taking notice of the settlement. The legacies shall be in satisfaction of the portions by the settlement 111
- By an old settlement in 1631, 3000*l.* is provided for daughters' portions on failure of issue male. The brother of the daughters, who might have barred his sisters by a recovery, having given them above the value of 3000*l.* by his will, it shall be intended a satisfaction 177
- By a marriage-settlement, in case of failure of issue male, the remainder is limited to the daughters, until they should raise 3000*l.* for their portions. There is issue a son and two daughters. The father by will gives his daughters 700*l.* a-piece, and dies; and the son afterwards, by his will, gives them to the amount of 7000*l.* The father or son's legacy shall not be a satisfaction of the 3000*l.* secured by the settlement. *Vide note*, p. 259 258
- One on the marriage of his daughter,

## A TABLE OF THE PRINCIPAL MATTERS.

gave a bond to the husband for the daughter's portion, and afterwards by will devises lands of much greater value to the husband and wife, and their heirs. The devise is no satisfaction of the land, though there are not assets to pay the testator's debts 298

*A.* gives bond to *B.* her servant, to pay her 20*l.* *per ann.* quarterly, for her life, free from taxes, and by will, without taking notice of the bond, gives *B.* 20*l.* *per ann.* for her life, payable half-yearly; but not said free of taxes. Decreed the annuity by the will not to be a satisfaction of the bond, and that *B.* should have both the annuities 478

*A.* on his wife's joining in sale of part of her jointure, gives her a note to pay her 7*l.* 10*s.* *per ann.* for her life, and afterwards on sale of a farther part, gives her a bond to pay her 6*l.* 10*s.* *per ann.* for her life; and by will, without taking notice of the note or bond, gives her 14*l.* a year for life. The devise shall be a satisfaction of the bond and note 498

*A.* on his marriage covenants to purchase and settle 20*l.* a year on his wife for her life; and if he died before it was done, to leave her 300*l.* for her better livelihood and maintenance. He died without making any settlement, and by will gives his wife the interest of 330*l.* for her life, with power to dispose of 30*l.* at her death. Decreed the legacy was not a satisfaction of the articles, and that the wife should have the 300*l.* by the articles, and the legacy too 505

*A.* by marriage-articles agrees to leave his wife 800*l.* and her jewels, &c. but it is declared, that notwithstanding the articles, she should not be debarred of any thing he should give her by will. *A.* by will makes a disposition of his whole estate, and gives his wife 1000*l.* The wife must either waive the articles or the will. She cannot claim the benefit of both 555

*A* child intitled by his father's marriage-articles to a share of his personal estate, has a legacy given him by the will of his father. If he will have the legacy, he must waive the benefit of the articles 556

### *Surplus and Residuary Legatee.*

One devises lands to his nephew to pay his debts, and makes the nephew executor, but makes no disposition of the surplus. Whether the devisee or the heir at law shall have the surplus? *Vide the note* 247

If an express legacy is given to the heir, the devisee shall have the surplus *ibid.*

One devises, after debts and legacies paid, the surplus of his estate to his wife and son *John* equally, and makes them executors, but if his wife should marry, then she should render the right of being an executrix to his son *Roger*, he to be partner with his brother *John* in the executorship. The wife marries. She thereby loses her right to the surplus, and to the executorship 308

Devise of an express legacy to the executors, and also to the next of kin, and no disposition of the surplus; how the surplus shall go. *Vide note* 361

One has a wife, and no child, and two brothers and two sisters, and by will gives a moiety of a banker's debt to his wife, whom he makes executrix, and makes no disposition of the surplus of his personal estate, and gives legacies to his brothers and sisters out of his real estate. *Per Cur.* The wife, by a devise of a moiety of the banker's debt, is excluded from the surplus, as executrix, though there was no child, and that legacies were given to the brothers and sisters out of the land, which had been unnecessary, unless the testator had intended the surplus for his wife, which otherwise would have been sufficient to pay the legacies 425

One makes a will, and his son executor, but makes no disposition of the surplus. The son dies without proving the will. The surplus shall be divided amongst the next of kin of the testator 634

One by will gives his next of kin, being his nephews, an express legacy, and gives 100*l.* a-piece to his two executors, and makes no disposition of the surplus. Whether the executors or the nephews shall have the surplus? *Vide note* 673, 674

## A TABLE OF THE PRINCIPAL MATTERS.

The wife of the testator is made executrix, and there is no devise of the surplus, nor any express legacy given to the wife, except what she had as executrix of her former husband, and some things she had before marriage. Decreed the surplus to the wife 675

The executor had 20*l.* given him for mourning. Distribution decreed 676

*A.* by will gives 100*l.* legacy to his wife; and also the interest of 300*l.* for her life, and makes his wife and two strangers executors, to one of whom he gives 20*l.* for mourning. Surplus decreed to be distributed 677

One devises the surplus of his personal estate to the children of *A.* and *B.* Neither of them has a child at the making of the will, or death of the testator. The devise is executory, and shall extend to any children that *A.* and *B.* shall afterwards have, and the children of such shall take *per capita*, and not *per stirpes*, they claiming in their own right, and not as representing their parents 705, 706

*In what Cases the Executor shall be only a Trustee. Vide under Title EXECUTORS.*

### *Ademption of a Legacy.*

*A.* by will gives his daughter 200*l.* and afterwards gives with her in marriage above 200*l.* This is a satisfaction 115

One devises 500*l.* viz. 400*l.* due on bond from *J. S.* and 100*l.* in money. Afterward the testator receives part of the 400*l.* and takes a new bond for the remainder. This is no ademption of the legacy 681

### LIMITATION OF ACTIONS, &c.

Where there is a devise for payment of debts, a debt, upon which the statute of limitations has run, is within the provision equally with other debts 141

Statute of limitations, as to rents, extends only to customary rents between lord and tenant, and not to rent arising by grant or will, whereof the commencement may be shewn 235

Statute of limitations not to take place against religion or charity 398, 399

If a man recovers a judgment or sentence in *France* for money due to him, the debt must be considered here only as a debt on simple contract, and the statute of limitations will run upon it 540

The statute of limitations provides, where the party to whom a debt is owing, goes beyond sea, but not where the debtor is beyond the seas 541, 694

But the statute of 4 and 5 of Queen *Anne*, saves the right of action, as well where the debtor, as where the creditor is beyond sea 695

The statute of limitations will not take place, if there be no executor, until administration be taken out *ibid.*

Merchants' accounts not within the statute: otherwise if stated *ibid.*

If a creditor sues out a *latitat* against *J. S.* and continues it, and *J. S.* dies, the creditor may bring a bill in equity against the executor of *J. S.* and need not to go on in the old action: and the statute of limitations is no bar *ibid.*

### LIS PENDENS. Vide under Title BILL.

After a bill brought by a second mortgagee against the first and third mortgagees to discover incumbrances, the last mortgagee may get in the first incumbrance, and protect himself against the second 99

A devisee obtains a decree to hold and enjoy against the heir, who, it was supposed, had suppressed the will. Pending this suit, a third person gets an assignment of a mortgage made by the testator, and then purchases the equity of redemption of the heir, with notice of the will. The court would not admit the purchaser, in regard he purchased *pendente lite*, to dispute the justice of the decree, nor to try it at law, whether the will was not cancelled by the testator 216

### LONDON.

A freeman of *London* dies within the province of *York*. The custom of *London* in the distribution of his

## A TABLE OF THE PRINCIPAL MATTERS.

- personal estate, shall control the custom of the province of *York* 48
- The custom of *London* follows the person, though never so remote from the city 82, 110
- A freeman of *London* assigns a lease for years in trust for himself for life, then for his wife for life, and afterwards for his son by a first *venter*. Whether this assignment shall stand against the custom, so as to bind the other children 98
- A freeman of *London* devises a lease for years to *A.* and his books to *B.* and the use of the surplus to his wife for life. Decreed the wife, there being no child, should have a moiety of the whole personal estate, as well of the lease and the books, as of all the rest, by the custom, and the use of the other moiety of the surplus for life by the will 110
- A voluntary judgment given by a freeman will not be good against the widow; but his debts being paid will bind the legatory part 202
- An only child of a freeman advanced in part, is not to bring that part into hotch-pot 234, 754
- A freeman of *London* by will gives 700*l.* for mourning. It shall be paid out of the legatory part, and not out of the orphanage or customary part 240
- If goods are absolutely given away by a freeman in his life-time, such gift will stand good against the custom. But if he makes a deed of gift of his goods, and retains the possession of any part thereof, this will be a fraud upon the custom 277
- Money brought into hotch-pot by an orphan, must be brought into the orphanage part only, and not to increase the widow's customary part, or the testamentary part 281, 629
- By the custom of *London* a master may justify turning away his apprentice for gaming 291
- If the child of a freeman of *London* dies under twenty-one, his orphanage part by the custom will survive to the other children, and he cannot devise it 559
- A freeman of *London* assigns the greatest part of his personal estate, in trust for himself for life, and then for his grandchildren. This deed is not good against the custom of *London*, as to the moiety belonging to the children; but binding as to the other moiety, which he had power to dispose of, he having no wife 612, 685
- An only child of a freeman of *London*, not fully advanced, is to have a full third of the personal estate, without regard to what has been paid for her portion 628
- Where a daughter is advanced in the father's life-time, and it appears by writing under the father's hand, what that advancement was, this will let her into her share by the custom 630
- If a freeman of *London* enters in his books several sums of money, as paid on account of his daughter's portion, he cannot afterwards write off those sums, and make the husband debtor for them 631
- Where an only child is fully advanced, the wife will be intitled by the custom to a moiety of the personal estate *ibid.* 666
- Settlement by a freeman of *London* before marriage, though of land, bars the wife of her customary part: and the children in such case will have a moiety of his personal estate 665
- A freeman of *London* by deed assigns over several leases in trust to pay any sum not exceeding 1000*l.* as he should appoint. He appoints 500*l.* to his daughter, and the residue to his grandchildren. This is in fraud of the custom, and void, as to the moiety, which the daughter is intitled to 685
- Advancement by a freeman of *London* of a child by settling a real estate, no bar of the orphanage part 753
- A leasehold estate devised by a freeman to a trustee for the separate use of his daughter, is not to be taken as part of her orphanage part, but to go out of the legatory part 754

### LUNATIC.

- Committee of a lunatic invests part of the lunatic's personal estate, in a



## A TABLE OF THE PRINCIPAL MATTERS.

and the inheritance descends to the daughter, who attains her age of nineteen, and dies. As the term for raising the portion is not merged in law, so neither shall the trust be extinguished in equity: it being more beneficial to the infant, that it should not be merged, in regard to her advancement in marriage, and payment of her debts, and her power of disposing her portion by will: and decreed the portion to be raised for the benefit of the mother, to whom the daughter had given all that was in her power to devise 348

A daughter's portion secured by a trust term not extinguished, by a devise of the lands to the daughter in tail, in remainder after a term for sixty years devised for payment of debts and legacies 457

### MISTAKE IN PLEADINGS. *Vide Title INTERROGATORIES.*

A mistake in the title of an order was amended, though to charge a surety that gave a recognizance to abide the order at the hearing 376

### MONEY.

Money has no ear-mark, and cannot be followed when invested in a purchase 441, 480

### MONTH.

In what case month reckoned as calendar month 222

### MORTGAGE.

*As to buying in of Incumbrances and what use may be made thereof. Vide under Title SECURITIES.*

*As to Concealment of Mortgages. Vide CONCEALMENT.*

A. having a lease for years of a brew-house, wherein are covenants to repair, assigns it by way of mortgage to B. The premises being out of repair, the lessor brings a bill against

B. to compel him to perform the covenant. B. having never been in possession, the court would not decree him to perform the covenant in specie, but leave the plaintiff to recover at law as he could 275

Lease for years subject to a ground-rent, is assigned over by way of mortgage to J. S. for 100*l.* The mortgagee never entered, but lost the 100*l.* mortgage-money, and is sued by the lessor for the ground-rent. No relief, it being his own default, to take the mortgage by way of assignment, and not by way of under-lease 374

Mortgagor shall present to the church, until the mortgage is foreclosed 401

One borrows 200*l.* and makes a mortgage, which is defeazanced, to be void on payment of 40*l.* per ann. quarterly for eight years. The court relieved on payment of the 200*l.* and simple interest 402

Mortgages are not to be preferred to other real incumbrances; but mortgages, judgments, statutes, and recognizances shall be paid according to their priority 525

*Exposition of the Statute of 4 and 5 W. and M. cap. 16. for preventing Frauds by clandestine Mortgages.*

A person, who will take advantage of this statute, must be an honest mortgagee: and therefore if a man has used any fraud or ill practice in obtaining a second mortgage, he shall not have the benefit of the statute 589

If a mortgage by the statute becomes irredeemable, it will remain so in the hands of the assignee, though assigned in consideration of the principal, interest, and costs due thereon 590

If a subsequent mortgagee redeems such mortgage, he shall hold the estate irredeemable *ibid.*

If there are more lands in the second mortgage than in the first, that seems to be a case omitted out of the statute; but the adding an acre or two shall not exempt it, for that may be a contrivance to evade the statute *ibid.*



## A TABLE OF THE PRINCIPAL MATTERS.

### *Special Agreements about Mortgages and Redemptions special.*

**A.** lends money to **B.** on a mortgage, and takes a covenant from **B.** by another deed, that if **A.** should think fit, **B.** should convey to **A.** so much of the mortgaged estate, as should be of the value of the money lent at twenty years' purchase. Covenant decreed to be set aside as unconditionable 520

**A** man shall not have interest for his money on a mortgage, and a collateral advantage besides for the loan of it: or clog the redemption with any by-agreement 521

### *Redemption, Foreclosure.*

**A.** makes an absolute assignment of a lease for three lives for 550*l.* to **B.** and **B.** by writing under hand agrees on payment of 600*l.* at the end of the year to re-convey. **B.** dies, two of the lives die, and the lease is twice renewed; yet redemption decreed on payment of the 550*l.* and the two fines with interest, and during the life of **B.** the profits to be set against the interest. *Vide the note on the point of setting the profits against the interest* 84

**A** feme mortgagee on her marriage settles the mortgaged estate on herself for life, remainder to the issue of the marriage. The mortgagor brings a bill to redeem against the mortgagee, who takes no notice of the settlement in her answer, and the mortgagor having a decree to redeem, pays the mortgage-money. Afterwards the eldest son of the mortgagee brings ejectment on the settlement, and recovers at law. The mortgagor relieved, having paid his money pursuant to the decree, and having been in no fault 142

**Lessee** for years mortgages his term, and afterwards borrows more money of the mortgagee on bond, and dies; his executors shall not redeem without paying the bond, as well as the mortgage 177

Where a man has two mortgages, and one is deficient in title or value, the heir of the mortgagor shall not re-  
VOL. II. PART II.

deem one without redeeming both. *Vide the note* 207

The first mortgagee forecloses the mortgagor, and afterwards devises the estate to the mortgagor. Whether the second mortgagee shall now be let in to a satisfaction of his money 235

**A** third mortgagee gets in the first, and brings a bill to foreclose the second mortgagee, if he do not pay what is due on both. He need not prove the actual payment of the money lent on the third mortgage, the producing an acquittance being sufficient 279

One makes two mortgages of two several estates for several sums of money, and one of them proves deficient. He shall not be admitted to redeem one, without paying off the other 286

One for 300*l.* grants a rent of 60*l.* per ann. for seven years. Whether redeemable? *Vide the note* 288

Mortgagor admitted to redeem a mortgage made in 1642, after three descents on the defendant's part, and four of the plaintiff's part. Length of time being answered by infancy, and coverture, and an account made up by the mortgagee in 1686 377

On a bill to redeem, an account is decreed, 240*l.* reported due, and exceptions to the report; pending which, the defendant the mortgagee commits waste. The court orders the mortgagee to deliver up the possession, on the plaintiff's giving security to abide the event of the account 392

**A.** mortgages in 1639, and in 1663 his heir brings a bill to redeem; he dying, the suit is revived by his co-heirs, who obtain a decree in 1672, but do not prosecute it. **B.** having purchased the equity of redemption of the co-heirs, brings his bill to have the benefit of the former decree. Bill dismissed by reason of the difficulty of the account and length of time 418

**A.** has a first mortgage, and **B.** a second, and subject to these mortgages the estate is settled on **C.** for life, remainder on **D.** an infant. **A.** brings a bill to foreclose. Though **B.** has not the like remedy over against **D.**

## A TABLE OF THE PRINCIPAL MATTERS.

who, because of his infancy, cannot be foreclosed; yet *B.* must redeem *A.* in six months, or be foreclosed.

*Vide notes* 518

Where a man conveys over the equity of redemption, or becomes indebted by judgment, the assignees or conusees are intitled to redeem 577

After a decree by the first mortgagee to foreclose the mortgagor, a second mortgagee may redeem the first, though the first mortgagee had no notice of the second mortgage before the decree 601

*A.* pawns jewels to *B.* and after borrows 50*l.* more of him on a promissory note. *A.* shall not redeem the jewels, without paying the money on the note. *Quare* 691

*When the Money shall be paid to the Heir, and when to the Executor, or to whom.*

If a mortgagor releases to the heir of the mortgagee in fee, the mortgage being forfeited, the administrator shall, notwithstanding, have the benefit of it, even though there be no debts 193

An old mortgage in fee, though two descents cast, and though more due upon it than the value, and though the mortgagee says by answer that he will not redeem, but submits to be foreclosed, shall go to the executor, and not to the heir; the equity of redemption not being foreclosed or released 367

*A.* having several mortgages, one of which was a mortgage of lands in *D.* on which he had entered, devises those lands to his two daughters and their heirs, and the other mortgages to them, their executors, &c. One of the daughters dies.—Her share of the lands in *D.* shall go to her heir, and not to her administrator: it being the intent of the testator, that those lands should pass as real estate, though as between him and the mortgagor, they were but a mortgage 582

*Mortgage assigned over.*

A mortgage is made for 450*l.* payable

at the end of five years, with interest in the mean time. About two months before the five years expire, the mortgagee assigns the mortgage for 560*l.* being the principal and interest then due. Decreed the interest to carry interest from the time of the assignment 135

*How and in what Manner, one, who has a Mortgage or other Incumbrance on an Estate, shall account, and what Allowances he shall have.*

Lands are limited by marriage-settlement upon failure of issue male, to daughters and their heirs, until the next remainder-man should pay them 3000*l.* There being four daughters only, they entered. Decreed at the Rolls, they should account for the profits; and that the rents should be applied first to pay the interest, and then to sink the principal; as in the case of a common mortgage. Decree affirmed by the Lord Chancellor, with this variation, that the principal should not be sunk, till a third-part was raised above the interest; and so again, when another third-part was raised 523, 576

Mortgagee having been at great charges to defend a suit at law brought by the heir of the mortgagor, who endeavoured to defeat the mortgage by an intail, but could not prevail; upon a bill afterwards brought by the heir to redeem, the mortgagee was allowed his full costs expended in that suit, and not tied down to the costs taxed; and he was also allowed his costs in taking out administration to the mortgagor, as principal creditor 536

N.

### NOTICE.

An administrator pays away all the assets in satisfying debts by specialty. Decreed to pay a debt by a decree, though he had no notice of the decree before he paid away the assets 37, 88

One lends money to a bankrupt after a commission sued out without notice

## A TABLE OF THE PRINCIPAL MATTERS.

- of the bankruptcy. By two Lords Commissioners against one, who doubted, he cannot come in as a creditor under the statute 157
- A.** makes a mortgage, and after a commission sued out against him, and an assignment made by the commissioners, he makes a second mortgage to *B.* who has no notice of the bankruptcy. *B.* shall not protect his mortgage by getting an assignment of the prior incumbrance *ibid.*
- Court of equity very careful not to impeach purchasers by presumptive notice 159
- A.** lends money on mortgage to *B.* who was tenant for life, with remainder to his first son, *A.* being advised that *B.* might destroy the contingent remainder, and being assured by *B.* he had no son, whereas he had a son born five days before: but *A.* having no notice of it, and having the settlement in his custody, the court would not relieve against this mortgage *ibid.*
- Payment of money to a trustee, having notice of the trust, is a mis-payment, though the trustee had judgment and execution against the person who paid the money 197
- A** devisee obtains a decree to hold and enjoy against the heir, who it was supposed had suppressed the will. Pending this suit, a third person gets an assignment of a mortgage made by the testator, and then purchases the equity of redemption of the heir with notice of the will. The court would not admit the purchaser to dispute the justice of the decree, nor to try at law, whether the will was not cancelled by the testator 216
- A** purchaser or mortgagee shall not protect himself by taking a conveyance from a trustee after notice of the trust; for by taking such conveyance he becomes the trustee himself 271
- One** purchases, having notice of a settlement, whereby the vendor was but tenant for life, remainder to his first, &c., son in tail, and afterwards the purchaser, with notice, sold the premises to one that had no notice. The tenant for life dies, leaving a son. Decreed the last purchaser without notice shall hold the land; but the first purchaser who had notice, shall account for the purchase-money which he received, with interest from the death of the tenant for life 384
- The aforesaid settlement was made after marriage, in pursuance of articles before marriage, but the articles are not taken notice of in the settlement; however the first purchaser having notice of the settlement, it was incumbent upon him to inquire whether this settlement was voluntary, or made in pursuance of articles, and he ought to have inquired of the wife's relations who were parties to the deed *ibid.*
- A.** makes three several mortgages to *B. C.* and *D.* and in the last mortgage *B.* is a party, and agrees, that after he is paid, he will stand a trustee for *D.* Decreed that *C.* shall be paid before *D.* For all the securities being transacted by the same scrivener, notice to him was notice to *D.* 574
- Notice to the agent is notice to the lender *ibid.*
- Where there are several mortgages, they that lend last must come last, if they have notice of what was before lent 575
- A.** purchases of a man, who had committed an act of bankruptcy, but without notice thereof: afterwards a commission is taken out, and there being a term standing out in trustees, the assignee brings a bill against them and the purchaser, to have the term assigned to him. Bill dismissed 599
- A** purchaser without notice shall not be hurt in equity, not only where he has got in a prior legal title; but where he has a better right to call for the legal title, than another, who has got an incumbrance prior to his title 600
- A** defective surrender of copyhold land, for securing a sum of money, which was become void by not being presented in due time, made good against a subsequent purchaser with notice 609
- A.** having notice of an incumbrance, purchases in the name of *B.* and then agrees that *B.* should be the purchaser, who accordingly pays the purchase-money without notice of the incumbrance. Though *B.* did

## A TABLE OF THE PRINCIPAL MATTERS.

- not employ *A.* nor knew any thing of the purchase, till after it was made; yet *B.* approving of it afterwards, made *A.* his agent *ab initio*, and therefore shall be affected with the notice which *A.* had. *Vide note*, p. 610 609
- A.* purchases a leasehold estate of an executor, having notice a debt of the testator's was unpaid; and out of the purchase-money has an allowance of 200*l.* due to himself from the testator, and of 550*l.* due to himself from the executor, and pays the remainder in money. This sale not good against an unsatisfied creditor, *A.* being a party, and consenting to and contriving a *devastavit* 616
- Lands are devised to *J. S.* in tail, subject to the payment of legacies. *J. S.* levies a fine, and five years' non-claim pass, and then he mortgages the lands. *J. S.* having no title, but under the will, the mortgagee must be supposed to have notice of the legacies being a charge on the estate 662
- A jointress is not bound to answer, whether her husband had any other title than as assignee of a mortgage, she denying that she had any notice of the mortgage, and insisting she was a purchaser without notice, and that her husband alleged he was in by descent 701
- O.
- OATH. *Vide AFFDIAVIT.*
- OCCUPANT.
- Estate *pur auter vie* may be limited to a man and his heirs, and may be entailed, and may descend, though a term for years cannot be so entailed 184
- A.* having an estate for three lives, settles it to the use of himself in tail, remainder to *B.* The remainder is void; or, if good, it might be barred by deed, surrender, or other conveyance. *Vide note*, p. 226 225
- Lease *pur auter vie* is not within the statute *de donis* 226
- An estate *pur auter vie* of lands in *Borough English* shall descend to the customary heir *ibid.*
- An estate *pur auter vie* in a copyhold shall go to executors or administrators, as well as a freehold *pur auter vie* 265
- Dean and chapter make a lease to a man, his executors and administrators for three lives. This was held to be a descendible estate, and to belong to the heirs and not to the executor. *Vide the note* 320
- A.* by will devises lands, in trust that the profits should be equally divided between his wife and daughter, during the wife's life, and after her death devised the same to his daughter in tail, with remainder over. The daughter died during the mother's life. Decreed this to be a tenancy in common between the mother and daughter; and that during the mother's life, the daughter's moiety did not descend or result to the heir, but was an interest undisposed of, and in nature of a tenancy *pur auter vie*, and should go to the administrator of the daughter 430
- A.* devises a college lease to his wife for life, remainder to his son, she paying 10*l.* *per ann.* to the son during her life. The son dies in the life of his mother. The rent continues during the life of the mother, and shall be paid to the executor of the son 666
- Devise of 50*l.* *per ann.* to the wife of *A.* during the life of *B.* for her separate use. The wife dies. The 50*l.* *per ann.* shall be paid to her executor during the life of *B.* 667
- Estate *pur auter vie*, if it came to executors, or administrators, was assets before the statute of frauds and perjuries 780
- OFFER.
- An offer to deliver up a bond upon terms not complied with, is not binding, and if made without consideration is *nudum pactum* 717
- OFFICE AND OFFICERS.
- An inquisition finding two negligent escapes against the Warden of the Fleet, though but for small sums, amounts to a forfeiture of his office. So is one voluntary escape a forfeiture 173

## A TABLE OF THE PRINCIPAL MATTERS.

If the Warden of the Fleet is but tenant for life, and forfeits his office, it belongs to the reversioner, and not to the crown 173

In case of an inquisition finding a forfeiture by the Warden of the Fleet, whether it ought to find, what estate the Warden had in the office? 174

The court is cautious how they pass a grant for the office of Warden of the Fleet, because it may occasion a general escape of the prisoners 175

If an office is granted for three lives, on the death of the grantee it shall go to his administrators 265

ORPHAN. *Vide* LONDON.

### OUTLAWRY.

Plea of outlawry must be upon oath 37, 198 *contra*

*A.* possessed of a lease for years, is outlawed for treason, and the King during the outlawry grants away the lease. The outlawry is reversed.—*A.*, or in case of his death, his executors or administrators, shall be restored to the term; or, in case the term was mortgaged before the outlawry, shall be restored to the equity of redemption of the term 312

If an outlawry for treason is reversed, the judgment is, that the party shall be restored to all that has not been answered to the King; so that as to the profits of lands received by the crown during the outlawry, there is to be no restitution 313

### P.

#### PARAPHERNALIA.

A feme by her marriage-articles agrees to have no part of her husband's personal estate, but what he should give her by will. This bars her of her *paraphernalia* 83

A man devises his wife's jewels to her for life, and afterwards to his son. The wife makes no election or claim to have the jewels as her *paraphernalia*. Her administrator shall not have them 247

PAROL. *Vide* AGREEMENT  
PAROL.

PAROL EVIDENCE. *Vide* EVIDENCE.

### PARTIES.

Upon a bill for a specific performance of a covenant with *A.* for the benefit of *B.*, *A.* must be a party 36

None but parties to a suit are bound by it. *Vide note* 113

A man obtains a decree against husband and wife as administrator of *J. S.* for 1500*l.* The wife dies. Whether the plaintiff can proceed against the husband, without reviving against the administrator of the wife? *Vide note* 195

Where two are liable to a demand, you cannot proceed against one alone *ibid.*

One is made a party to a bill against whom the plaintiff can have no decree, but may examine him as a witness. He may demur 380

Upon a bill brought against an assignee of a lease, to pay the rent and perform the covenants in the lease, the original lessee ought to be a party: but if the assignee has divided his interest in the lease into a great number of shares, it is not necessary to make all the sharers parties 422

*A.* is tenant for life of a trust-estate, remainder to his sons. *A.* before a son born, brings a bill against the trustees, and an account is decreed, and afterwards taken. This account shall bind the sons; for all persons that could be made parties, were parties in the suit 527

### PARTNERS AND PARTNERSHIP.

If one partner borrows money, and gives a note for it for himself and partner, this will bind the other partner 277

One partner receives money in the shop, and gives his note for it, and having survived the other partner, dies. This note binds both; and though at law the note stands good only against the executor of the surviving partner, who gave the note, yet in equity the creditor may follow the estate of the other partner 293



## A TABLE OF THE PRINCIPAL MATTERS.

**A.** and **B.** are partners in trade. **A.** embezzles the joint-stock, and contracts private debts and becomes bankrupt, and his estate is assigned by the Commissioners. Court inclined, that first out of the joint-stock all the partnership-debts are to be paid, and then out of **A.**'s share satisfaction is to be made for what he has embezzled of the stock, before his own private creditors shall be paid 293

### PART-OWNERS IN SHIPS.

Master of a ship buys provisions for the ship, and has money from the owners to pay for the same, but fails without paying the money. The owners are liable to pay in proportion to their respective shares in the ship 643

Master of a ship is but a servant to the owners *ibid.*

### PARTITION.

Bill for writings and a partition; defendant insists the plaintiff has no title, and that there is an intail subsisting; the court gives the plaintiff a year's time to try his title. Trial is had, and verdict for the plaintiff. Upon hearing the cause on the equity reserved, it was insisted, this being a matter of right of inheritance, defendant ought not to be bound by one trial; *sed non allocatur*, it being a decree for a partition. *Quære. Vide the note* 232

Partition between tenants in tail, though by parol only, shall bind the issue 233

### PAYMENT.

*General Payment, how it shall be applied.*

**A.** indebted by articles, and also on simple contract, pays several sums, and enters them in his 'book as 'paid on account of what was due on the articles. This entry not sufficient to make the application 606

*Quicquid solvitur, solvitur secundum modum solventis* 607

But this rule is to be understood, when the person paying, at the time of

payment declares, on what account he pays the money 607

If the payment is general, the application is in the person receiving *ibid.*

*To whom to be made, and when good.*

Where lands by Act of Parliament are to be mortgaged for a particular purpose, it is incumbent on the mortgagee to see the money applied accordingly 5

Payment of money to a trustee, with notice of the trust, is a mis-payment, though the trustee had judgment and execution against the person who paid the money 197

**A** scrivener lends his client's money to **J. S.** and takes a bond and warrant of attorney to confess judgment in the client's name, to whom he gives a copy of the judgment, but keeps the bond, and afterwards receives the money, and delivers up the bond. Whether **J. S.** is liable to pay this money over again 265

**A.** and **B.** being trustees of money for the separate use of a feme covert, lend it to **C.** who gives bond to the trustees, and the trust is declared in the condition. The bond is kept by the feme, and **B.** having received money for **C.** they settle an account, and **B.** gives **C.** a receipt for 100*l.* as received for the use of the feme. **B.** becomes insolvent. Whether **C.** is well discharged of this 100*l.* *Vide note, p. 540* 539

### PENALTY.

*Vide BOND.*

Lessee for years covenants not to plough pasture-land, and if he does, then to pay 20*s.* *per ann.* for every acre ploughed. The court will not relieve the lessee against the penalty, if he ploughs 119

**A** mortgage is made at 5*l.* *per cent.* with a covenant to pay *six*, if the interest is in arrear for sixty days after it is due. This being the agreement of the parties, equity will not relieve against it as a penalty 134

**African Company** hire the defendant's ship to freight, and the defendant



## A TABLE OF THE PRINCIPAL MATTERS.

covenants not to trade in any of the goods in which the Company dealt, and if he did, to pay double the value for such goods, with liberty to the Company to deduct the same out of the freight. The Company bring a bill to discover whether the defendant traded in any of the said goods.— Though this be a penalty, yet the defendant shall discover, it being his own agreement 244

### PERPETUITY.

*Vide Limitations of Terms for Years under Title ESTATES.*

### PERSONAL ESTATE.

*Where the personal Estate shall be applied to exonerate the real. Vide Title REAL.*

*A.* dies intestate, leaving a wife and two daughters: 200*l.* is found hid in a wall, and 200*l.* in a box. The widow lays out this money in a purchase, and settles the land on herself for life, remainder to her two daughters to tail, remainder to herself in fee. She and her two daughters die, and the plaintiff, as administrator to the two daughters, brings a bill against the heir-at-law, for two-thirds of the 400*l.* out of the land, as personal estate; and it was decreed to him by the Master of the Rolls; but reversed by the Lord Keeper, money having no ear-mark. 440

### PLEA.

Plea of outlawry must be upon oath 37, 198 *contra*

So must a plea of privilege 83

If the party insists the Court of Chancery hath not jurisdiction of the matter in question, he must plead to the jurisdiction of the Court, and not object it at the hearing 484

### PORTIONS OR PROVISIONS FOR CHILDREN.

*Vide Legacies or Portions vested, &c., under Title LEGACY,*

*Vide Trust for raising Portions and Payment of Debts, under Title TRUST.*

By a marriage-settlement a term for years, expectant on failure of issue male, is limited for raising 3000*l.* for daughters not preferred in the life of the father, payable at eighteen or marriage. There are issue a son and two daughters. The father in his life-time raises 1800*l.* for his daughters by sale of lands, which by another deed he had charged with raising 2000*l.* for them, payable at twenty-one or marriage. This 1800*l.* though payable at a different time, and though not intended to go as part of the 3000*l.* (there being a son then living) shall be taken as part thereof 255

By a marriage-settlement, in case of failure of issue male, the remainder is limited to the daughters, until they should raise 3000*l.* for their portions. There is issue a son and two daughters. The father by will gives his daughters 700*l.* a-piece, and dies. The son by his will gives his sisters to the amount of 7000*l.* The father or son's legacies shall not be a satisfaction of the 3000*l.* secured by the settlement 258

One dies intestate leaving younger children, and indebted by mortgage, with a covenant for payment of the mortgage-money. Whether the mortgagee shall be permitted to exhaust all the personal estate by the covenant, and leave the younger children destitute? *Vide the note, p. 310* 309

A term for five hundred years is limited to trustees for raising 5000*l.* for daughters' portions, in case of failure of male issue, payable at the age of eighteen; and maintenance until the portions were payable. There is issue only one daughter, and the father dying, the inheritance descends upon the daughter. The daughter attains the age of eighteen, and dies unmarried; the term being in trustees is not merged, and the 5000*l.* portion of the daughter shall go to her executor or administrator, and not sink in the land 348, 349

On marriage, lands are settled on *A.* for

## A TABLE OF THE PRINCIPAL MATTERS.

life, remainder to the first, &c., son of the marriage in tail male, remainder to trustees for five hundred years to raise 5000*l.* portion for daughters, payable at eighteen or marriage, remainder to *A.* in fee. After the marriage *A.* settles other lands, and a term is created for the raising a like sum of 5000*l.* for daughters on failure of issue of *A.* by any wife, and it is payable at a different time, viz. sixteen or marriage. There is issue only one daughter, who attains eighteen, and dies unmarried. The portion shall go to her executor or administrator. But there shall be but one 5000*l.* raised, and the executor or administrator shall have the election, by which of the settlements he will take

348, 354, 439

*A.* portion is charged by will on a real estate, payable to a daughter at twenty-one or marriage. The daughter dies at six years old. Her portion shall sink in the land for the benefit of the heir, and not go to her administrator

416

Where portions are provided for daughters by a settlement, the father cannot, by his will, annex any condition to the payment of the portions, nor devise them over, in case of the death of any of the daughters before their portions become payable

452

By marriage-settlement a term for five hundred years is limited to raise 5000*l.* if but one daughter, to be paid her at twenty-one, or marriage, which should first happen, after the death of the father and mother, or within six months after either of those days or times. There being one daughter only, and she having attained twenty-one, and her father being dead, her portion was decreed to be raised in the life-time of the mother

458

By a marriage-settlement lands are limited to husband and wife for their lives, remainder to the heirs male of their bodies; and if there should be no issue male, and one or more daughters, then to trustees for five hundred years from the decease of the survivor, in trust by sale or mortgage to raise 1000*l.* for

daughters' portions; but there is no time appointed for the payment of them. The father dies leaving a daughter only. The portion vesting in the daughter, it was decreed to be raised by a sale in the life-time of the mother; with reasonable maintenance in the mean-time, though no maintenance is provided by the settlement

460

*A.* devises his estate to *B.* his son, charged with 500*l.* to the daughter of *B.* payable at twenty-one, or marriage. *B.* marries his daughter and gives her 1500*l.* portion, but no notice is taken of the 500*l.* legacy, nor any release given. Twenty-one years afterwards the daughter and her second husband bring a bill against the father for the 500*l.* Bill dismissed. The 1500*l.* shall be presumed a satisfaction of the 500*l.* especially after such length of time

484

*A.* by marriage-settlement is tenant for life, remainder to trustees to raise 4000*l.* for younger children's portions, as *A.* should appoint; remainder to his first, &c., son, in tail. *A.* appoints the 4000*l.* amongst his younger children, and particularly 2600*l.* to his second son. The eldest son afterwards dies, and *B.* becoming eldest son, and intitled to the whole estate after his father's death, *A.* makes a new appointment of the 2600*l.* to one of his daughters. Decreed the last appointment to take place; the first being made to *B.* upon a tacit or implied condition, that he should not become eldest son

598

Lands by marriage-settlement are limited to the sons in tail male, remainder to *A.* the husband in fee. Provided if *A.* and his wife, or either of them, die without issue male living at the time of his or her death, leaving only one daughter unmarried, the trustees to stand seised, till they have raised 1500*l.* for such daughter; and if more daughters unmarried at the death of *A.* and his wife, or either of them, and no issue male living begotten between them, then 3000*l.* for such daughters. *A.* dies leaving daughters, and his wife ex-

## A TABLE OF THE PRINCIPAL MATTERS.

*seint* of a son, which is afterwards born. Whether the daughters are intitled to the 3000*l*. 578

A term is limited in remainder after the father's death by marriage-settlement, upon trust if he died without issue male, and there should be one or more daughters unmarried or unprovided for at his death, the trustees should raise 2000*l*. for their portions, to be paid at eighteen or marriage. The mother being dead, and there being one daughter, who was married, and no son, the court would not decree the 2000*l*. to be raised in the life of the father, it not vesting till his death 640, 655

If a portion is directed to be paid at eighteen or marriage, and the term is absolutely vested; the daughter shall not expect during the life of the father, but the term may be sold in the father's life, although a term in remainder, and not in possession 656

If the trust of a term is limited on a condition precedent; as to commence, if the father dies without issue male by his wife, in trust to raise portions for daughters; there, if the wife be dead without issue male, leaving a daughter, the term has been decreed to be sold, though the father was living *ibid*.

But by the Lord Chancellor *Cowper*, if it was *res integra*, he should not decree it 657

By a marriage-settlement 2500*l*. is provided for the issue of the marriage in such proportions as the husband shall appoint. He dies leaving a daughter only, and makes no appointment. She shall have the 2500*l*. 665

By a marriage-settlement a term is limited to trustees on failure of issue male of the marriage, in trust after the commencement of the term, to raise 4000*l*. by rents and profits, sale or mortgage, for daughters' portions payable at twenty-one or marriage. The husband died, leaving only a daughter, who married in the life-time of the mother. The 4000*l*. shall not be raised during the life of the mother, nor will it carry interest in the mean time 760

## POSSESSION, HOW FAR FAVOURED.

Bill for a specific performance of a covenant, whereby the plaintiff was to have a pit in the defendant's ground for digging black stones. Proved that the defendant, and those under whom he claimed, had been in possession of a pit there above sixty years. Bill dismissed 127

After a long enjoyment of a water-course running to a house and garden, through the ground of another, it shall be presumed that the owner of the house has a right to the water-course, unless the other party can show a special license, or an agreement to restrain it in point of time 390

A long quiet enjoyment is the best evidence of a right 391

Rent decreed to a Lord of a Manor issuing out of a copyhold estate, though the estate was held of another manor, and the plaintiff had no other evidence of his title to the rent, but that it had been paid him for near twenty years 516

## POSSIBILITY.

A possibility cannot be assigned; but may be released. *Vide note*, p. 564 563

## POWER.

*Discretionary Power.* *Vide* DISCRETION.

*Defective Execution of a Power.* *Vide Defective Conveyance made good in Equity, under Title DEEDS.*

If a man by settlement has a power to limit the lands to such of his children, and in such proportions, as he by any writing shall appoint, he may not only limit the lands to any of his children, but may charge it with rent-charges or sums of money for any of them. *Vide the note* 80

If a man has a power to dispose of money by his will, this is assets, and liable to his debts 319

A. on marriage conveys his land to a trustee, to the use of himself for life,

## A TABLE OF THE PRINCIPAL MATTERS.

remainder to his wife for life, remainder to the heirs of their two bodies, remainder to A. in fee: proviso that, in default of issue of the marriage, the trustee shall convey to such uses as the survivor shall appoint. Though the husband devises the land, and dies without issue, yet the wife surviving has a good power of disposing of the estate by her appointment 376

Tenant for life with power to make a jointure of 1000*l.* *per ann.* covenants upon marriage to make a jointure on his wife of 1000*l.* *per ann.* and afterwards gives a particular of lands mentioned to be 1000*l.* *per ann.* which are settled for the jointure, but prove to be but 600*l.* *per ann.* Decreed the jointure to be made up 1000*l.* *per ann.* by the issue in tail 379

A. by marriage-settlement is tenant for life, remainder to trustees to raise 4000*l.* for younger children's portions, as A. should appoint, remainder to his first, &c., sons in tail. A. appoints the 4000*l.* amongst his younger children, and particularly 2500*l.* thereof to B. his second son. The eldest son afterwards dies, and B. becoming eldest son, and intitled to the whole estate after his father's death, A. makes a new appointment of the 2600*l.* to one of his daughters. Decreed the last appointment to take place; the first to B. being made upon a tacit or implied condition, that he should not become the eldest son 528

In a settlement a power is reserved to tenant for life in possession, to make leases of all lands anciently demised, reserving the ancient rents, and of the other lands, reserving the best-improved rents. Tenant for life being ill, and not having the counter-parts of the old leases, makes a general lease to his sister of all the lands; *reddend'* for the lands that had been let the ancient and accustomed rents, and for the lands not usually let, the full and improved rents and value thereof. Lease adjudged void by the Lord Keeper, and the Lord Chief Justice *Trevor*, *contra* the opinion of the Lord Chief Justice *Holt* 531, 542

Where a woman on her marriage reserves a power to dispose of her personal estate, all that she dies possessed of shall be taken to be her separate estate, or the produce of it, unless the contrary can be made appear; and as she has power over the principal, she may dispose of the interest 535

By marriage-settlement 2500*l.* is provided for the issue of the marriage, in such proportions as the husband shall appoint. He dies leaving a daughter only, and makes no appointment. She shall have the 2500*l.* 665

### PREROGATIVE.

#### *Debt to the Crown.*

By the statute of Queen *Elizabeth*, where one is a receiver of the revenues of the crown, his real estate is bound, and stands liable to answer the King's debt, though he is not actually a debtor to the King, nor any extent against him in several years after 389, 390

Where a term is attendant on the inheritance, if the King extends the inheritance, he shall have a right to the term. But if the King's receiver is possessed of a term in gross, and it is assigned before an actual extent, the assignment is good against the crown 390

### PRESENTATION TO A CHURCH OR CHAPEL.

Ground is granted to trustees wherewith to erect a chapel for the use of the inhabitants. Decreed in the dutchy, that the nomination of the minister was in the inhabitants 387

A manor with an advowson appendant, being mortgaged, the church becomes void. The mortgagor shall present, and if pending a suit by the mortgagee to foreclose, the church becomes vacant, though the defendant has no bill, yet he offering to pay principal, interest, and costs, the court will grant an injunction to stay proceedings in a *quare impedit* brought by the plaintiff 401

## A TABLE OF THE PRINCIPAL MATTERS.

One seised of the manor and patronage of *W.* by will gives 100*l.* *per ann.* rent-charge, and the right of nominating to the church to six trustees, who, when reduced to three, were to choose others. The only surviving trustee assigns the trust to new trustees, who nominate to the church, being a donative. Decreed the assignees of the trust, though the assignment was made by one only who survived, had the right to 'nominate to the church, and not the owner of the manor 748

### PRIVILEGE.

*Vide Title PLEA.*

Bill is brought to redeem a mortgage against one, who was then an ambassador in *Spain*. The court ordered all proceedings to stay for a year and a day, unless the ambassador should return sooner 317

An ambassador, if he is a defendant, has a right to an *essoyn* for a year and a day, and after to renew it, if the occasion continues. And a *protection* lies for an ambassador, *quia profecturus*, or *quia moraturus* 317

### PROCESS.

*Subpœna.*

Leaving of a *subpœna* to appear and answer at the lodgings of a defendant who was not to be found, not good service, though an order was obtained for that purpose; it appearing afterwards, that the defendant had left his lodging above a year before the *subpœna* served 369

*Attachment.*

After a writ of execution, and an attachment returned for not performing a decree for payment of money, the court will not give the defendant leave to be examined, unless he gives security to perform the decree 91

### PROPORTION.

*Vide AVERAGE.*

What proportion a devisee for life

ought to bear of mortgages and other incumbrances on the estate. *Vide the note* 301

*A.* is intitled to 8000*l.* in the Chamber of *London*, and whilst a stop was put to payment there, he makes his will, and declares, that when his executors should receive the 8000*l.* he gives 2000*l.* to three hospitals. Afterwards an act passed for settling a fund for paying a perpetual interest for the orphan's debt, and the 8000*l.* is then worth to be sold but 6300*l.* yet decreed the whole 2000*l.* to be paid, and that there should not be an abatement in proportion 547

*A.* devises a college-lease for years to his wife for life, remainder to his son, she paying 10*l.* *per ann.* to the son during her life. The son dies in the life of his mother. The rent continues during the mother's life, and shall go to the executor of the son; and the mother is compellable to pay her proportion of the fine for a renewal of the lease 666

### PURCHASE AND PURCHASE-MONEY.

Where lands are by Act of Parliament to be mortgaged for a particular purpose, it is incumbent on the mortgagee to see the money applied accordingly 5

*A.* enters into partnership in fifths, with three others for twenty-one years, in digging for mines in *A.*'s lands; *A.* to have two-fifths, and in consideration of his ownership of the land, to have a tenth of the share of the other partners. *A.* dies, and his widow sets up a voluntary settlement made after marriage. The court inclined the partners were as purchasers, and that the voluntary settlement should not stand good against them. *Vide note*, p. 328, 326

*A.* lessee at a rack-rent, and who paid no fine, is a purchaser, and shall avoid a voluntary conveyance 327

### PURCHASER.

*How far favoured.* *Vide NOTICE.*



## A TABLE OF THE PRINCIPAL MATTERS.

*As to a Purchaser's Buying in of Incumbrances.*

*Vide under Title SECURITIES.*

Bill is brought by a bishop against an assignee of a lease, which was made to commence after the estates then in being were determined, charging that the defendant knew the lease was expired, and that the same did appear by writings in his custody. Defendant pleads he was a purchaser of the lease, and that he was then informed, there were fifty-seven years to come in the lease, and therefore gave nineteen years' purchase for it. Plea allowed 255

If a purchaser gives a note for payment of part of the purchase-money, and dies: this note will be no charge in equity upon the land 261

A jointress is not bound to answer, whether her husband had any other title than as assignee of a mortgage, she denying, that she had any notice of the mortgage, and insisting she was a purchaser without notice, and that her husband alleged he was in by descent 701

R.

### REAL ESTATE.

*Where the personal Estate shall be applied to exonerate the Real.*

Personal estate applied in ease of the real against the residuary legatee. *Vide note, p. 44* 43

A. having mortgaged his lands, by will appointed them to be sold for payment of the mortgage-money; and in another part of his will devised a moiety of the mortgaged premises to B. and devised his personal estate to his executor for payment of his debts. The personal estate shall be applied to pay off the mortgage in favour of the devisee 112

A. by will gives 20*l.* to B. and makes him executor, and gives his real estate to C. paying his debts and legacies, and in default of payment within a limited time, the legatees and creditors to enter and hold till paid, and

makes no express disposition of the surplus of his personal estate. The surplus shall be applied in ease of the real estate 120

One devises lands to A. for payment of his debts, and devises other land which he had mortgaged to B. and also gives B. his personal estate. B. must take the mortgaged lands *cum onere*, and though the personal estate is devised to B. and land is devised for payment of debts; yet the personal estate will be subject to the debts. *Vide the note* 183

One dies indebted by mortgage, with a bond to perform covenants, and owes other bond-debts. The personal estate shall be applied to pay off the bond-debts in the first place 273

A. devises his personal estate to his wife, whom he makes executrix. She takes as executrix, and the personal estate shall be applied to exonerate the real 302

One dies intestate, being indebted by mortgage, and leaving several younger children: in the mortgage there is a covenant for payment of the mortgage-money. Whether the mortgagee shall be permitted to exhaust all the personal estate by the covenant, and leave the younger children destitute? *Vide note, p. 310* 309

A. joins with B. her husband, in making a mortgage for years of her inheritance, to raise money to buy him a place: B. covenants in the mortgage to pay the money, and on payment thereof at the day, the term by the proviso is to cease. The mortgage is afterwards assigned, and the proviso is, that on payment by the husband and wife, or either of them, the term is to be assigned, as they, or either of them, should direct. B. by letter promises to apply the profits of the place to pay off the mortgage. He pays off the mortgage, and takes an assignment in trust for himself, and by will gives it to his second wife. The son and heir by the first wife brings a bill to have the mortgage assigned to him. The court would not relieve him but on payment of principal, interest, and costs:



## A TABLE OF THE PRINCIPAL MATTERS.

- but this decree was reversed by the House of Lords 437
- A.** by will, after some legacies, gives the residue of his personal estate to his daughter, and gives his real estate to her and her heirs; and if she died under twenty-one and unmarried, gives his real estate to his brother. The daughter dies at sixteen, and by will gives all her personal estate to *B.* The estate being subject to a mortgage, whether the personal estate in the hands of *B.* shall be applied to exonerate the real? *Vide note, p. 470* 469
- A.** by will, computing the surplus of his personal estate, after debts and legacies paid, would amount to 5800*l.* gives the 5800*l.* to some of his grandchildren in several proportions; and wills, if the surplus fell short, they should abate in proportion; if it amounted to more, it should be divided between them in the same proportions. Decreed that a mortgage on an estate devised to two other grandchildren, should be paid out of the personal estate, although by this means the personal estate would fall short of the 5800*l.* 477
- An express devise shall not be defeated by applying the personal estate to pay off a mortgage in favour of an heir at law *ibid.*
- A.** by will charges his real estate with the payment of his debts, legacies and funeral expenses; and devised to his wife, whom he made executrix, all his personal estate, not otherwise disposed of. Decreed the personal estate to be applied in ease of the real; there being no words in the will to exempt the personal estate from the debts, and the wife taking the personal estate as executrix 568
- A** man having mortgages, one of which was a mortgage in fee of lands in *D.* on which he had entered, devises those lands to his two daughters and their heirs, and the other mortgages to them, their executors, &c. One of the daughters dies. Her share of the lands in *D.* shall go to her heir, and not to her administrator; it being the testator's intent that those lands should pass as real estate to his daughters; though as between him and the mortgagor, they were but a mortgage 582
- A** mortgage in fee is made redeemable, on payment of 300*l.* and interest upon any *Michaelmas-day*, on six months' notice. Mortgagor dies, having devised his personal estate to his wife. Personal estate not liable to pay off the mortgage in ease of the real estate; there being no covenant express or implied 701
- One** devises his fee-farm rents to be sold for payment of his debts, and gives the surplus to his heir-at-law, and younger brother; devises his household goods to go with his house, and the residue of his personal estate to his sister. The personal estate shall not be applied to pay debts in ease of the real estate 718
- There is a difference between charging an estate with payment of debts, and devising an estate to be sold out and out to pay debts *ibid.*
- One** directs his debts and legacies to be paid out of the rents of his real estate, and that his executors shall receive the rents, till his nephew was twenty-five, and then pay the surplus of the rents to him, and gives his nephew the surplus of his personal estate. The nephew dies an infant. *Per. Cur.* If the surplus had been given to a third person, he should have had the personal estate discharged of the debts; but being given to the same person to whom the land is devised, the surplus of the personal estate was not intended to be exempt from the debts. 740
- Where the real Estate shall be charged.*
- One** borrows 70*l.* of *A.* and as a security gives him a warrant of attorney, for a judgment in ejectment, of three closes of land, on a feigned demise for twenty years. This is a defective security; but a good agreement in equity to charge the land 151
- A.** purchases lands of *B.* and mortgages back those lands for part of the purchase-money, and gives a note to *B.* for payment of 200*l.* the other part thereof. *A.* devises those lands for payment of his debts. This 200*l.*

## A TABLE OF THE PRINCIPAL MATTERS.

note, though for part of the purchase-money, shall not be preferred to other debts, nor be a charge on the land in equity 281

### RECOGNIZANCE.

*Vide Judgment, &c., under Title*  
**SECURITIES.**

### RECOVERY COMMON.

A defective common recovery, as to a tenant to the *præcipe*, will bar an estate-tail in a trust 132  
Bare articles will bar an entail of an equity. *Vide note* 926  
A child in *ventre sa mère* may be vouched 711

### RELEASE.

Whether a release by will to *J. S.* of all debts, accounts, and demands, will transfer the property of goods, which he has in his hands, belonging to the testator? *Vide note*, p. 115 114  
*A.* devises to *B.* 100*l.* and by his will releases him of all debts and demands; and afterwards *A.* lends *B.* 100*l.* Whether this 100*l.* is released by the will? *Vide note*, p. 137 136  
If one says in his will, *I forgive such a debt, or My executor shall not demand it, or shall release it*; this is a discharge of the debt, though the debtor dies in the life of the testator 522  
But if a debt is devised by will to the debtor, without words of release or discharge, and the debtor dies in the life-time of the testator, the debt subsists *ibid.*  
A possibility cannot be assigned; but it may be released. *Vide note*, p. 564. 563

### REMAINDER.

*Devise or Limitations of Remainders over of Leases, Money, &c.* *Vide Limitations of Terms for Years, Money, &c., under Title* **ESTATES.**

A woman covenants to stand seised to the use of herself in tail, remainder

to such uses as she by writing should appoint; for want of appointment, to the use of her kinsman in fee. Whether this remainder to the kinsman is good, being on a covenant to stand seised? 7

Land is devised to *A.* for sixty years, if he lives so long, and from and after his death to *B.* his eldest son in tail. Whether the limitation of the intail to *B.* is good, being expectant on a term of sixty years? 131

Lands are devised to trustees and their heirs, in trust to receive the rents, till the testator's son came to twenty-one, and to pay one-third to his wife, in lieu of dower, and out of the other two-thirds, to raise portions for his daughters, and then devises the lands to his son, when twenty-one, in tail, with remainder over. The son died before twenty-one, without issue, and the mother, who survived him, died before such time as the son would have attained twenty-one. The remainder over is good, though the son died before twenty-one 138

*A.* having an estate for three lives, settles it to the use of himself in tail, with remainder over. The remainder is void, or if good, it may be barred by deed, surrender, or other conveyance. *Vide note*, p. 226 225

Tenant for life of a copyhold, with remainder to his first, &c., son in tail, takes a surrender to his own use of the reversion in fee before the birth of a son. The contingent remainder is not destroyed, the freehold being in the lord 243

*A.* seised in fee, by deed and fine conveys the lands to the use of trustees for seventy years, remainder to trustees for three thousand years, and after the death of *A.* then to his son *B.* Whether the remainder to *B.* be good? *Vide note*, p. 372 370

### RENT AND RENT-CHARGE.

The incumbent of a parsonage, and the grantee of the next avoidance, join in a lease of the tithes, rendering rent at *Midsummer* and *Christmas*. The incumbent dies before *Midsummer-day*, the lessee having first got in the greatest part of the tithes. Who

## A TABLE OF THE PRINCIPAL MATTERS.

- shall have the *Midsummer rent*?  
*Vide note*, p. 205 204
- One takes a mortgage of a lease for 100*l.* subject to a ground-rent. He loses his 100*l.* mortgage-money, never enters on the premises, and yet is sued for the ground-rent. No relief in equity, it being his own folly to take his security by way of assignment, and not by way of under-lease 374
- A woman having 120*l.* *per ann.* rent-charge for her jointure, and there being a great arrear, and not sufficient distress on the land, she brought her bill against the devisee of the inheritance, that he might set out sufficient distress, or that she might hold and enjoy till paid the arrears. *Cur.* When the party has provided one remedy, we will not give another, unless some fraud be proved in letting the land lie fresh, or depasturing the land in the night-time only; and declared they could give no relief 382
- Devisee of a rent-charge out of lands, with power of distress, dies; his executor brings a bill for the arrears. Decreed that he may enter, and hold and enjoy, till paid the arrears and costs 386
- Lord of the manor of *A.* brings a bill for a rent of 8*s.*, payable out of the manor of *B.* and though it appeared by the rolls of the manor of *B.* from *Hen. VIII.* to *Car. I.* that the copyhold was held of the manor of *B.* and was so admitted by the plaintiff, and he had no other evidence of his title to the rent, but that it had been paid him near twenty years; yet the court decreed him the arrears and growing rent, and denied the defendant a trial at law 516
- By the rules of law in case of *incroachment* of rent, if the tenant makes but one payment of more than was due, he shall never go back from it 517
- A.* is a tenant in tail, subject to a rent-charge to *B.* for life. *A.* dies, the rent-charge being in arrear. The issue in tail not liable by the statute of 32 *Hen. VIII. ca. 37.* to the arrears incurred in the life of his ancestor 612
- One claims a fee-farm rent under the statute of *Car. II.* and the land out of which the rent was issuing, being under a sequestration, the court would not order the sequestrators to pay the rent out of the money in their hands, but left the party to take his remedy at law for the rent, notwithstanding the sequestration 713
- For the encouragement of purchasers of fee-farm rents, the statute of *Car. II.* gives the purchasers the same power of distress, as the king had, not only on the land out of which the rent issues, but on any other land of the tenant 714
- Though the king may distrain on any other of the lands of his tenant, as well as on those out of which the rent issues; yet if the tenant alien, devise, or lease at will only, his other lands, the king cannot distrain on those lands *ibid.*

### RENTS AND PROFITS.

Where debts are directed by will to be paid out of rents and profits, the court, if necessary, will decree a sale 26

### REPLICATION.

Where there is a plea and answer, and the plaintiff replies, the replication must be to the answer as well as the plea 46

### RETURN OF WRITS.

A commission returnable *sine dilatione* must be executed before the second return of next term; and if executed afterwards, it is void 197

Where the sheriff returns *nulla bona* upon a *feri facias* and there is a recovery against him for a false return, that vests no property of the goods in him; but they remain in the party, and are liable to any subsequent execution 239

### REVIVOR. *Vide* ABATEMENT.

## A TABLE OF THE PRINCIPAL MATTERS.

term of years attendant on the inheritance of *B.*'s estate, which had been assigned to three trustees. In 1688, *B.* and one of the trustees assign the term to *C.* for securing money then borrowed of him. *A.* having notice of this assignment, gets an assignment of the term from the two other trustees to *D.* in trust for better securing his 1000*l.* *A.* shall have the benefit of this assignment, and be paid before *C.* 524

**SHERIFF.** *Vide under Title* RETURN OF WRITS.

**SHIP. PART-OWNERS OF A SHIP.**  
*Vide under Title* PARTNERS.

**SIMONY.**

Mortgagee of a manor and advowson being in possession, and the church becoming vacant, makes a simoniacal presentation of *A.* which is rejected by the bishop. Then the mortgagor and mortgagee join in presenting *B.*—*C.* gets the title of the crown, and brings an information in the name of the Attorney General, to remove the mortgagee's title, and that it might not be set up at law; and it was so decreed 549

**SPECIFIC PERFORMANCE.**

*When to be decreed, and when not.*  
*Vide under Title* AGREEMENT.

**SPIRITUAL COURT.**

An account decreed of an intestate's personal estate, notwithstanding an account had been before taken, and a distribution decreed in the spiritual court 47

**STATUTES.**

In an Act of Parliament, the intention appearing in the preamble, shall control the letter of the law 58  
The Act of Parliament relating to the *New River Company* ought to have

a liberal construction, so as the town in general may be served with water 431

By Act of Parliament an estate is vested in trustees to be sold, and the money to be applied first to pay off mortgages, and then to pay statutes, judgments, and recognizances. Decreed that subsequent mortgages shall be paid before precedent statutes 711  
A general saving in an Act of Parliament must not control the express provision in the Act 718

**STATUTE OF LIMITATIONS.**  
*Vide Title* LIMITATION.

**STATUTE OF FRAUDS AND PERJURIES.** *Vide under Title* AGREEMENT.

**STATUTES FOR SECURITY.** *Vide under Title* SECURITIES.

**SUBPOENA.** *Vide under Title* PROCESS.

**SURETY.**

A mistake in the title of an order amended, though to charge a surety, who gave a recognizance to abide the order of hearing 376

*A.* is bound as a surety in a recognizance dated May 5, 1660, for payment of money, which happened not to be made good, by the convention act, for confirming judicial proceedings, the act not extending to that day. *A.* being a surety only, and having no consideration for entering into this recognizance, the court would not make it good, nor allow it to be so much as a debt 393

The principal in a bond, being arrested, gave bail, and judgment is had against the bail. On a bill by the sureties, who had been sued on the original bond, and paid the money, decreed the judgment against the bail to be assigned to them, in order to reimburse them what they had paid, with interest and costs 608

## A TABLE OF THE PRINCIPAL MATTERS.

### SURVIVOR.

*Vide* JOINT-TENANTS.

- Money is devised to be laid out in land, and settled on the children of *J. S.* Land is purchased, and settled on them and their heirs, and one of them dies. Decreed the land should not survive 46
- Agreement by one joint-tenant to sell does not bind the survivor 63
- Where two are bound jointly, and one dies, the survivor only is liable. Otherwise, if bound jointly and severally 99
- Devise to two, equally to be divided, and to the survivor of them; they are joint-tenants 323
- A.* and *B.* are joint-tenants for their lives. *A.* makes a lease of his moiety for years, to commence from his death, if *B.* so long live. This lease shall bind the survivor *ibid.*
- Two men joint-tenants in fee: one of them, being sick, assigns his moiety by deed to his wife, and afterwards devises it to her. The assignment void, and the devise will make no severance. *Vide note, as to the devise* 385
- Administration is granted to two, and one of them dies. The administration does not cease, but survives to the other 514
- But if a letter of attorney is made to two, and one dies, the authority ceases *ibid.*
- A.* and *B.* are joint-tenants of the trust of a term. *A.* dies. *B.* shall have the whole by survivorship 556
- If a child of a freeman of *London* dies under twenty-one, his orphanage-part by the custom will survive to the other children, and he cannot devise it 559
- A debt is devised to two, and if either died, to the survivor. One died before the debt was got in. The survivor shall have the whole debt 654

T.

TERM' FOR YEARS. *Vide* ESTATE FOR YEARS.

### TITHE.

Tithe ore is not due, but by particular custom 46

### TRIAL.

- New trial granted after one trial on an issue directed; the matter in question being of value, and concerning all the copyholds in the manor 75
- Bill for writings and a partition; defendant insists the plaintiff has no title, and that there is an intail subsisting: the court gave the plaintiff a year's time to try his title. A trial is had, and verdict for the plaintiff. Upon coming on upon the equity reserved, it was insisted, this being a matter of right of inheritance, defendant ought not to be bound by one trial; *sed non allocatur*, it being a decree only for a partition. *Quare. Vide the note* 232
- Bill for a new trial, plaintiff suggesting, that her mark to the bond in question was forged by one *Webb*, and that all the witnesses to the pretended bond were dead, and that the verdict was obtained by surprise. A new trial was ordered 240
- Upon an appeal, the House of Lords granted a new trial, to try whether a bond was forged or not, though a verdict for the bond had been before obtained at law, on *non est factum* pleaded, and though new trial denied in equity 376, 419
- If after the trial a witness be convicted of perjury, or the party of forgery, it is a good cause for granting a new trial 379
- Precedents where new trials, and in an indifferent county, have been granted, and also some denied 437
- An issue at law was directed in a matter where the plaintiff had a proper action at law, and was under no impediment of bringing such action 503

### TRUST AND TRUSTEE.

Devise of 1500*l.* to *A.* and *B.* for such uses as the testator had declared to them, and by them not to be disclosed. *A.* in the life of *B.* writes a  
3 E 2



## A TABLE OF THE PRINCIPAL MATTERS

- letter disclosing the trust. This is a good declaration of the trust 50, 106
- Trustee appointed to raise and pay a portion of 500*l.* to *A.* Trustee enters and gives judgment to *A.* for paying the 500*l.* Trustee raises the 500*l.* and more, and becomes insolvent: whether the land is discharged? 35, 178
- Where a trust appears upon the face of the will, the person may be averred 100
- Whoever purchases an estate from a trustee, with notice of the trust, becomes the trustee himself 271
- A.* in consideration of 80*l.* conveys an estate absolutely to *B.* and brings a bill to redeem. *B.* by answer insists the conveyance was absolute, but confesses, that after payment of the 80*l.* and interest, he was to stand seised for the benefit of the plaintiff's wife and children. Plaintiff replies to the answer, and the trust is not proved; yet decreed the trust for the benefit of the wife and children 288
- Trustees joining with the *cestui que trust* in tail in a feoffment, will bar the estate-tail in the trust. *Vide note*, p. 345 344
- How conveyed, barred, or transferred, and how to be executed.*
- One appoints his trustees to convey his lands to his daughter after his death, and afterwards has a son. The conveyance shall be made to the son 104
- A* defective common recovery as to a tenant to the *præcipe*, will bar an estate-tail in a trust 132
- Bargain and sale only will bar an estate-tail in a trust. *Vide note* 133
- But *contra* 552
- Where a trust is limited to a man and the heirs of his body, with remainder over, the court will not decree the trustees to convey to him an estate in fee, but an estate-tail only 428
- Where money is devised to be laid out in land, and settled to the use of *J. S.* in tail, with a remainder over; the court ought not to decree the money to be paid to *J. S.* although he will have power over the land, when purchased, by suffering a recovery; but ought to decree the money to be laid out, and the land settled according to the will 552
- A.* being a tenant in tail of the trust of a copyhold estate, with remainder over, and the trustees refusing to surrender the legal estate to him, he brought his bill for that purpose, and, pending the suit, went to the Lord's Court, and offered to surrender, but was refused, not having the legal estate; and thereupon he made his will, and gave the estate to his wife and children. Decreed the estate to go according to the will, the court conceiving the will sufficient to bar the intail of a trust 583
- The trust of lands is devised to *A.* for life, with power of leasing, remainder to the heirs male of his body. Decreed the trustees to convey an estate to *A.* and the heirs male of his body, and not an estate for life only, with remainder to his first, &c., sons in tail male 670
- But otherwise it would be, if lands were agreed to be so settled by marriage-articles 671
- When a question arises how a trust ought to be executed by a conveyance, there is no better rule than to observe and follow what has been done at law in the executing of conditions that are executory, and to be performed, so far as the case will admit 736
- A.* devises lands to the *Drapers' Company* in trust to convey the same to *B.* for life, and to his first, &c., sons for their lives successively, and so to their issue male for their lives only, remainder over. Though this is a vain attempt to create a perpetuity, yet the trustees shall make as strict a settlement as may be, making all the persons in being but tenants for life; but the limitations to the sons unborn must be in tail 737
- A.* seised of the manor and patronage of *W.* by will gives 100*l.* *per ann.* rent-charge, and the right of nomination to the Church, to six trustees, and those trustees, when reduced to three, to choose others; five of the trustees died, and the sixth assigned his trust to others, who nominate to the church (being a donative). Decreed the assignees of the trust,



## A TABLE OF THE PRINCIPAL MATTERS.

though the assignment was made by one only, who survived, had the right to nominate to the church, and not the owner of the manor 748

### *Resulting Trust, and Trust by Implication and Construction.*

A purchase by the father in the name of his infant son, decreed to be an advancement for the son, and not a trust for the father 19

A. conveys lands to the use of himself for life, remainder to his wife for life, remainder to his son in fee, and at the same time makes his will, and gives the same lands to his son in tail charged with his debts. The son not a trustee for the father in the settlement. Otherwise it would have been, if the intire fee had been conveyed to the son. *Vide note*, p. 29 28

A. purchases a walk in a chase, and takes the patent to himself and his wife, and J. S. during their lives and the life of the survivor; the husband dies indebted. The wife decreed the benefit of the patent during her life, though A. had not left assets to pay his debts, but after her death J. S. to be a trustee for the executor of the husband, and the patent to be applied towards payment of debts 67

In the purchase-deed the consideration-money is mentioned to be paid by the grantee, and there was no express declaration of trust in writing; yet upon the circumstances of the case decreed a trust, though the grantee had devised the estate for payment of his debts 167

In a will the devisee is to take to his own use if no trust be declared 247

A mortgagee assigns over his mortgage to J. S. and declares a trust by parol for other persons; J. S. acknowledges the trust. The court inclined that there being an express trust declared by parol only, it shall prevent a resulting trust to the assignor 294

The statute of *Frauds* and *Perjuries*, which saves resulting trusts, extends only to such as were resulting trusts before the statute *ibid.*

Land is devised to trustees to sell, and out of the money arising by the sale,

among other sums, to pay 100*l.* to the heir-at-law; and no disposition is made of the surplus. The land shall not be turned into personal estate, nor more sold than is necessary to pay the legacies 425

A. by will devises his land to trustees to sell, and to dispose of the money as he by writing should appoint, and for want of appointment, to his four nephews. A. by writing, appoints his trustees to pay several sums to several persons; but not near the value of the land. Decreed the surplus to the heir, and not to the nephews, as an interest resulting, and not disposed of 571

Lands are devised to three persons and their heirs, to the use of them and their heirs, upon trust to convey part to A. for life, and other part to B. in tail; but gives no direction as to the remainder in fee. Though two of the trustees were related to the testator, yet the remainder in fee will not belong to them, but be a resulting trust for his heir-at-law 644

Lands are devised to executors to be sold for payment of debts; the surplus, if any, to be deemed personal estate, and go to the executors, to whom the testator gave 20*l.* a-piece. Surplus decreed to the heir-at-law. *Vide the note* 645

A term for five hundred years is limited in trust to pay debts, and four years after to attend the inheritance. As soon as debts paid, a trust for the heir *ibid.*

Two hundred pounds a-year devised for sixteen years to pay debts and legacies. Surplus a trust for the heir *ibid.*

### *For raising Portions and Payment of Debts.*

*Vide Devise of Lands to be sold for Payment of Debts, &c., under Title WILL.*

### *Vide PORTIONS OR PROVISIONS FOR CHILDREN.*

Lands are settled on marriage upon condition, if there should be a daughter, the persons in remainder should pay

## A TABLE OF THE PRINCIPAL MATTERS.

her 2000*l.* at sixteen, with a power for the daughter in case of non-payment to distrain for the portion. Though no power to sell, yet a sale decreed for raising the portion 1

Where debts are directed by will to be paid out of rents and profits, the court, if it is necessary, will decree a sale 26

A trustee for raising and paying a portion of 500*l.* to *A.* enters and gives judgment to *A.* to pay the 500*l.* when raised. He raises the 500*l.* and more, and then becomes insolvent. Whether the land is discharged? *Vide the note* 85

Tenant for life, with power to charge the lands with 5000*l.* for daughters' portions, by will charges the lands with 5000*l.* for daughters' portions, and directs that the trustees shall enter and hold until the money be raised by rents and profits. The court decreed a sale for raising the money 310, 420

Reversion in fee expectant on an estate for life, is devised to *A.* and *B.* for payment of debts and legacies, and *A.* and *B.* are made executors. The devisees being made executors, the money raised by sale is legal assets, and the debts must be first paid. Otherwise, if the trustees had not been made executors. *Vide note*, p. 249 248, 405

Where a term is limited to raise portions for younger children by rents and profits, the heir may have the portions raised by a sale, though the younger children oppose it, as well as the younger children may insist upon a sale, if they think fit 420

*A.* by will gives 500*l.* to his daughter to be paid by his executor at her age of twenty-one, out of his personal estate, and rents of his real; and if not raised by that time, the executors to stand seised and take the rents, till the 500*l.* was raised; and after payment gives the land to his son. The daughter marries at eighteen, and dies under twenty-one, and the husband administers. Decreed the portion to be raised, and that by a sale, though the land, by reason of

the incumbrances, would produce little more than the 500*l.* 424

By Act of Parliament an estate is vested in trustees to be sold, and the money to be applied first to pay off mortgages, and then to pay statutes, judgments, and recognizances. Decreed that subsequent mortgages shall be paid before precedent statutes 711

### *Trust for preserving contingent remainders.*

Trustees for preserving contingent remainders are decreed to join in a sale, the estate settled being only an equity of redemption subject to a mortgage, and there being no issue born, and the wife consenting to the sale 303

If tenant in tail joins with the trustees for preserving contingent remainders, in barring the limitations in the settlement, it is no breach of trust in the trustees. *Vide note*, p. 755 754

### *Trustee. How and when to be charged and discharged, and what Allowances to have.*

A legacy of 100*l.* is devised to an infant, payable at twenty-one, and if he dies before, then to go over, and the interest is for his maintenance in the mean time. The trustee pays 20*l.* to place the child out an apprentice, who died under twenty-one. The trustee allowed the 20*l.* out of the legacy 157

Two trustees for sale of an estate join in a conveyance of it to a purchaser, and in a receipt for the consideration-money; but each of them receives only a moiety thereof. One of them afterwards became insolvent. The other shall not be answerable for what the insolvent trustee received 504, 515, 570

Otherwise it is, where executors join in sales *ibid.*

Although a trustee is not directed to put money out at interest; yet if he makes interest, he shall account for it 548

## A TABLE OF THE PRINCIPAL MATTERS.

### V.

#### VERDICT.

*Relief denied after a Verdict, and  
à contra.*

A verdict having been obtained against an executor, (who pleaded *plene administravit*;) upon producing a letter of his, confessing a mortgage for 300*l.* made to the testator; the executor brought his bill and was relieved, he proving the mortgage appeared to be worth nothing, and that there were two prior mortgages on the same estate 146

In debt against an executor, he pleads *ne unques* executor, and on proof at the trial, that a chimney-back, or some other slight thing, came to his hands, plaintiff had a verdict: but equity relieved against it 147

So in another case upon the like plea, it was proved the defendant took money for some pots of ale sold in the testator's house after his death: equity relieved *ibid.*

A decree grounded on two verdicts at law set aside by the House of Lords 446

#### VOLUNTARY.

*Vide* FRAUD, &c.

A remainder-man in tail in a voluntary settlement, brings a bill for discovery of the deed; and it appearing the intail was discontinued, the court would not relieve him 35

A. on his marriage with B. settles lands for her jointure, which were subject to an intail. C. brother of A. was privy to the intail, ingrossed the jointure-deed, and had the deed of intail in his custody, and concealed it. A. devises the inheritance of the lands to J. S. and dies without issue, and J. S. marries the widow, and they bring a bill to be relieved against the deed of intail, which was set up by C. Decreed the wife to hold her jointure: but bill dismissed as to the husband's claim under the will, it being a voluntary conveyance 239

A mortgage, though made after a settlement, yet if that settlement be voluntary, will be good 272

A. in 1683, makes a voluntary settlement of an estate on his grandson and his heirs, and afterwards in 1690, he makes another voluntary settlement of the same estate on his eldest son for life, remainder to his first, &c., son in tail, and by his will gives a considerable estate to his grandson. Although it was proved that A. always kept the settlement of 1683 in his custody, and never published it, and after his death it was found among waste-papers, and the deed of 1690 was often mentioned by him, and he told the tenants that the plaintiff was to be their landlord after his death; yet the son could not be relieved against this first settlement 473

A man makes a voluntary settlement, reserving to himself a power to mortgage what part he pleased. This amounts in effect to a power of revocation, and therefore fraudulent as against creditors by statute and judgment 511

A voluntary covenant is not to be carried in equity beyond the letter 693

### U.

#### USURY.

A woman resorts to places of gaming, and borrows money to supply persons in their gaming, and gives the lenders great premiums, and afterwards borrows more money, and being arrested for it gives bond and judgment, and then brings a bill to be relieved against these securities, and to have an allowance for the former excessive premiums which she had paid; but the court would not relieve against the judgment, but upon payment of principal, interest, and costs 170

Though a security is hazardous, yet that will not justify the taking of excessive interest. *Vide the note*

172

Where party giving an usurious bond afterwards executes a warrant of

## A TABLE OF THE PRINCIPAL MATTERS.

attorney to enter up judgment, and thereby loses his opportunity of defending himself at law, whether equity will relieve him? 172

One in 1683, borrows 200*l.* of *A.* and gives a mortgage of a reversionary term for thirty-six years commencing from 1700, of the value of 200*l.* *per ann.* and the mortgage is defeazanced on payment of 40*l.* *per ann.* for eight years by quarterly payments. The court relieved on payment of the 200*l.* with simple interest 402

A bill may be brought in behalf of a child in *ventre sa mère* for an injunction to stay waste 711

*A.* on the marriage of his son, settles a messuage to the use of himself for life *sans waste*, remainder to his son. Though the estate for life of the father be *sans waste*, yet he cannot pull down the house, nor commit any voluntary waste; and if he does, the court will grant an injunction, and oblige him to put the house in as good repair as it was before the waste committed 738

### W.

#### WASTE.

*Injunction to stay Waste. Vide Title INJUNCTION.*

Devise of lands, upon which timber is growing to *A.* for life, remainder to *B.* in fee, paying several legacies within a limited time, and in default of payment the remainder is limited over to *C.* he paying the legacies. Upon a bill brought by *B.* the court gave him leave to cut down timber for the payment of the legacies, though it was opposed by the tenant for life, and him in remainder over 152

A term for years is limited by deed for payment of debts, and by will of the same date the reversion is devised to *A.* for life *sans waste*, remainder to his first, &c., sons in tail. *A.* being in want, the court gave him leave to cut timber for his support, not exceeding the value of 500*l.* 218

The tenant of a jointress at 40*l.* *per ann.* had committed waste *sparsim*, but insisted he had improved the estate to 60*l.* a-year, and offered to take a lease at that rent for fifty years, and to pay for the timber cut. Whether equity will relieve against the forfeiture for the waste 263

On a bill to redeem, an account is decreed, and 240*l.* reported due, and pending exceptions to the report the mortgagee commits waste. Ordered he should deliver up possession, on the plaintiff's giving security to abide the event of the account 392

### WATER-COURSE.

After a long enjoyment of a water-course running to a house and garden, through the ground of another, it shall be presumed that the owner of the house has a right to the water-course, unless the other party can show a special license, or an agreement to restrain it in point of time 390

### WILL AND TESTAMENT.

*How far parol proof may be admitted to explain a Will. Vide Title EVIDENCE.*

A wife, whose husband is banished by Act of Parliament for his life, may make a will 104

Whether a release by will to *J.S.* of all debts, accounts and demands, will transfer the property of goods, which he has in his hands, belonging to the testator? *Vide note, p. 115* 114

An heir-at-law is to be favoured, where the words of a will are doubtful, and there shall be no strained construction to work a disinherison; but where a will is plain, no favour then to the heir 340

Word (or) not taken for word (and) in a will 389

*A.* devises land to several persons, and after his death, one who was a friend to the heir-at-law snatches the will out of the executor's hands and tears it in pieces. The pieces being gathered up and stitched together, a bill is brought to establish the will;

## A TABLE OF THE PRINCIPAL MATTERS.

and decreed the devisees to hold and enjoy, and the heir to convey to them

441

The words in a will, *I desire*, or *I will*, will amount to an express devise. If I devise any thing to *A.* for life, directing him at his death to give it to *B.* this amounts to a devise of the use of it only to *A.* for his life, remainder to *B.*

467

*A.* devises all the rest and residue of his real and personal estate whatsoever; this passes a fee

564

A female may make a will at twelve, a male at fifteen, if proved to be of discretion. *Vide note*

469

There must either be express words in a will, or a necessary implication, to disinherit an heir-at-law

571

*A.* devises lands by will, to which there are no witnesses, and afterwards makes a codicil executed in the presence of three witnesses. The will is void, as to the land, and the codicil will not support it

598

A will speaks not until the death of the testator: but the construction is to be made, as matters stood at the time of making it

653

Fraud in obtaining a will of land may be relieved against in equity; as if *A.* agrees to give *B.* 1000*l.* in bank-bills, if *B.* will devise his land to *A.* and *A.* gives *B.* forged bills. On proof thereof, this will shall be set aside in equity. *Vide the note*

700

One devises his land by will attested by three witnesses, and afterwards makes another will of his land which revokes all former wills; but this will is not duly executed. The last will, being no will, and void, will not amount to a revocation, it being intended to operate as a will, and not as an instrument of revocation

741

Where there are duplicates of a will, and the testator cancels one of them only, and the other part is left entire; *that* is an effectual cancelling of the will

742

A former will of land is cancelled, the testator supposing a latter will by him made of the same land to the same effect was good. If the last will proves not to be duly executed, equity will set up the former will

743

### *Probate.*

Fraud in obtaining a will relating to personal estate only, is not examinable in Chancery, after the will is proved in the Spiritual Court, so long as that probate is in force

8, 76

A bill may be brought against an executor for discovery of the personal estate, before the will is proved, or during the litigation thereof in the Spiritual Court

49

Although a will of personal estate only, gained by fraud, if proved in the Spiritual Court, cannot be controverted in a Court of Equity, yet if a person claiming under such a will comes for any aid in equity, he shall not have it

76

One makes a will, and his son executor, but makes no disposition of the surplus. The son dies without proving the will. The testator is dead intestate, as to the surplus, and the same shall be distributed amongst his next of kin

634

### *Devise and Devisee.*

*Devise of Remainders over of Leases, Money, &c. Vide Limitations of Terms for Years, Money, &c., under Title ESTATES.*

*Devise for a Charity. Vide under Title CHARITY.*

The real estate being devised to the executor, was decreed to be charged with an annuity given by the will, though there were no express words in the will to charge the lands with this annuity

143

Land is devised to *A.* for life, remainder to *B.* in fee, paying several legacies within a limited time, and if he failed, with like remainder over to *C.* he paying the legacies. Upon a bill by *B.* the court gave leave to cut down timber to pay the legacies, though opposed by the tenant for life, and *C.* the last devisee in remainder, *B.* making satisfaction to *A.* for breaking the ground, carriage, &c.

152

One devises to two of his sisters 400*l.* a-piece, and to his third sister what



## A TABLE OF THE PRINCIPAL MATTERS.

- his executors should think fit. Decreed the third sister should have 400*l.* also, if the estate would hold out 153
- A.** devises lands to *B.* in tail, remainder over, and gives his executor power to raise 500*l.* out of his estate for his next heir, and desires him to see his debts paid. The lands are charged with the debts, and the executor has a power to sell for payment thereof 154
- Land** is devised to *A.* for payment of debts, and other lands which the testator had mortgaged are devised to *B.*—*B.* must take the mortgaged lands *cum onere* 183
- One** seized of *Blackacre* in tail, and *Whiteacre* in fee, by mistake devises the intailed acre, and leaves the fee-simple acre to descend. The devisee upon a bill had a decree to enjoy 233
- One** devises, after his debts and legacies paid, the surplus of his estate to his wife and his son *John* equally, and makes them executors; but if his wife should marry, then she should render the right of being an executrix to the testator's son, *Roger*: he to be partner with his brother *John* in the executorship. The wife marries again. She thereby loses her right to the surplus, and to the executorship 308
- A** house, together with the furniture, is devised to a woman and such heir of her body as should be living at her death, and in default of such, remainder over. The woman has an estate-tail in the house, and an absolute property in the furniture. The words (heirs of the body) cannot, in the same clause, be construed words of limitation as to the land, and, as to the goods, words of designation of the person 325
- One** devises lands to his son by his second wife in tail male, remainder to his eldest son by his first wife, provided that if the land should come to his eldest son, that then he or his heirs should pay 1000*l.* to the testator's daughters, within four months after the estate should come to him or them, and, in default of payment, the trustees to enter and raise the money. The son by the first wife dies leaving a son, and the son by the second wife dies without issue. Though the estate never came to the eldest son by the first wife, he dying in the life of his half-brother; yet the proviso being that the eldest son, or his heirs, should, within four months after the estate came to him or them, pay, &c., the land is liable to pay the 1000*l.* 359
- One** devises several parcels of land to his several children in tail, and if any of them die before twenty-one, or unmarried, such child's part to go to the survivor. One of them dies unmarried, but above twenty-one. His share shall go to the survivors for their lives only, and if any of the other children afterwards die under age, or unmarried, the share that went over before, shall not go over a second time 388
- Devise** of lands to trustees and their heirs, in trust that the profits should equally be divided betwixt the testator's wife and daughter, during the life of the wife; and after the death of the wife, then to the use of the heirs of the body of the daughter. Remainder over. The daughter dies in the life of the mother. Her moiety during the life of the mother, shall go to the executor or administrator of the daughter 430
- One** devises a year's wages to such of his servants as shall be living with him at his death. Stewards of courts, or such as are not obliged to spend their whole time with their master, are not within the words of this devise 546
- But** it shall not be restrained to such servants only, as lived in the testator's house, or had diet from him 547
- A** devise of two farms to a man and his wife for their lives, remainder to trustees and their heirs, till *A.* and *B.* respectively come of age, and then to convey one farm to *A.* and the other to *B.*—*A.* died under twenty-one. He being to have had an estate in fee conveyed to him, the conveyance shall be made to his heir 561
- A.** having two daughters *B.* and *C.* devises fee-simple lands to *B.* and other lands, of which he was tenant



## A TABLE OF THE PRINCIPAL MATTERS.

- in tail, to *C.* If *B.* will claim a share of the intailed lands under the settlement, she must quit the fee-simple lands; for the testator having disposed of his whole estate amongst his children, what he gave them was upon an implied condition, that they should release to each other 581
- If a devise is to one of the sons of *J. S.* who hath several sons, the devise is void, and shall not be supplied by any parol proof 624
- A.* devises to trustees in trust for his daughter for life, remainder to the second son of her body in tail male, and so to every younger son, with remainders over. There were two sons, *B.* and *C.*—*B.* died, and after his death *C.* is born. *C.* though an only son, shall take, he being the second son in order of birth, and, as the will is worded, not to be excluded 660
- One, who is *cestuy que trust* of a copyhold estate, may devise it, without making a surrender to the use of his will 680
- Surplus of personal estate is devised to the children of *A.* and *B.* The children shall take *per capita*, and not *per stirpes*; they claiming in their own right, and not as representing their father 705
- Lands are devised to *A.* and the heirs male of his body. *A.* dies in the life of the testator, leaving issue a son. The devise is void, and the son cannot take 722
- Lands are devised to *A.* in tail, and after *A.*'s death without issue, to *B.* *A.* dies in the life of the testator, leaving issue. The devise to *A.* is void, and *B.* shall take presently, though against the words and intent of the will 723
- A.* having by the will of her husband a power of disposing of lands with consent of trustees, devises the lands by her will. This being without consent of the trustees, the devise is void *ibid.*
- A.* devises lands in trust, after debts paid, to convey the same to the heirs male of the body of *B.* the testator's great-grandfather. *C.* is the heir male of the body of *B.* but not heir general, there being a daughter of an elder brother, who is heir general. Decreed the trustees to convey to *C.*; for as *C.* would be well entitled to take as heir male by descent, so he is sufficiently described to take by purchase 729
- A person may take, as well by a description, as by a christian or surname 732
- A man may devise land to his heirs in *Borough English*, or to his heirs in *gavel-kind*; and such a special heir will take, though not heir general 733
- A devisee brings a bill to establish the will against one who is not heir-at-law. Defendant by answer claimed under a settlement, which he could not find, but hoped, when he did, he should have the benefit of it. It was insisted for the plaintiff, that the defendant might try his title by a certain time, or in default thereof that the plaintiff might hold and enjoy against the defendant. Bill dismissed with costs 743
- Devise of Lands for payment of Debts, &c. Vide Trusts for raising Portions, and Payment of Debts, under Title TRUST.*
- Land is devised to executors for payment of debts. When the land is sold, the money will be legal assets 106
- One makes his nephew executor, and devises to him and his heirs all his lands, in trust to sell, and pay his debts and children's portions, and gave his children 100*l.* a-piece. The money arising by the sale is not legal assets, and the debts and children's portions shall be paid in equal proportion 133
- Where there is a devise for payment of debts, a debt, upon which the statute of limitations has run, is within the provision equally with other debts 141
- Lands are devised to *A.* for life, remainder to *B.* in fee, paying several legacies within a limited time; and in default of payment, the remainder over to *C.* he paying the legacies. Upon a bill by *B.* the court gave leave to *B.* to cut timber for payment

## A TABLE OF THE PRINCIPAL MATTERS.

- of the legacies, though it was opposed by tenant for life, and the devisee over 152
- One devises lands to his nephew to pay his debts, and makes his nephew executor; but makes no disposition of the surplus. Whether the devisee, or the heir, shall have the surplus? *Vide note*, p. 248. 247
- If an express legacy is given to the heir, the devisee shall have the surplus *ibid.*
- In case of a will, devisee is to take to his own use, if no trust be declared 247
- Lands are subjected by will to the payment of debts and legacies.—Whether debts shall have a preference? *Vide note*, p. 302. 248, 302
- A. purchases lands of B. and mortgages back those lands for part of the purchase-money, and gives a note to B. for the remainder, and then devises the lands to be sold for payment of his debts. This note can have no preference, but must be paid in proportion with the other debts 281
- What Words in a Will will amount to charge the real Estate with Debts or Legacies.*
- Real estate decreed to be charged with an annuity given by the will, though no express words to charge the land, the executor being devisee of the land 143
- A. devises lands to his brother and heir-at-law, gives legacies, and makes his brother executor, desiring him to see his will performed. The real estate is charged with the legacies 228
- One begins his will with disposing of all his worldly estate, and then wills that all his debts be first paid; gives his wife a moiety of what is left after his debts paid, devises some lands to A. and gives the remaining part of his real and personal estate to B. The real estate is charged with the debts 690
- One by will devises, that his debts and legacies shall be paid in the first place; and then devises his lands to his sister for life, remainder to her issue, remainder over: and made the sister executrix. Decreed the lands to be charged with the debts 708
- Who may make a Will.*
- A female may make a will at twelve, a male at fifteen, if proved to be a person of discretion. *Vide note* 469
- What Estate or Interest passes, and to whom.*
- A. devises to B. a rent out of a lease for years determinable on lives, to be paid half-yeerly, if the *cestuy que vie* lived so long. B. dies during their life-time. The rent is not determined by the death of B. but shall be paid to his executor during the lease 35
- A. devised lands in trust to pay one-third of the rents to his wife in satisfaction of dower, till his son attained twenty-one. The wife dies, and then the son dies under twenty-one. The administrator of the wife shall have her third of the rents, till such time as the son might have attained twenty-one 65
- Where a devise is to children, the grandchildren cannot come in to take with the children: but if there is no child, the grandchildren shall take 107
- A devise to J. S. and his children, and if he dies without issue to go over. This is an estate-tail 536, 7
- A devise to the issue of J. S. who had a daughter living, and afterwards a son born. All the children shall take, and even grandchildren, if there were any; but they shall only take an estate for their lives. *Vide note* 545
- A devise to J. S. and his children. If he has children, they take with their father; but if he has none, it is an estate-tail in J. S. *ibid.*
- A devise to a man and his children of personal estate. A child born after the death of the testator shall not take 545
- A devise to two, and the heirs of their bodies. It is a joint-estate for their lives, and several inheritances: and so it is if there is a devise over *ibid.*

## A TABLE OF THE PRINCIPAL MATTERS.

But if there is a devise over, and one of them dies without issue, a moiety shall go over to the remainder-man

545

A devise to the issue of *A.* and for want of such issue to *B.*—*A.* has a son and a daughter. They shall take as persons described; but they shall take only an estate for their lives

546

*A.* devises all the rest and residue of his real and personal estate whatsoever. This will pass a fee

564

A devise of lands to the heir after the death of the wife, by a necessary implication gives an estate for life to the wife: otherwise, where the devise is to a stranger

572

*A.* devises to his brother *B.* all his lands and hereditaments, and all his personal estate, desiring him to pay his debts and legacies. A fee passes

687

One begins his will with disposing of all his worldly estate, and then wills, that all his debts be first paid; gives his wife a moiety of what is left after his debts paid, devises some lands to *A.* and gives the remainder of his real and personal estate to *B.* A fee in a moiety of the surplus of the real estate passes to the wife

690

*What Things pass by the Words, and to whom.*

One devises 1500*l.* in trust for the children of *A.* who has one child and several grandchildren. Decreed the grandchildren to share with the child

50

But this decree was afterwards reversed, and the legacy decreed to the only child

106

Admitted, if there had been no child, the grandchildren might have taken

108

*A.* devises 20*l.* a-piece to all the children of his sister *B.* A child born after the making the will, and before the death of the testator, shall take

105, 545

*A.* seised in fee, devises *Blackacre* to *B.* for life, and devises to *C.* all his lands not before devised, to be sold. By this devise of all his lands, &c., the reversion in fee of *Blackacre* is well devised to *C.*

461

*A.* devises that the furniture and pic-

tures of his three houses in *B.* *C.* and *D.* should go along with his three houses. Adjudged the plate then at the three houses passed by this devise. *Vide the note*

512

*A.* devises lands to trustees to pay debts and legacies, and then to settle the remainder on his son *B.* and the heirs of his body, with remainders over: and directs that special care be taken in the settlement, that it should never be in the power of his son to dock the intail. Decreed the son should be only tenant for life, without impeachment of waste, and should not have an estate-tail conveyed to him

526

*A.* devises to *B.* all his goods and furniture in his house, except his pictures, which he gives to *C.* Pictures in boxes, as well as what were hung up in the house, will pass to *C.* and so will pictures bought after the making the will

538

A devise to *A.* for life, he paying 200*l.* a-piece to his two sisters, and after his decease to the heirs male of his body, and the heirs male of the body of every such heir male, severally and successively, as they shall be in priority of birth, and seniority of age, remainder over. Whether *A.* is tenant in tail, or for life only?

551

*A.* devised a farm to *B.* for life, and after some legacies devises all other his personal estate, lands, tenements, and hereditaments not before devised, to *C.* The reversion of the farm passes by the general devise to *C.*

560

Mortgages in fee, though forfeited, will not pass by a general devise of all the testator's lands, tenements, and hereditaments. *Vide note*

625

Nor will they pass by such general words, though the equity of redemption was foreclosed, or released after the making of the will

*ibid.*

Plate will pass by a devise of household goods

638

*A.* articles to purchase lands in trust for *B.* who before any conveyance made, by will directed all his freehold estate to be settled on *C.* and his first son, &c. The lands articted for will pass by the will

679

One devises to his wife all his personal

## A TABLE OF THE PRINCIPAL MATTERS.

- estate at *W.* By this devise all the personal estate which the testator had at *W.* at his death, will pass, though not there at the making the will 688
- A devise of all a man's worldly estate comprises all a man has in the world 691
- One devises the surplus of his personal estate to the children of *A.* and *B.* neither of whom has a child, either at the making of the will, or the death of the testator. The devise is executory, and shall extend to such children as *A.* and *B.* shall have at any time; and the children shall take *per capita*, and not *per stirpes*, they claiming in their own right, and not as representing their father 705
- One devises the surplus of his personal estate to his grandchildren living at his death. Grandchildren born after his decease shall not take 710
- One devises to his son the furniture of his house at *D.* and orders goods to be carried from *London* to his said house, and agrees with carriers for that purpose, but dies before the goods are removed to *D.* These goods will not pass by the will, as part of the furniture of the house at *D.* 739
- One devises all his household goods and furniture, which should be in his house at *R.* at his death, to his wife, and afterwards going beyond sea, his steward gets the landlord of the house to take a surrender of the lease thereof, and removes the goods to another house, and sends an account of what he had done to the testator, who approves of it, and dies before his return to *England.* The wife is not intitled to the goods 747
- But otherwise it would be, if the goods had been removed by fraud to defeat the legacy, or by any tortious act without the privity of the testator *ibid.*
- Revocation.*
- One devises a lease to his daughter, and afterwards renews the lease, and after that makes several codicils; but takes no notice of the lease. Whether the renewal of the lease is a revocation of the devise? 209
- One devises lands to trustees, to pay his debts, and then to pay his wife 200*l.* a-year for her life. The testator's debts being afterwards increased, for great part of which his trustees were bound, he by deed and fine, in which his wife joined, conveys his lands to the said trustees to sell, to pay his debts, and the surplus to be paid to him and his heirs. Whether this is a revocation of the wife's 200*l.* a-year, or whether she shall have her annuity out of the surplus of the money after the debts paid? Decreed for the wife. *Quære. Vide the note* 241
- A.* by will devises to his son a messuage for ninety-nine years, if three lives lived so long, paying 40*l.* *per ann.* to his sister for her life, and afterwards makes a lease to *B.* of the same messuage for ninety-nine years, if three lives lived so long, paying 50*l.* *per ann.* to the lessor and his heirs. Decreed at the Rolls, that the lease was a revocation of the devise: but upon an appeal to the Lord Keeper, decreed to be no revocation, and that the daughter should be paid her annuity. *Vide note, p. 496* 495
- Where a subsequent act shall amount to a revocation of a devise by implication, such implication must be necessary, and wholly inconsistent with the will 496
- A man articles to purchase lands, and, before a conveyance, makes his will, and devises those lands, and afterwards they are conveyed to him and his heirs. Whether this amounts to a revocation 680
- One devises lands in trust to permit his daughter *Susan* to receive the rents until her marriage or death, and in case she marries with the consent of the trustees, then to convey to her and her heirs; but if she died before marriage, or married without such consent, then to convey to other persons. *Susan* afterwards marries with the consent of her father, who settles part of the lands on her and her husband, and dies. This settlement is no revocation of the will as to the rest of the lands 720
- One devises his land by will attested

## A TABLE OF THE PRINCIPAL MATTERS.

by three witnesses, and afterwards makes another will of his land, which revokes all former wills; but this will is not duly executed. The last will, being no will, and void, will not amount to a revocation of the former, it being intended to operate as a will, and not as an instrument of revocation 742

### *Republication.*

One devises a lease to his daughter, and afterwards renews the lease, and after that makes several codicils; but takes no notice of the lease. Whether the renewal of the lease is a revocation of the devise, and if a revocation, whether the codicils will amount to republication? 209

A man saying his will was in a box in his study, amounted to a republication *ibid.*

A. by will duly executed, devises a copyhold estate to his wife, and on the day of his death, orders his nephew to obliterate some devises, but says nothing as to the copyhold, and then caused a memorandum to be wrote, that he approved of the will as obliterated, but does not republish it; and ordered his nephew to carry it to one to write it fair, and before it was done, he becomes delirious. Held to be a good will, and that the copyhold passed 498

One devises lands by will, to which there are no witnesses, and afterwards makes a codicil, executed in the presence of three witnesses. The will is void, as to the land, and the codicil will not support it 598

A codicil, which concerns only personal legacies, will not amount to a republication of the will, so as to pass lands purchased after the making of the will 625

Making a codicil, and annexing it to the will, is no republication of the will 722

### WITNESS.

A wife is not to be examined as a witness against her husband 79

When there is a single witness against defendant's oath, this is not sufficient

evidence for a decree, nor will the court direct a trial at law 283

Where there is a dispute touching money given to parishioners, none of the inhabitants of the parish can be witnesses 317

A. and B. claiming each of them a rent-charge out of land, by the same deed, B. can be no witness to A.'s title to his rent-charge, being a party interested, until he has released his rent-charge 375

Upon an appeal from the Rolls, it was objected to the evidence of a witness examined in the cause, and read at a former hearing, that he had since, by answer to a bill exhibited against him, confessed, that, on the day he was examined, the plaintiff gave him a bond, that if the plaintiff recovered the land in question, he would convey part of it to the witness, in order to prevent his being a witness: this answer was read, by the opinion of the *Lord Keeper*, Chief Justice *Holt*, and Judge *Powel* 463

If after a hearing a witness is convicted of perjury, the party may take advantage of it on a re-hearing 464

After publication, the party may examine to the competency, as well as credibility of a witness *ibid.*

A witness was examined before the hearing, while she was interested, but after the hearing she released her interest and was examined again before the master; her depositions before the master were allowed to be read 472

If a bankrupt has released and assigned all his estate to the assignees, he may be examined as a witness 637

One examined as a witness, when disinterested, afterwards becomes intitled to the estate in question; his depositions shall be read 699

The obligee makes the only living witness to the bond, his executor. The executor shall be allowed at law to prove the hands of the other witnesses that are dead 700

*Bill to examine witnesses in perpetuam rei Memoriam.*

The court will not give a plaintiff leave to examine witnesses to perpetuate

## A TABLE OF THE PRINCIPAL MATTERS.

testimony, though in case of a purchase of a reversion, where there can be no trial at law during the estate for life 159

Y.

YORK.

*Vide* LONDON.

A freeman of *London* dies within the province of *York*. The custom of *London*, in the distribution of his personal estate, shall control the custom of the province of *York* 49

The custom of the province of *York* is only local; but that of *London* follows the person, though never so remote from the city 82

An inhabitant within the province of *York* makes a settlement on his wife, in bar of what she might claim out of his personal estate by the custom of the province of *York*, or otherwise; and dies intestate, leaving his wife and two children. Whether the whole personal estate shall be divided between the two children, as if there had been no wife? *Vide notes*, p. 264 263

By a marriage-settlement, *A.* is tenant for life, remainder as to part, to his wife for life, remainder as to the whole, to his first, &c., son in tail. By the custom of *York*, the eldest son by means of this settlement, is excluded from a share of his father's personal estate 373



AN  
**INDEX**  
OF THE  
**MATTERS CONTAINED IN THE NOTES**  
**IN BOTH VOLUMES.**

---

A.

**ABSCONDING TO AVOID PRO-  
CESS.**

**ABATEMENT OF LEGACIES.**

*Vide Contribution.*

Form used by the court to give notice to persons absconding to avoid process, to appear, II. 370.

In what cases specific legatees shall abate, I. 31.

Where legacies to charity abate, 231.

Pecuniary legacies in general shall abate, 334.

**ACCEPTANCE OF RENT.**

As to the effect of it being considered as sufficient notice to the lessor of assignment of lease, by his lessee, I. 68.

**ABATEMENT OF SUIT.**

For ground of the difference on this head, between the cases of female plaintiff and defendant marrying, I. 318.

No abatement by death of husband, where suit by husband and wife in right of the wife, II. 248.

**ACCOUNT.**

*Vide Conusor, Laches, Mortgages, Mortgagor, Statute of Limitations, Rents and Profits, Vouchers.*

In what manner mortgagee of an estate for life shall stand charged in account, I. 45.

How conusee shall account for profits in respect of extended value, 50.

It seems it is only in cases of account that both parties are actors. As to a distinction between an account arising out of a cause, and an account decreed upon a dealing in trade, II. 219.

**ABEYANCE.**

On the doctrine of abeyance, II. 131.

**ABJURATION OF THE REALM.**

*Vide I. 71.*

**VOL. II. PART II.**

## INDEX TO THE NOTES.

### ACCOUNT SETTLED.

*Vide Legatee.*

Specific legatee of a mortgage not bound by an account settled between the executor of the mortgagee, and the mortgagor, I. 31.

As to barring the opening of settled accounts by length of time, 180. II. 276.

### ACCOUNTANT.

Where accountant allowed sums of money on his own oath, I. 470.

### ACTION AT LAW.

*Vide Baron and Feme, Governors of Foreign Possessions.*

Action on the case will not lie for breach of trust, I. 344.

As to action of *trover* vesting the property. II. 239.

Where sheriff has seized goods, he may have *trover* or *trespass* against him who takes them away, *ibid.*

As to action at law against factor, 638. Tenant in tail expectant on an estate for life, without impeachment of waste, cannot bring *trover* for timber which grew upon, and was severed from, the estate, 739.

### ACTION OF COVENANT.

In what cases action of covenant will lie for grantee of reversion, and for assignee of a term against grantee of reversion, I. 88.

And further, on action of covenant, to pay rent, and not to erect buildings; distinction between action of covenant and action of debt for rent reserved; in what case the one may be had, the other not, *ibid.*

By whom it may be brought, as between the person in whose name and the person for whose benefit the covenant is made, II. 276.

### ACTION ON PENAL STATUTE.

*Vide Damages.*

Action does not lie against executor for

the treble value of tithes, under stat. 3. Edw. 6. cap. 13. Nor can a parson and a vicar join in an action under that statute. Where their rights unite, how they must declare in an action under the statute. Vicar need not set forth how he is intitled. Two farmers may join in an action under that statute. Whether farmer of tithes is intitled to his action except under the equity of the statute? I. 60.

### ACTION OF TRESPASS

Will lie for *mesne* profits after reversal of outlawry, II. 315.

### ACTS OF PARLIAMENT.

On the subject of expounding Acts of Parliament, II. 712.

### ADEMPMENT OF LEGACY.

Principles and distinctions governing the doctrine of ademption, I. 95.

### ADMINISTRATION.

Administration in a foreign court not noticed here, I. 21.

As to determination of administration, *durante minoritate*, 25

Letters of administration may be taken out after commencement of the suit, 31.

Where a will is in being, administration is void, 107.

Administration not a bare authority and survives, II. 514.

### ADMINISTRATION-BOND.

A creditor has a right as well as the next of kin, to sue upon an administration-bond in the name of the ordinary, II. 642.

### ADMINISTRATOR.

*Vide Privity, Prohibition.*

Term vested in wife as administratrix, may be disposed of by husband, I. 19.

As to general power of administrator, *durante minoritate*, 25.

## INDEX TO THE NOTES.

Administrator not intitled to any allowance for his care and trouble, 316.

### ADVANCEMENT.

*Vide London. Trust Resulting.*

As to purchase by father in the name of his infant son, or settlement of reversion on infant, being considered as advancement, I. 467; and further, II. 20.

### ADVOWSON.

As to the nature of interest of mortgagee in a naked advowson, II. 401.

### AFFIDAVIT.

*Vide Costs.*

What sort of affidavit required, to admit examination of witnesses after publication passed, I. 47.

Affidavit of loss of deed on bill, in what case not required, 59.

Affidavit must be filed previous to the issuing an attachment, 172.

In what cases affidavit necessary, where bill for discovery of bond or deed, 180.

### AGE OF PERSONS INTITLED TO MAKE A WILL.

*Vide Courts Ecclesiastical.*

### AGENT.

As to agent becoming a purchaser, I. 466.

Agent need not be authorised in writing, II. 456.

Whether agreement made by agent must not be in writing, *ibid.*

As to notice to the agent being notice to the party, 610.

### AGREEMENT.

*Vide Agreement in writing, Awards, Bond Creditors, Joint Tenants, Parol Agreement, Specific Performance, Voluntary Agreement.*

Where specific performance decreed

here of marriage-agreement made abroad, I. 21.

This court acts upon agreements relating to distribution of personal estate, 134.

As to the court confirming or carrying into execution agreement for settling a heriot, inclosure, or stinting a common, 456.

In what case the court will not establish an agreement made between a tradesman and his creditors for composition of his debts, II. 71.

In what case agreement to settle, and settlement in pursuance thereof, good against bond-creditors, 221.

How far mutuality necessary to agreement, 416.

As to agreement being binding if signed by one party only, 456.

Whether agreement made by agent must not be in writing, *ibid.*

### AGREEMENT IN WRITING.

Agreement in writing may be dissolved by Parol, II. 456.

### ALIMONY.

*Vide Feme Covert.*

### AMBASSADOR.

In the case of an ambassador, private men's actions and suits must be suspended for a convenient time, II. 317.

### AMENDMENT AT LAW.

Vol. II. 435.

### ANNUITY.

Covenant to pay annuity, covenantor shall not deduct for taxes, for the charge is personal merely, II. 307.

### ANSWER.

*Vide Notice.*

In what case in mortgage joint answer of husband and wife held equal to a fine, I. 41.

## INDEX TO THE NOTES.

Where bill for distinct demands and demurrer, as to necessity of denying combination by answer, 416.

In what case answer not suffered to be read against the plaintiff, in a cause for the same matter in which he had put in the said answer in a former cause, 448.

As to the principle on which an answer swearing defendant had received no more than such a sum allowed to be good, 470.

As to the cases and circumstances under which answer put upon the file, may be taken off and rectified or amended, II. 434, 435.

### APPEAL.

Whether appeal from decree in Chancery on the statute of charitable uses ? I. 42 ; II. 118, 747.

Appeal lies to Dutchy court from court of equity at Lancaster, I. 184.

As to the nature of evidence on appeal, 214.

To *Dom. Proc.* and Lord Chancellor, 442.

And further on this subject, the nature and purpose of appeal from the Master of the Rolls to the Lord Chancellor, and from the Lord Chancellor to the House of Lords, II. 464. — [Does not stay proceedings without special order, I. 344.]

### APPOINTMENT.

*Vide Illusory Appointment.*

Distinction between lease for years and lease for life made by person having power of appointing fee, I. 85.

In what cases the court has held instruments good, as appointments in favour of a charity, which in other respects were void or inoperative, II. 454.

Where power of appointment amongst several and no appointment made, decreed to go equally, 664.

### APPRENTICE.

*Vide Master and Apprentice.*

### ARBITRATOR.

The king may be an arbitrator, II. 613.

### ARREARS.

*Vide Mortgagee.*

In what case the court will have regard to the length of arrear in relieving as to interest being turned into principal, I. 194.

As to bill for arrears of growing rent and rent-charge, 359.

### ARTICLES.

*Vide Feme Covert, Marriage-Articles.*

Articles executed in England under seal for mutual consideration, give jurisdiction to the king's courts here, whatever be the subject-matter, I. 77.

### ASSENT OF EXECUTOR.

Executor not admitted to undo his own assent, I. 94.

Nor where compelled—Assent of one executor though *an infant* shall bind all, *ibid.*

### ASSETS.

*Vide Charge, Contingent Security, Devise for Payment of Debts, Marshalling Assets, Power, Separate Debts.*

In what case lands devised and descended are held to be equitable assets, I. 65, 103.

Where damages recovered by executor in an action shall be assets, 174.

Reversion after mortgage in fee and estate tail, whether assets—whether advowson in gross assets—what will make equitable assets ? *ibid.*

In what case money under articles not assets, 471.

As to reversion in fee being assets, II. 134.

Power to dispose of money by will is assets, 319.

As to marshalling as between legal and equitable assets, 436.

## INDEX TO THE NOTES.

As to equity of redemption being assets, 764.

And further as to what are legal and what equitable assets, *ibid.*

### ASSIGNEE.

Vide *Assignment, Mortgagee, Scire Facias.*

Distinction between particular and general assignees of husband, in respect of his disposition of the trust-term of *chose en action* of the wife, I. 7.

In what cases and to what extent assignee of lessee rendering rent is liable in respect of the rent, and herein of the effect of lessor's acceptance of the assignee and of the rent, 88.

Assignee cannot bring a bill of review, 426.

### ASSIGNEES OF BANKRUPT.

Vide *Bill of Revivor.*

Where death of assignee of bankrupt, new assignee cannot revive but must bring supplemental bill, I. 426.

As to assignee of Bankrupt becoming purchaser, 466.

How far intitled to have the performance of agreement with the bankrupt, II. 195.

And generally as to assignees of bankrupt standing in his place in case of assignment of simple contract debts, of mortgage, of bankrupt debtor to the crown, of award made after bankruptcy, of equity to which bankrupt was liable, of voluntary conveyance by bankrupt;—the principle, 429.

And further, as to the nature of the interest that vests in assignees of bankrupt, 433.

And of assignees being bound as the bankrupt, 566.

### ASSIGNEE OF CLERK OF THE PEACE.

Vide *Bill of Revivor.*

### ASSIGNEE OF LESSEE.

As to acceptance of assignee of lessee

by lessor, what considered as such, its effect in respect of action for rent, I. 88.

### ASSIGNEE OF MORTGAGEE.

Vide *Mortgagee.*

### ASSIGNMENT.

Voluntary assignment by husband of *chose en action* of the wife, will alter the property, I. 7.

Assignee of a lease rendering rent assigns over; he shall be liable in equity for the rent during the time he enjoyed the land, 87.

### ASSIGNMENT OF DOWER.

Vide *Costs.*

In what cases the court will assign dower, I. 219.

The want of a formal assignment of dower not regarded in equity, *ibid.*

### ASSIGNMENT OF SEAMEN'S WAGES.

Whether such assignment would specifically bind the wages before stat. Geo. 2? II. 391.

Such assignments are now void by stat. Geo. 2. cap. 14. sec. 17., 595.

### ATTACHMENT.

Vide *Affidavit, Sheriff.*

Whether it is usual to stay proceedings on attachment in another court, I. 25.

Where good though executed after the death of the king, 300.

Where sued out against feme covert alone, II. 614.

### ATTORNMENT.

On the doctrine of attornment, I. 330; II. 113.

## INDEX TO THE NOTES.

### AUDITA QUERELA.

The nature of the writ *Audita Querela*, II. 697.

#### AVERAGE.

Vide *Abatement of Legacies*.

### AVERMENT.

Vide *Devise*.

Where averment of mistake on court roll admitted, II. 547.

### AWARDS.

In what cases the court will and will not interfere in respect of awards, I. 158.

But court will not be ancillary to making awards effectual or to assist insufficient powers in arbitrators—after award made, it may be made a rule of court, *ibid*.

As to agreement between submission and award, 260.

In what cases exceptions will and will not lie in this court to an award, 470.

For distinction taken between awards for the payment of money, and to do any act in specie, II. 25.

Whether submission to an award avoided by a secret act of bankruptcy, 230.

#### B.

### BAIL BOND.

Vide *Sheriff*.

### BANISHMENT.

Vide I. 71.]

### BANKRUPT

In what cases bankrupt may and may not be a witness, II. 637.

### BANKRUPTCY.

Vide *Discovery*.

An act of bankruptcy, no notice of the bankruptcy, I. 28.

### BANKRUPT'S CERTIFICATE.

As to certificate discharging bankrupt from debt though judgment not obtained till after the certificate allowed, II. 697.

### BARON AND FEME.

Vide *Answer, Extinguishment, Feme Covert, Feme Covert Executrix, Trust Estates*.

Where husband may dispose of wife's term, and trust of a term, I. 7; II. 63.

In what cases equity will put terms upon husband and his representative, where suing for present demand in right of the wife, I. 40.

The equity of the wife extends to newly-acquired property, *ibid*; and further, II. 494.

Surrender to husband and wife and their heirs, they take as one person by entreties, I. 233; and further on that point, II. 120.

And for distinction between joint estate to two before they marry, and after marriage, I. 233.

As to husband reducing wife's *chose en action* into possession, 261.

In what case wife must be joined in action with the husband—when wife intitled after judgment at law recovered by the husband, 396.

Where mortgage in fee shall survive to wife notwithstanding articles—as to acts by which husband may alter the property of wife in her *choses en action*, *ibid*.

In what cases husband may sue alone in respect of wife's debt, *ibid*.

In case of purchase by husband for himself and his wife, where it shall survive to wife though husband dies indebted, II. 68.

In what cases *choses en action* of wife shall survive to her though settlement made on her, 69.

Wife cannot be a trustee for her husband, 79.

How far wife may act as *feme sole* where husband is an alien enemy, or transported beyond the seas, 105.



## INDEX TO THE NOTES.

How far wife bound by answer of husband in a matter of inheritance, 249.  
Where husband obliged to sue in equity for wife's fortune, court will put terms upon him, 271.

Court will not entertain a bill by wife to discover acts of hard usage by husband, nor will it establish an agreement between husband and wife to live separate, 386.

Husband and wife levy a fine, husband alone acknowledges the uses, how far wife shall be bound, 472.

Husband and wife may, in equity, sue each other, 481.

In what case husband held a trustee for separate use of the wife, 660.

In what cases where wife's estate mortgaged for the benefit of husband, wife may stand as a creditor, 689.

### BASTARD.

In what cases a bastard is excluded where general devise to *children*, or to *all the natural children of A.* II. 705.

### BENEFICE.

As to demise of benefice for years by spiritual persons, II. 205.

### BILL FOR ACCOUNT.

Vide *Laches*.

### BILL PRO CONFESSO.

In what cases and under what circumstances bills taken *pro confesso*, I. 224, 399.

### BILL OF CONFORMITY.

Bill of conformity not now in use, II. 37.

### BILL TO CARRY FORMER DECREE INTO EXECUTION.

Whether the court on such a bill, will vary or rectify mistake, II. 409.

### BILL FOR DISCOVERY.

Vide *Heriot*.

Bill for discovery may be brought against executor before will proved, or during litigation thereof in the spiritual court, II. 47.

For distinction between mere bill for discovery in aid of ejectment and bill for relief as well as discovery, 463.

### BILL DISMISSED.

Vide *Costs*.

Dismissal of a bill upon election to proceed at law, is no more peremptory than a nonsuit at law, I, 103.

Where bill filed eighteen years after suit for the same matter compromised by plaintiff, dismissed, 263.

### BILL FOR DISTRIBUTION OF INTESTATE'S EFFECTS.

Vide *Plea*.

### BILL OF EXCHANGE.

In what case bill of exchange is and is not payment of a debt, though not paid when due, I. 474.

### BILL FOR INCLOSURE.

Whether if one commoner will stand out, inclosure can be decreed, II. 103.

### BILL ORIGINAL.

Vide *Bill for Discovery*.

Original bill may be brought in this court after two issues directed out of the Court of Exchequer, and bill dismissed for the same matter, I. 221. So after decree in the Exchequer on the ground that decree was not complete—*secus*, after decree in Exchequer affirmed in *Dom. Proc.*, *ibid*.

Original bill will lie for keeping undressed and restoring any subject of curiosity and antiquity, 273.

## INDEX TO THE NOTES.

### BILL FOR PARTITION.

*Vide Ireland.*

### BILL FOR REDEMPTION.

Whether demurrer to bill for redemption on the ground of length of time may be good? I. 363.

### BILL FOR REHEARING.

Whether bill for rehearing will lie after twenty years? I. 363.

### BILL OF REVIEW.

*Vide Assignee.*

The rules as to staying proceedings where bill of review filed, I. 117.

Where bill of review may be brought upon bill of review, 135.

Whether in case of a bill of review a new supplemental bill may be added—and as to parties to bill of review, *ibid.*

For further rules as to bill of review, 166.

Upon a bill of review the plaintiff cannot assign for error that any of the matters decreed, are contrary to the proofs in the cause, 214.

As to the nature of evidence on bill of review, *ibid.*

In what case order dispensing with costs on party bringing bill of review, making oath that he is not worth 40*l.* besides the matter in question, is to be set out in the bill, 264.

Bill of review will not lie for error apparent after twenty years from making the decree, 363.

And further, as to bill of review, II. 429.

### BILL OF REVIVOR.

*Vide Assignees of Bankrupt, Executor.*

Bill of revivor allowed as to matters, part of the matters mentioned in a previous decretal order, but omitted in the final decree, I. 216.

Assignee or devisee cannot file bill of revivor, 283.

But may bring original bill in the nature of a bill of revivor, 426.

The practice is to revive in all cases indiscriminately by bill, *ibid.*

In what cases and on what ground defendant or any creditor where suit by one creditor on behalf of himself and other creditors intitled to revive, II. 219.

Bill of revivor does not lie for assignee of clerk of the peace, nor of a bankrupt, 549.

### BILL OF SALE.

In what case bill of sale shall be preferred to a judgment at law, II. 511.

### BILL TO PERPETUATE TESTIMONY.

Distinction between bills to perpetuate testimony and examination *de bene esse*, I. 309.

A slight interest will sustain such a bill, 354.

### BOND.

*Vide Marriage, Penalty, Portion, Release, Trustee.*

In the case of a joint and several bond, obligee may proceed in equity for an account against any one of the obligors named in the bond, I. 140.

*Vide* further on this head and apparently contra except in the case of sureties or judgment obtained, II. 195.

Whether action can now be brought at law on bond without profert, 299.

May declare upon the bond as lost, *ibid.*

In what cases bond released at law is evidence. In what cases bonds void or defective at law aided in equity. Where joint bond considered as joint and several. Where joint bond held several, 481.

Where condition of bond partly good and partly void, *ibid.*

As to the effect of assignment of bond in respect of the rights and liabilities of assignees—conveys no legal right, 692.

## INDEX TO THE NOTES.

### BOND-CREDITORS.

*Vide Voluntary Deeds.*

In what case agreement to settle, and settlement in pursuance thereof, good against bond-creditors, II. 221.

And where not containing a particular covenant or mention of any lands in particular, 483.

### BOROUGH ENGLISH.

In what case lease for lives of lands in *Borough English* shall go to youngest son.—And a rent, I. 489.

A descent of lands in *Borough English* to younger son will not prevent his having a full distributive share of his father's personal estate, II. 639.

### BOTTOMRY BOND.

Equity will not assist obligee of a bottomry bond where it carries unreasonable interest, I. 263.

For difference between bottomry bonds and respondentia bonds, II. 718.

### C.

### CATTLE LEVANT AND COUCH- ANT.

Where cattle *levant* and *couchant* extended upon an outlawry may be taken upon a *levari facias* for the King, II. 131.

### CHAMBER OF LONDON.

City orphan marries and husband dies before the orphan attains twenty-one, and her portion is in the Chamber of London; this is a *chose en action* and must survive, II. 559.

### CHARGE UPON THE LAND.

*Vide Portion.*

The effect of the words "my debts being first satisfied;" or "I will that all my debts be justly paid," I. 45.

Charge of debts will make equitable assets, 410.

Where land charged with annuity and legacies without express words, 411. As to the rule for charging real estate with debts and exempting the personal, *ibid.*

Legacy allowed by the Ecclesiastical Court sufficient to create a charge under a devise to pay debts and legacies, II. 9.

In what case court inclined not to charge portion upon land, where land devised to son and portion given by the will to daughter and devisee made executor, 144.

As to the rule of evidence to show that testator meant to charge the real estate with legacy although he had not so done by his will, 506.

### CHARITY.

*Vide Poor. Defective Conveyance.*

In what cases the court will and will not interfere to vary the constitutions or provisions of a charity, I. 56.

As to the right of the Crown to appoint where charity void, 251.

In what cases and to what extent the court will sustain devise or bequest to a charity which in other cases would be void or inoperative, II. 454.

As to equity supplying defective conveyance for a charity, *ibid.*

### CHARTER PARTY.

As to the form of clauses inserted in charter parties of East India Company respecting freight, II. 212.

### CHATTEL PERSONAL.

How far devise or limitation over of a personal chattel good, II. 59, 332.

Limitation of personal chattel or trust of it not carried further in equity than legal limitations of terms for years, 88.

### CHATTEL REAL.

Whether a chattel real will pass by a devise of all a man's personal estate, II. 137.

## INDEX TO THE NOTES.

### CERTIORARI.

Certiorari may be brought to remove a cause out of a palatine court of equity into Chancery, I. 59.

### CESSET EXECUTIO.

As to a *cesset executio* during a term on a judgment in dower at law, II. 404.

### CESTUI QUE TRUST.

In what cases *cestui que trust* must be a party, I. 261.  
And further, II. 422.

### CREDITORS.

Of the power of creditors to follow the assets of a testator disposed of by executor in the hands of third persons, II. 76.

### CHILD AFTER-BORN.

In what case where legacy to children, child born after the will shall take, II. 105.

### CHILD EN VENTRE SA MERE.

In what respects a child *en ventre sa mère* considered as a child living—distinction between children of testator and of strangers, II. 580.  
As to child *en ventre sa mère* afterwards born illegitimate, 705.

### CHILDREN.

Vide *Marriage-Settlement, Words*.

After-born child shall come in with the rest of the children for customary share of freeman of London's personal estate, I. 397.  
Whether extended to grand-children in case of a power to give to children, II. 80.  
Ground upon which children may compel performance of marriage-agreement though the relations of husband or wife should fail on their part, 449.

### COMMISSION OF BANKRUPT.

A commission issued is notice of the bankruptcy, I. 28.  
In what case the court will stay the superseding the commission though a majority of the creditors have agreed to certify that the commission ought to be superseded, 209.  
As to proving contingent debt under commission of bankrupt, II. 662.  
Under what circumstances and to what extent joint-debts admitted to be proved under separate commission, and *vice versa*, and generally on the subject of joint and separate commission, 706.

### COMMISSION OF CHARITABLE USES.

Vide *Appeal, Costs, Visitor*.

### COMMISSION TO EXAMINE WITNESSES.

In what case court will grant commission for examination of witnesses beyond sea, where affidavit insufficient, I. 334.

### COMMISSIONERS OF BANKRUPT

Are liable to action of false imprisonment, I. 154.

### COMMITTEE OF LUNATIC.

As to the power of committee of lunatic, I. 262.

### COMMON.

In what case copyholder having common, it is extinguished, II. 250.  
In what case common extinguished by enfranchisement, *ibid*.  
As to court granting issue whether sufficient common left in the case of improvement within the statute of Merton, 301, 356.

### COMPENSATION.

No advantage to be taken of a penalty or forfeiture where compensation can be made. But where there cannot

## INDEX TO THE NOTES.

be compensation, there must be performance even of condition subsequent, I. 83.

As to the doctrine of compensation for the breach of condition, II. 366.

### COMPETENCY OF WITNESS.

In what cases the interest of witness shall go to his competency, I. 254.

### CONDITION.

Vide *Conditions in restraint of Marriage, Words.*

Distinction between conditions precedent and subsequent in respect of performance, I. 81.

No technical words to distinguish them, 83.

In what case equity will relieve against non-performance of condition of which remainder-man is to take advantage, 81.

Distinction as to performance of condition, at law, between deed and will, 83.

And between condition precedent and limitation of use, *ibid.*

If condition be performed in substance, it is good, *ibid.*

If in case of condition precedent, it may be performed *cy pres*, *ibid.*

In what case where condition of agreement not performed, the terms of the original agreement depending on that condition, not held binding, 211.

Where condition to release a right to land taken distributively, 222.

Whether this court will relieve in case of non-performance of condition precedent, 223.

In what case condition annexed to the land and to a gift will bind infant, 344.

Distinction between condition and conditional limitation; and equity of this court to compel election, 403.

Condition not to be extended to limitation over. As to the operation of words of condition alone or connected with the context, *ibid.*

Whether any one can take advantage of the non-performance of a condition who is himself the cause of its not having been performed, II. 344.

As to the doctrine of compensation for breach of condition, 366.

How far condition attached to original legacy shall attach upon survivorship, 620.

### CONDITIONS IN RESTRAINT OF MARRIAGE.

Conditions in restraint of marriage not extended, I. 20.

The principle upon which the court suffers such conditions to take effect, 83.

And further on this point, II. 573.

### CONSENT.

The court in cases of condition of marriage with consent, will not extend them—favours consents, I. 20.

### CONSENT OF COUNSEL.

Court will not set aside a decree obtained by consent of counsel on both sides, I. 274.

In what case infant bound by decree taken by consent, *ibid.*

### CONSIGNEE.

Vide *Consignor.*

### CONSIGNOR.

Where consignee insolvent, consignor may stop the goods *in transitu* at any time; and that though they have in part been paid for, II. 203.

### CONSTRUCTION.

As to the difference of construction, in creating estate tail, and estate for life, between marriage-articles and will, II. 527, 705.

### CONTRACTS.

Vide *Inadequacy of Price.*

In what cases equity will and will not relieve against hard and unequal contracts, where not actual fraud, I. 141, 320.

## INDEX TO THE NOTES.

How far time material in the performance of a contract, 472.

### CONTINGENT REMAINDERS.

*Vide Trustee to preserve Contingent Remainders.*

### CONTINGENT SECURITY.

In what case contingent security shall not stand in the way of simple contract debt in administration of assets by executor, II. 273.

### CONTRIBUTION.

*Vide Legatee.*

Where devisee of real estate and legatee of personal estate shall share debts equally, and where, land alone, I. 37.

The rule between tenant for life and remainder-man, 70, 401.

Whether heir shall contribute where made a devisee with a stranger, 440.

As to surety's liability to contribute, 456.

And further as to contribution as between heir and jointress, heir and stranger in case of a devise, devisees, joint and separate estates in case of bankruptcy, sureties, tenants in tail, exchange, legatees, tenant for life, and remainder-man; and as to the jurisdiction of equity in cases of contribution: not ousted by the jurisdiction at law, II. 757.

### CONVERSION.

In what case executor changing security, giving up the security of testator and taking a new security to himself for the debt, investing estate in the funds, or transfer of stock is a conversion, I. 474.

### CONVEYANCE.

*Vide Defective Conveyance.*

In what case an absolute conveyance may be rendered redeemable, I. 8.

In what cases conveyance by intended wife of her property without know-

ledge of intended husband established; in what cases set aside, 18.  
In what cases conveyance shall operate as a covenant to stand seised, 40, 141.  
Conveyance in fee for payment of debts revocation *pro tanto* only, 330.

### CONUSEE.

*Vide Account, Conusor.*

### CONUSOR.

*Vide Account.*

By bill in equity conusor shall compel the conusee to account according to the real value, I. 52.

### COPYHOLD.

*Vide Customary Lands.*

In what case copyhold is presumed to be merged, I. 22.

As to custom to grant copyholds for three lives *successive*, and the effect of it in payment of fine, 416.

As to custom of cutting off intails in copyholds by common recovery, 458.

No tenant to the *præcipe* in a copyhold, II. 243.

In what cases equity will and will not relieve against forfeiture of copyhold, 368, 538.

As to the operation of the statute of frauds upon devise of copyhold lands. Neither copyholds nor trust, or equity of redemption of copyholds subject to the statute, 499.

But resulting trust of copyhold as well as freehold within the statute, I. 416. *Qu.*

And see further, II. 593.

As to the effect of surrender to bar intail in copyhold, 585.

### COPYHOLDER.

Decree against lord of a manor will not bind copyholders in fee, or freeholders for life where not parties, II. 103.

In what case copyholder having common, it is extinguished, 250.



## INDEX TO THE NOTES.

### COPYHOLDER FOR LIFE.

As to contracts by copyholder for life, for sale of his estate where widow's estate by the custom, II. 63.

### CORNWALL.

*Vide Sequestration, Writ.*

### CORPORATION.

Corporation must disfranchise themselves if they will examine any of their members as witnesses, I. 117, 254.

Where a corporation is not to have any time to be examined on interrogatories, 122.

Effects of a dissolution of corporation, 311.

### COSTS.

*Vide Feme Covert, Mortgagee, Sheriff.*

As to the power of the court to give costs under the statute of charitable uses, I. 42.

In what case trustee for charity decreed to pay costs, 44.

As to costs in an action under stat. 3. Edw. 6. cap. 13., 60.

Where demurrer in writing waived on argument and over ruled, and demurrer *ore tenus* in the same matter allowed, no costs on either side, 76.

In what case costs taxed upon motion to dismiss bill, and particulars should be specified in the affidavit to be made by the party praying the costs, 116, 334.

In what case to be ascertained by the parties' own oath, 207, 450.

As to costs where apportionment or writ of dower, 219.

Where the whole of a transaction originally a fraud, money decreed to be paid back again with interest and costs, 353.

In what cases heir-at-law and heir to the honours of the family shall have their costs, II. 463.

### COVENANT.

*Vide Action of Covenant, Annuity, Bond-Creditor, Extinguishment, Marriage, Taxes, Words.*

How far and in what case covenant to pay wife a sum of money will bar her of her customary part, I. 16.

As to the force of a covenant on the part of mortgagor that no person should have the power or benefit of redemption but only himself and the heirs of his body. Or if any covenant or agreement at the time of making the mortgage, 7, 33.

In what case a covenant to settle lands does not specially bind any lands, 64.

The effect of covenant that vendee shall enjoy or purchase-money be refunded, where the vendee evicted by *A.* who claimed the land under a settlement, and is also executrix of vendee, 464.

As to the effect of covenant to levy a fine by tenant in tail. Of covenant to settle jointure by tenant for life having power, II. 306.

Where equity will and will not relieve against covenant in the case of assignee of lease to renew, and in case of a purchaser under a defective title covenanting that he was lawfully seised, 447.

In what case, and to what extent, covenant to settle land shall be considered a lien, 483.

How far covenant in the case of *free bench* is equal to bar with surrender at law, 584.

### COVENANT TO RENEW.

*Vide Action of Covenant.*

### COVENANT TO STAND SEISED.

*Vide Conveyance.*

Covenantor to stand seised, to the use of another, may make an estate to commence *in futuro*, I. 40.

### COUNSEL.

As to remedy by party against his counsel for decree obtained wrongfully by

## INDEX TO THE NOTES.

consent of counsel, or by fraud and covin, I. 274.

### COURTS.

*Vide Judgments in Inferior Courts.*

The Courts of Great Session in Wales, County Palatine of Chester, County Palatine of Durham, and the Court of Ely, are original superior courts, I. 59.

### COURTS ECCLESIASTICAL.

*Vide Injunction, Jurisdiction, Prohibition.*

Proceedings in the Ecclesiastical Courts in this kingdom not records, I. 21. Spiritual Court cannot oblige guardian to pay interest for infant's money in his hands, but will compel him to give security, 27.

Judgments of Ecclesiastical Court as much subject to the equity of this Court as judgments at law, II. 47.

Suit in Spiritual Court by infant legatee cannot be pleaded in bar to suit in equity, *ibid.*

This court will not intermeddle where Spiritual Court first possessed of a cause in which it has concurrent jurisdiction, *ibid.*

On what ground this court will grant an injunction as to a suit in the Ecclesiastical Court for subtraction of tithes, *ibid.*

The age at which persons may make a will is a matter within the jurisdiction of Spiritual Court, and courts of law will not intermeddle, 469.

### COURTS FOREIGN.

*Vide Administration, Judgment of Foreign Courts, Lunacy.*

How far and in what manner the judgments of foreign Courts of Admiralty, and the Court of Admiralty in Scotland and the County Palatine of Durham may be controverted here: and the judgments of foreign courts generally considered here as simple contract debts, I. 21.

### COURT ROLL.

Where averment of mistake in Court Roll admitted, II. 547.

### CHOSE EN ACTION.

*Vide Baron and Feme, Chamber of London.*

Wife's portion though consisting of *choses en action* shall not pass to the husband as a purchaser, unless the settlement be express or clearly import to be equivalent to the portion, II. 503.

In what case *chose en action* assignable in equity, 595.

### CROSS REMAINDERS.

On the doctrine of cross remainders, II. 545.

### CUSTODIAM.

As to the process by *custodiam* in Ireland, I. 423.

### CUSTOM.

*Vide London.*

It is sufficient if the custom of London be certified at the bar *ore tenus*, I. 216.

When once certified, the court must take notice of it, *ibid.*

Distinction between customs of London and York, 465.

### CUSTOMARY LANDS.

*Vide Statute of Wills.*

Rule that heir-at-law cannot be disinherited but by express words or necessary implication holds good as well where he is heir of *customary* lands as of *freehold*, I. 22.

In what case a customary freehold can pass only by will executed according to the statute of frauds, II. 499, 598.

## INDEX TO THE NOTES.

### CHURCH AND CHURCH-RATE.

As to jurisdiction in the cases of repair and rebuilding of church, and church-rate, II. 262.

### CY PRES PERFORMANCE.

*Vide Condition.*

On the doctrine of *cy pres*, I. 251.  
As relating to charities, II. 266.

### D.

### DAMAGES.

A jury cannot give other damages in an action under stat. 3. Edw. 6. cap. 13. than those given by the statute, I. 60.

### DEAD MAN'S SHARE.

*Vide London.*

### DEBTS.

*Vide Charge of Debts, Devise for payment of Debts, Preference of Debts to Legacies, Satisfaction, Statute of Limitations.*

### DECREE.

*Vide Consent of Counsel, Inrolment of Decree, Jurisdiction.*

In what respects, and to what extent, decree of this court is equal to a judgment at law, I. 58, 143, 369.

Whether any are bound by a decree but such as are parties to the suit, 124.

How far decree is notice, 127.

How far purchaser *pendente lite* without actual notice will be bound by a decree, 460.

### DECREE TO ACCOUNT.

*Vide Sequestration.*

Decree *quod computet* is but as an interlocutory judgment at law, I. 58.

Distinction between decree to account and final decree, 143, 369.

How an executor is to pay debts of testator, after a decree *quod computet*, 457.

### DECREE FOR FORECLOSURE.

In what case plea of decree for foreclosure by first mortgagee without notice to a like bill by second mortgagee overruled, II. 601.

### DEEDS.

*Vide Voluntary Deeds, Wills.*

In what cases the court will exercise its jurisdiction in setting aside deeds—as to the diversity of that exercise in the respective cases of deeds and wills, I. 19.

If two are parties to a deed, and one acknowledge it before a judge, it will bind the other—as to enrolling deed without examination of the party, and enrolment of a deed being received in evidence, 228.

### DEED LOST OR DESTROYED.

Where deed casually lost, the evidence is the same in equity as at law, II. 557.

And further as to the nature and rules of proof in case of deed lost or destroyed, 561.

Deeds are presumed to be lost, *ibid.*

### DEEDS AND WRITINGS BROUGHT INTO COURT.

In what cases ordered or not in respect of two parties claiming under the same settlement—of a peer disinherited—of one claiming in remainder in tail—of heir-at-law—of defendant before hearing—of remainder-men in general, II. 463.

### DEFECTIVE CONVEYANCE.

As to equity supplying defective conveyance in favour of a charity, II. 454.

## INDEX TO THE NOTES.

### DEFENCE IN EQUITY.

A man may in many cases defend himself in equity with that which would not give him a title to sue, II. 253.

### DEFENDANT EXAMINED AS A WITNESS.

As to defendant being examined as a witness for plaintiff; where the examination of one defendant read against another defendant, being executors, II. 99.

### DELEGATES, COURT OF.

Whether equity will relieve against sentence of delegates, II. 47.

### DEMISE OF THE KING.

No proceedings in any court of equity shall be determined by the demise of any King or Queen of this realm, I. 400.

### DEMURRER.

*Vide Costs.*

Plaintiff may have an interest, yet if it appear on the face of the bill that he has not a proper title, demurrer will hold, I. 40.

In what case demurrer allowed to bill brought by persons stating themselves to be next of kin to lunatic, 105.

Demurrer allowed to bill for delivering up a bond charging consideration to have been against good morals, and praying a discovery of acts of adultery and incontinence, 108.

Where demurrer held bad on an order to answer, 275.

Whether demurrer to bill for redemption on the ground of length of time may be good, 363.

In what cases demurrer because no *elegit* or execution sued out, allowed and overruled, 399.

In what cases demurrer allowed and not to bill for distinct demands—as to answer denying combination, 416.

As to demurrer for forfeitures and penalties, 110. II. 444.

### DEPOSITIONS.

In what case the first depositions of a witness for whose re-examination an order has been obtained, and who died before the re-examination had, may be used after the death of witness, where witness who had been examined in a cause, may be examined in a second cause for the same manner, and where not, I. 254, 413.

Where depositions in a cross cause allowed to be read in the original cause, *ibid.*

In what case and matter court allows deposition to be amended, II. 376.

As to reading the same depositions to the same question in two distinct causes, 448.

Depositions of witness disinterested at time read in the cause wherein he was afterwards a plaintiff, 472.

### DEVASTAVIT.

*Vide Feme Covert Executrix, Infant Executor.*

Whether changing security and taking fresh bonds by devisee for life with the assent of the executor is a *devastavit*, I. 455.

### DEVISE.

*Vide Executory Devise, Feme Covert, Remainder.*

What estate in mortgaged premises passes by a devise of all lands, tenements, and hereditaments, by a general residuary devise by mortgagee, I. 4.

Express devise shall not be defeated by applying personal estate to pay off a mortgage even in favour of an heir-at-law, 37.

As to devise to relations, in what case shall be confined to the statute of distributions, 226.

In what case averment may be against devise—*dévisé* implies a consideration in itself, II. 247.

## INDEX TO THE NOTES.

Whether devise of lands to executors till debts paid any more than a chattel interest in executors, 404.

Devise or bequest in trust for *A.* during the life of *B.* the executors, &c. of *A.* shall have it during the life of *B.* 667.

Where devise to *A.* and the heirs of his body begotten settled that the heirs of the body cannot take by purchase, 722.

### DEVISE FOR PAYMENT OF DEBTS.

*Vide Recovery.*

If lands be devised to trustees *for payment of debts*, specialty and simple contract debts shall be paid in proportion; and the trustees, creditors or sureties of testator not preferred, I. 65.

A term devised to trustees for payment of debts is not to be taken as an absolute subsisting term, but only as a security for money, 227.

How far, where devise or grant in trust for payment of debts, the whole estate is affected with the trust, II. 644.

### DEVISEE.

*Vide Contribution, Surrender.*

### DISCOVERY.

This court will not compel discovery from *bona fide* purchaser for a valuable consideration and without notice of an act of bankruptcy, I. 28.

### DISMISSION OF BILL.

Where pleadable as a decree, I. 447.

### DIVORCE.

*Vide Feme Covert.*

### DOWER.

*Vide Assignment of Dower, Dowress, Thirds.*

As to election where provision in bar of dower, I. 219.

VOL. I. PART. II.

As to the operation of the statute of limitations in the case of dower, 219

As to provision by marriage-settlement being in bar of dower, 346; II. 366.

As to what shall be a good bar of dower in respect of devise of lands; of bond to secure bequest from husband if wife survived; of settlement and covenant on part of husband to pay money in trust for wife if she survive provision expressed to be in bar, if precarious as to election, II. 66.

Jointure, in order to be an effectual bar of dower, must be expressed or averred to be in satisfaction of dower—and further, as to what acts by husband will bar from intent or by implication, as where fine by way of render—where husband only a trustee, where husband only a *cestui que trust*, or intitled only to equity of redemption of mortgage in fee—where devise—covenant to settle in bar of dower—but implication or intent must be plain, 366.

### DOWRESS.

Dowress paying her proportion of the mortgage-money has a right to redeem mortgage and to hold over till satisfied, I. 33.

Dowress shall have a satisfied term removed as against the heir, 179.

As to court aiding dowress to set aside a trust term assigned in trust to attend the inheritance, II. 324.

### DURHAM, COURT OF COUNTY PALATINE OF.

Is an original superior court, I. 59.

### DUTCHY COURT OF LANCASTER.

Is only a court of revenue, I. 221.

### E.

### EAST INDIA COMPANY.

Rule as to making parties in the case of the East India Company, I. 117.

In what case the members in their private persons are said to be made liable, 122.

## INDEX TO THE NOTES.

As to the form of clauses inserted in charter-parties of East India Company respecting freight, II. 212.

### EMBARGO.

In what case embargo will extinguish a contract, II. 243.

### ENFRANCHISEMENT.

Of the effect of enfranchisement to extinguish common, II. 250.

### ENTAIL OF PERSONALS AND TERMS FOR YEARS.

I. 255, 327, 347.

### ESTATE.

*Vide Feme Covert.*

Distinction between estate *executed* and *executory* in regard to claim of estate for life or estate tail under a will, II. 526.

### ESTATE IN FEE.

By what words an estate in fee will pass, II. 561.

The general principle of construction, *ibid.*

### ESTATE FOR LIFE.

*Vide Estate.*

Formerly held, there could not be an estate for life by implication in a term as there might be in an inheritance, I. 22.

Lease to A. his executors, &c., for three lives held a descendible estate and to belong to the heir, &c., before Stat. 14. Geo. 2. cap. 20., II. 320.

As to estate for life being turned into an estate tail by implication, 451.

Estate for life by one instrument and limitation in tail by another, they cannot unite, 489.

### ESTATE POUR AUTRE VIE.

In what case held to be assets before the statute of frauds, I. 234.

How it may be limited, and further as to the general nature of the estate and its application as assets, II. 185, 320. Before the statute of frauds, 720.

Estate *pour autre vie* in lands in *Borough English* shall go to the heir in *Borough English*, 226.

### ESTATE TAIL.

*Vide Estate, Estate for life.*

Whether estate tail can be raised by implication, II. 451.

As to estate tail in a settlement where by mistake the words of inheritance omitted, 545.

### ESTATE TRUST.

Trust estate cannot be barred without a recovery, any more than a legal estate—how far they may be affected by one recovery where tenant for life of the equitable estate has also the legal estate for life, I. 14.

How far fine or recovery of trust estate good without consideration, *ibid.*

### EXAMINATION DE BENE ESSE.

Distinction between examination *de bene esse* and bill to perpetuate testimony, I. 309.

### EXAMINATION OF WITNESSES.

In what cases after publication passed, examination may be had, I. 47.

Whether party can in any case examine to a thing not put in issue in the case, 484.

### ECCLESIASTICAL OFFICER.

In what case the court made an order on ecclesiastical officer, I. 54.

### ELECTION.

*Vide Bill Dismissed.*

If defendant plead statute of limitations, plaintiff not bound to elect whether he will proceed in equity or



## INDEX TO THE NOTES.

at law till plea argued—so as to plea in bar, I. 103.

As to election in the case of dower, II. 66.

And further, as to the cases and the principle on which the court proceeds in cases of election—in what case election can arise—where heir-at-law can and cannot be compelled to elect—where *feme covert* allowed to elect—how far person claiming under person electing is bound by the election of that person, *e.g.* issue in tail by election of tenant in tail, child by election of parent, &c., 582.

### ELEGIT.

*Vide Demurrer.*

### EMBLEMENTS.

Where husband and wife joint-tenants of the land, and husband sow the land and wife survive, if wife shall have the emblements, II. 323.

### ENTRY.

Whether injunction will prevent entry, II. 519.

### ESCHEAT.

*Vide The King.*

### EXECUTION.

*Vide Demurrer.*

### EXECUTOR.

*Vide Action on Penal Statute, Assent of Executor, Bill for Discovery, Contingent Security, Conversion, Heir, Interest, Judgments of inferior Courts, Privity, Prohibition, Sperate Debts, Simple Contract Debts.*

Term vested in wife as executrix may be disposed of by husband, I. 19.

Devise to A. whom he makes sole executor, A. takes beneficially, 23.

Executor who never administered need not be made a party, 31.

Distinction between executor doing a thing voluntarily and by compulsion, with respect to his being indemnified, 92.

If executor be excommunicated, he cannot proceed in his suit until he be discharged, 184.

In what cases and to what extent executor shall be charged for loss—distinction in this respect between executors and trustees, 197, 303.

Executor not intitled to any allowance for his care and trouble, 316.

May prefer creditor in equal degree in equity as well as at law, 369.

In what manner executor is to pay debts of his testator after a decree *quod computet*, 457.

Executor not finally concluded by inventory exhibited, 460.

In what cases executor shall and shall not have the residue when undisposed of, 473.

As to the right of executor to bind the assets of his testator, 474.

How executor may defend himself in this court on action in debt upon a bond at law, II. 57.

Executor of an executor cannot retain for his debt, 62.

The general power of executor to dispose of the assets of his testator, and how far legatees and creditors may follow the assets disposed of by him in the hands of third persons, 76.

In what case the examination of one executor read against another, 99.

Where widow and another appointed executors, but if the widow married again, her executorship to cease; executors filed a bill and proceedings had, then widow married, bill of revivor held necessary, 309.

Whether devise of lands to executors till debts paid any more than a chattel interest in executors, 404.

As to executor following the assets of his testator, 445.

As to sale by executor, *ibid.*

The principle of dealing with executors—how far testator's goods liable for debt of executor—how far and in what cases purchaser from executor bound or not to see to the application of the purchase-money, 616.

## INDEX TO THE NOTES.

### EXECUTORY DEVISE.

In what case executory devise is good in part though void for part—executory devise exceeding prescribed limits cannot be supported upon the possibility that the estate may vest sooner, II. 88.

### EXCEPTIONS TO ANSWER.

Where answer to discovery and plea to relief, exceptions may be taken as to the discovery before plea argued, I. 344.

### EXCHEQUER, COURT OF.

*Vide Bill Original.*

Where party restrained in Chancery from setting up decree of court of exchequer, I. 221.

As to the interference of Chancery where extent in aid out of the exchequer, *ibid.*

Whether suit and dismissal in the court of exchequer, may be pleaded in bar in Chancery, 310.

### EXTENDED VALUE.

*Vide Account, Mortgagee.*

Whether after an estate has been held under an extent for a long time and gone through several hands, account shall be taken otherwise than at the extended value, I. 398.

An incumbrancer shall account only at the extended value, 468.

### EXTENT.

*Vide Extended value, Jurisdiction, Length of time.*

Whether goods and chattels can be extended in the hands of a grantee before extent under a statute, I. 294.

### EXTENT IN AID.

As to the jurisdiction of this court to set aside extents in aid, I. 469 ; II. 427.

### EVIDENCE.

*Vide Charge upon the Land, Ordinary, Witnesses.*

As to the nature of evidence on appeal and on bill of review, I. 214 ; II. 464.

As to evidence in action of trespass brought for negro, I. 453.

As to the nature of evidence required in cases where instruments have been lost, suppressed, or destroyed, II. 380.

As to copy of enrolment of instrument being received as evidence, 473.

The rules of evidence generally the same in equity as at law, 557.

### EXTINGUISHMENT.

*Vide Embargo, Marriage-Portion.*

In what case copyholder having common it is extinguished, II. 350.

As to effect of enfranchisement to extinguish common, *ibid.*

Where bond, covenant, or agreement, between two persons extinguished at law by their after-marriage, 481.

### F.

### FACTOR.

*Vide Policy of Insurance.*

Where one factor out of several joint-factors suable alone, I. 140.

How far factor may bind his principal and the property of the goods, 408.

How far he has a lien on them—goods of principal in the hands of factor becoming bankrupt not subject to bankrupt's creditors, II. 117.

And further on this point and the general relation of principal and factor, 638.

As to action at law against factor, *ibid.*

### FRAUD.

*Vide The King.*

As to fraud under the statute 13. Eliz. and 27. Eliz., I. 427.

## INDEX TO THE NOTES.

No length of time will bar a fraud,  
445.

### FRAUD UPON THE CUSTOM OF LONDON.

As to what shall be considered a fraud upon the custom of London by free-man in respect of his voluntarily confessing judgment—executing assignment of personal estate—deed of gift—obtaining a release—keeping possession of voluntary settlement executed and receiving the rents—purchasing in joint names of himself and wife—the principle upon which a disposition of his property by free-man considered as a fraud upon the custom, II. 277.

### FRAUD ON MARRIAGE.

How far marriage-settlement or debt concealed is a fraud on marriage, I. 408.

How far court will order securities in fraud of marriage to be delivered up, 412; II. 652.

### FRAUD IN OBTAINING WILL.

*Vide Probate.*

### FRAUDULENT BARGAINS.

On the doctrine of fraudulent bargains, I. 240; II. 16.

### FRAUDULENT CONCEALMENT OF SECURITIES.

Court will relieve against an entail set up after fraudulent concealment, I. 137.

Further on this point, II. 151.

Whether he who conceals his incumbrance shall be postponed, 370.

Decree made upon a suppressed deed, 380.

### FRAUDULENT CONVEYANCES.

Voluntary conveyance is not for that reason fraudulent, only evidence of fraud, II. 491.

General principles governing the doctrine of fraudulent conveyances, II. 491.

### FEE.

*Vide Estate in Fee.*

### FEES.

*Vide Solicitor.*

### FEE-FARM RENT.

Court ordered that grantee of a fee-farm rent under the crown might distrain for rent notwithstanding a sequestration. *Qu.* If sequestrators might not have been ordered to pay the rent as before the sequestration? II. 715.

### FEME COVERT.

*Vide Mortgagor, Separate Property.*

Feme covert seised of lands in fee cannot devise the same to her husband—nor can charge her estate by articles, I. 48.

Nor (though having a separate maintenance secured by deed) has she a capacity to contract debts or be sued at law as a feme sole. Query, in case of abjuration or banishment of the husband, 71.

Wife divorced *a mensa et thoro* having alimony; entitled to costs on personal action, and husband cannot release them to bind the wife, 244.

Wife cannot, during coverture, acquire property distinct from her husband, 261.

In what case wife not bound by marriage-articles to convey her own lands although she had accepted a jointure, 285.

Where feme covert bound by inclosure, 427.

Feme covert, being an infant mortgagee or trustee, may convey by fine under stat. 7 Ann. cap. 19., 461.

How far court will carry into execution the agreement of feme covert with her husband—and after death of the husband, II. 61.

## INDEX TO THE NOTES.

In what cases feme covert may appear and answer without her husband—where decrees and orders made by the court against feme covert defendant alone, 614.

Where wife may appear and may be compelled to appear without her husband here and at law—ground of it, *ibid.*

And further as to jurisdiction of court in respect of feme covert, 671.

Savings out of her separate maintenance, may dispose of them as a feme sole, 748.

### FEME COVERT ADMINISTRATRIX.

How far husband may be charged for assets wasted by his wife administratrix before marriage, II. 118, 195.

### FEME COVERT EXECUTRIX.

Cannot commit a devastavit—in what case she may be charged for waste done by her husband, I. 328.

How far husband may be charged for waste committed by his wife executrix, *dum sola*, *ibid.*

Or for personal estate possessed by her though he took it as a portion, II. 195.

Writ *ne exeat regno* may issue against feme covert executrix where husband out of the jurisdiction, 614.

### FEME DEFENDANT.

Where feme defendant intermarries, the suit does not abate, but the husband ought to be named in the subsequent proceedings, I. 318.

In cases of fraud, equity has a concurrent jurisdiction with law, II. 123.

And often beyond and contrary to the rules of law, *ibid.*

### FEOFFMENT.

Feoffment *in futuro* is void, I. 40.

### FLEET PRISON.

Vide *Warden of the Fleet*.

### FREE BENCH.

Vide *Covenant, Surrender*.

In what case feme may be bound by settlement of a jointure in lieu of her *free bench*—as to the nature of *free bench*, II. 63.

And further on this point—as to the power of husband to bar widow of her *free bench*, 584.

### FREIGHT.

As to the form of clauses inserted in the charter parties of the East India Company respecting freight, II. 212.

### FINE.

Vide *Answer*.

In what case the court will relieve against a conveyance by deed and fine, and where a fine shall be avoided, I. 93, 369 ; II. 307.

How far fine will bar mortgagee, I. 132.

As to the effect of a fine levied by tenant in tail in remainder, 213.

In what case equity will restrain the operation of a fine, 369.

A fine can be reversed by writ of error only, *ibid.*

Husband and wife levy a fine, and husband alone declares the uses; in what case and how far the wife shall be bound, II. 472.

### FINE AND NON-CLAIM.

In what case during pendency of suit, plea of a fine and non-claim overruled, I. 74.

Fine and non-claim will bar a trust if levied by a stranger, *dict.* 84.

Fine and non-claim bar to a bill of review, 132, 289.

### FIXTURES.

As to the nature of fixtures and what shall be considered as such, II. 508.

## INDEX TO THE NOTES.

### FORECLOSURE.

In what case decree of foreclosure though signed and inrolled opened, II. 235.

Whether infant may be foreclosed, 518.

As to the practice of making all incumbrancers parties to bills for foreclosure, *ibid.*

### FORFEITURE.

*Vide Compensation.*

In what cases, and with what restrictions and distinctions a defendant may shelter himself from answering so as to subject himself to forfeiture or punishment; and therein of the distinction between a limitation over and a condition working a forfeiture, I. 110.

### FURNITURE.

*Vide Goods.*

## G.

### GAMING.

As to the mode of proceeding in equity by common informer under the gaming acts, I. 490.

### GAVEL-KIND.

Lands lying in Kent are presumed *prima facie* to be gavel-kind, I. 325.

### GRAND-CHILDREN.

*Vide Words.*

### GRANT.

In what cases, under what circumstances, and to what extent, the king can grant the custody of the person and lands of idiot, I. 11.

If termor *grant* the land, grantee is but tenant at will; if he *devise* the land, the whole term passes, II. 684.

### GREAT SEAL.

Power of great seal in relation to ideots and lunatics, I. 11.

In relation to setting aside or repealing letters patent on holding plea of *sci. fac.*, 55.

A grant of lands within the county palatine of Lancaster, under the great seal only, is not good—so grant of next avoidance where advowson belongs to the dutchy; *secus* as to presentation, 386.

### GIFT.

In what cases the manner and circumstances of a gift may be regulated by this court, I. 56.

In what case gift of lease by lessee fraudulent even at law, II. 727.

### GOODS.

In what cases goods and furniture shall and shall not pass by bequest of *all my goods and furniture, in or at or belonging to A.*, II. 740.

### GOVERNORS OF A CHARITY.

In what case court of equity will and will not interfere with the governors of a charity, II. 400.

### GOVERNORS OF FOREIGN POSSESSIONS.

Action brought here against governor of Minorca, for trespass and false imprisonment committed there, held well brought, I. 77.

### GUARDIAN.

*Vide Courts Ecclesiastical, Security.*

As to the grounds of the interference of this court in transactions between guardian and ward, I. 296.

As to powers of guardian in case of infant executor, 328.

In case of infant heir, in paying off incumbrances, how far acting under decree—how far court will decree guardian satisfaction out of infant's

## INDEX TO THE NOTES.

estate, where he has paid money for infant, 428 ; II. 193.

As to powers of guardian or trustee over infant's property, so as to alter it, I. 437.

In respect of the old practice of infant suffering a recovery by his guardian under privy seal, 461.

Guardian not compellable to apply profits of estate of infant heir, to pay off bond-debts, II. 713.

### H.

#### HALF PAY.

Whether half pay of officer in the army is in any case assignable, II. 595.

#### HEIR-AT-LAW.

*Vide Devise, Heir and Personal Representative, Hotch-pot, Infant, Next of Kin, Portion, Sequestration, Surrender, Trust Resulting.*

How far and in what cases the principle, that heir-at-law shall not be disinherited but by express words, or by necessary implication holds good—how far express intention in favour of heir-at-law necessary in respect of will and deed, as contra-distinguished, I. 22.

Heir-at-law is not bound by deed or by obligation unless expressly named, 180.

In what cases portion shall sink for the benefit of the heir, 205.

Whether heir shall contribute where made devisee with a stranger, 440.

Where lands given to trustees to be sold for payment of debts and legacies, and more than sufficient sold, the heir shall have the surplus money, 487.

As to term merging in heir-at-law, II. 91.

Where heir decreed to join in a sale of lands for raising portions, the lands being settled on trustees, *ibid.*

Where in case *A.* articles for purchase or sale of land, and dies before the conveyance, the heir to convey or enjoy, and the executor to pay or receive the purchase-money, 322.

How far heir-at-law is favoured in this court, where question between him and administrator, 350.

In what case decreed to pay costs upon bill filed to establish will by devisees, 441.

In what cases the court will and will not order deeds and writings to be brought into court in favour of an heir-at-law—plaintiff heir-at-law need not state every link of his pedigree—nor need he first establish his title at law—he has a right to inquire by what means, and under what deed he is disinherited—distinction in such cases between heir-at-law and heir-in-tail, 463.

In what cases, whether as plaintiff or defendant, he shall have his costs, *ibid.*

Whether bound by deed or bond if not expressly named, 483.

Whatever is not disposed of belongs in equity to the heir-at-law, 572.

In what cases heir bound and not bound to elect, 582.

As to the necessity of being heir general, where one would take as heir by way of purchase, 736.

#### HEIR TO THE HONOURS OF A FAMILY.

In what cases such an heir shall be intitled to have deeds and writings brought into court—where he shall have his costs, II. 463.

#### HEIR BUYING IN INCUMBRANCE

May under circumstances be allowed on account the whole money due thereon, I. 335, 464.

#### HEIR AND PERSONAL REPRESENTATIVE.

Their rights are purely legal rights, I. 299 ; II. 310.\*

#### HEIR-IN-TAIL :

In what cases in equity distinction taken between heir-at-law and heir-in-tail, II. 463.

---

\* Note. A question has of late been made as to the extent of this doctrine.



## INDEX TO THE NOTES.

### HEIRS OF THE BODY.

As to the words "*heirs of the body*," where taken as words of purchase, and where as words of limitation, II. 43.

### HERIOT.

This court will not entertain a bill of discovery who is of best ability in the manor to answer a heriot, I. 441.

As to agreement between lord and tenants for settling heriot being confirmed by this court, 456.

### HOTCH-POT.

Widow of freeman has no claim upon what is brought into hotch-pot among the children, I. 216.

In what case heir-at-law must bring gift of personalty in the life-time of intestate, into hotch-pot, II. 639.

If there is a wife and but one child of a freeman not fully advanced, the child shall not bring that part into hotch-pot, 754.

### I. & J.

### INADEQUACY OF PRICE.

Where court will and will not relieve against contracts, on the mere ground of inadequacy of price, I. 142, 320.

### INFANT.

*Vide Condition, Consent of Counsel, Courts Ecclesiastical, Guardian, Mortgagor, Parol Demurring, Rents and Profits, Statute, Warranty.*

How far infant bound by his contracts, I. 132, 343.

Inheritance of female infant bound by settlement, 132.

Whether infant capable of grant of custody of idiot, 137.

How far infant bound by decree to sell for payment of debts, 295.

Infant not bound by common recovery, suffered against him, though he appear by guardian—as to the old practice of recoveries suffered by infant under privy seal, 461.

As to deed of infant, partition by infant, II. 225.

How far laches shall or shall not be accounted to infant in respect of non-entry or claim, or non-performance of a condition, 342.

Infant may file a bill for an account against a stranger, *ibid.*

In what cases, and how far laches in general may be accounted to infants, *ibid.*

Time in respect of redemption of mortgage may run upon an infant, 369.

As to infant having a day when the lands devised to trustees, and trustees apply to the court for direction to sell, 479.

Whether infant can be foreclosed, 518.

### INFANT ADMINISTRATOR.

How administration shall be granted in case of infant administrator, I. 328.

### INFANT EXECUTOR.

*Vide Assent of Executor.*

In case of infant executor administration, with will annexed, granted to guardian, I. 328.

Cannot commit devastavit, 343.

### INFANT HEIR-AT-LAW.

In what cases decree made against infant heir-at-law and devisee, I. 173.

As to the application of rents and profits of real estate during the minority of the heir-at-law, 174.

### INFANT LEGATEE.

*Vide Courts Ecclesiastical.*

### INFANT MORTGAGOR.

How far length of time shall operate in the case of infant mortgagor, after decree had to redeem, II. 419.

### INFANT TRUSTEE OR MORTGAGEE.

*Vide Feme Covert.*

As to the powers of infant trustee or

## INDEX TO THE NOT

mortgagee under the statute 7 Ann.  
c. 19., l. 461.

How far i  
inferred

### INFANT'S FORTUNE.

*Vide Guardian.*

INT

In what cases, and how far, the court  
will of itself, or will permit execu-  
tors and trustees to break in upon the  
capital of infant's fortunes, l. 255.  
Or alter the property of infant, 437.

In what  
not can  
As to rate  
court of  
How far  
legacy

### INTAIL DOCKING.

INT

As to bond covenant or agreement by  
tenant in tail not to dock the intail,  
ll. 234, 635.

*Vide Bott*

### IDEOT.

*Vide Words.*

In what c  
terest is  
194.

The king's prerogative as to ideots and  
their estate—the freehold is in the  
ideot—to what time in particular  
office found shall have relation in  
respect to ideots, l. 9.

In what ca  
in relie  
length  
Where ex  
with int

In what cases, under what circum-  
stances and to what extent, the king  
can grant the custody of person and  
lands of ideot—power of great seal,  
11.

Where the  
ginally  
paid ba  
353.

How an ideot is to sue and defend,  
106.

As to inter  
master's

What will pass by grant of the custody  
of an ideot—of the finding of an  
ideot on inquisition, 137.

As to the  
rate of i  
either h  
perty in  
of stat.  
interest  
executed

### IMPEACHMENT OF WASTE.

*Vide Tenant for Life.*

INTER

As to the effect of the words "im-  
peachment of waste," l. 23.

As to redu  
interest  
ment or  
terest a  
317.

### INFERIOR COURT.

Inferior court must show jurisdiction,  
l. 59.

IN

### INHERITANCE.

By what words lands of inheritance  
shall not pass, l. 23.

How far i  
tended in  
grounded

## INDEX TO THE NOTES.

In what case a new set of interrogatories allowed to be settled before the master after publication passed, 254.

### INTESTACY OF CITY ORPHAN.

*Vide London.*

### IRELAND.

*Vide Sequestration, Subpœna.*

How far court will act on bill for partition of lands in Ireland, I. 77.

As to the history of Ireland with reference to its courts of justice, 422.

### IMPLICATION.

*Vide Estate for Life, Heir-at-Law.*

Whether implication can be against the plain intent of the party expressed in the will, II. 60.

### JOINT-TENANT.

Agreement by one joint-tenant to sell not decreed against survivor, II. 63.

### JOINT-TENANCY.

As to joint-tenancy in cases of trade, I. 217.

What words will create a joint-tenancy—courts in later times lean against joint-tenancy, 353.

As to joint-tenancy of a legacy, *ibid.* 482. II; 611.

As to joint-tenancy of trust of a term, II. 545.

As to severance of joint-tenancy in a term of years by mortgage, 557.

### JOINTURE.

Jointure though out of land will bar wife of her customary part, I. 6.

Where feoffment to the use of *B.* will create a jointure for *B.* under stat. 27. Hen. 8. cap. 10., 199.

In what case jointure being short of the amount agreed to be made by tenant for life made good against the issue in tail, 218.

In what case feme may be bound by jointure in lieu of her *free bench*, II. 63.

### IMPROVEMENT WITHIN THE STATUTE OF MERTON.

As to court granting issue whether sufficient common left in such a case, II. 301.

### IMPROVIDENCE.

As to the effect of improvidence to avoid a release, I. 19.

### INCORPOREAL INHERITANCE.

The crown may, but a subject cannot, reserve a rent out of an incorporeal inheritance, II. 714.

### INCLOSURE.

As to performance of agreement for inclosure in this court, I. 456.

### INROLMENT OF DECREE.

Whether inrolment of decree prevents a rehearing, I. 131.

In what cases opened, vacated, and reversed, *ibid.*

### INROLMENT OF INSTRUMENTS.

As to the effect of inrolment and of copy of inrolment of deed as evidence, II. 471.

### JUDGMENT AT LAW.

In what case husband may alone assign over extended interest obtained under a judgment given in trust for wife when sole, I. 7.

In what case judgment at law after execution awarded shall survive to husband, 397.

Where an old judgment allowed to be brought in on condition not to docket it, II. 151.

In what case bill of sale shall be preferred to judgment, 511.

As to the effect of judgment obtained after allowance of bankrupt's certificate on debt proveable under the

## INDEX TO THE NOTES.

commission to prevent certificate from being a discharge, 697.

### JUDGMENTS OF INFERIOR COURTS.

Executors shall be presumed to take notice of all judgments in the inferior courts of law, even in the court of *pie poudre*, I. 59.

### JUDGMENTS OF FOREIGN COURTS.

How far and in what manner judgments in foreign courts of admiralty may be controverted here—as to the force of judgments in foreign courts, here, I. 21.

### JURISDICTION.

*Vide Articles, Courts Ecclesiastical, Church and Church Rate, Inferior Court, Plea to Jurisdiction, Subject-matter of Suit.*

As to the jurisdiction of the courts of equity in setting aside deeds and wills, I. 19.

This court has jurisdiction in case of writ *de excomm' capiend'* till return, 24.

Where the Court of Chancery has concurrent jurisdiction with the admiralty and other courts, 55.

As to the jurisdiction of the court by decree to bind the Isle of Man, 76.

Over lands in the plantations abroad, 77.

On appeal from the court of great sessions in Wales, 178.

Where jurisdiction in equity and concurrent jurisdiction assumed by courts of law, this will not prevent relief in equity, 207.

In the case of extent from the crown this court will not examine the quantum of the king's debt, 224.

In case of concurrent jurisdiction this court will not hinder spiritual court from proceeding if first possessed of the cause, 230.

As to jurisdiction of the court in the case of master and apprentice, 460.

To set aside extents in aid, 469.

Where equity has and has not jurisdic-

tion in respect of the rights and duties of marriage, II. 47.

As to the jurisdiction of the court over stock in the public funds in favour of creditors, 491.

### ILLUSORY APPOINTMENT.

*Vide Power of Appointment.*

In what cases appointment deemed illusory and in what cases not, I. 67.

### INCUMBRANCER SUBSEQUENT.

As to subsequent incumbrancer getting in prior security though satisfied, and keeping it till all the money due on subsequent incumbrance be paid, II. 81.

### INJUNCTION.

Whether injunction upon an attachment or a *dedimus* on a defendant's praying time extends to stay proceedings in spiritual court—or proceedings in courts of admiralty—whether court of law will enjoin or otherwise stay proceedings in ecclesiastical court, I. 25.

Whether the court will grant or continue an injunction to the hearing where the title not clear at law, 120.

On what ground to a suit in the ecclesiastical court for subtraction of tithes, II. 47.

This court will not grant injunction to stay proceedings in ecclesiastical courts, for a legacy, *ibid.*

Where injunction granted to restrain the breach of a restrictive covenant secured by forfeiture and penalty, 119.

Whether injunction will prevent entry, 519.

### INSTRUMENTS LOST, SUPPRESSED OR DESTROYED.

As to the evidence required in such cases, II. 380.

### ISSUE.

As to court granting issue whether suffi-

## INDEX TO THE NOTES.

cient common left in case of improvement within statute of Merton, II. 356.

### K.

#### KEEPERS OF PRISONS.

The penalty for any keeper of a prison to connive at or assist in escape of a prisoner, II. 174.

#### KIN, NEXT OF.

The next of kin as to the personal estate stand in parity of reason with the heir-at-law as to the real, I. 22.

Where the next of kin take *per capita*, and where *per stirpes*, II. 653.

#### KING IN COUNCIL.

Whether application for sequestration against lands in the plantations abroad should not be made to the king in council, I. 76.

### THE KING.

*Vide Demise of the King, Outlawry.*

The king may sue in what court he pleases, I. 281.

In case of fraud the king shall not be bound, *ibid.*

In what case mortgage of a term held good against the king, 341.

The ground on which the king if he extend the inheritance shall have a term attendant on the inheritance, 357.

The king is considered *quasi* a trustee in the case of a lunatic—may be considered in this court as a royal trustee, 439.

Where office of Warden of the Fleet is in one for life and the fee in another and office forfeited, the forfeiture is to him in the reversion and not to the king, II. 174.

Mortgagee in fee after forfeiture attainted, and the king seised, whether mortgagor shall redeem, 313.

Whether this court helps the king to an

equity of redemption, being intitled by forfeiture for treason, 313.

Where escheat of inheritance to the king he shall have a term attendant thereon, 390.

The king may be an arbitrator, 613.

### L.

#### LACHES.

Bill for account dismissed on the ground of laches, though length of time not pleadable in bar, I. 363.

Account as against trustee confined to the time of filing the bill on ground of laches, 445.

How far laches shall or shall not be accounted to infant in respect of non-entry or claim, or non-performance of a condition, II. 342.

And in general, *ibid.*

#### LANCASTER, COUNTY PALATINE OF.

*Vide Great Seal.*

### LAND.

*Vide Contribution, Money, Outlawry, Owelty of Partition.*

Distinction between an agreement or mortgage of the land itself and of a rent-charge issuing thereout, I. 8.

Where to be considered as money, 299, 345.

Land and money shall never be taken as a satisfaction the one for the other, *ibid.*

Whether where charge of a certain sum on land, and trustee raises more and becomes insolvent, the trustee or the land shall bear it, II. 85.

#### LANDS IN FOREIGN COUNTRY.

*Vide Jurisdiction, Plantations Abroad, Sequestration, Will.*

### LAW OF MERCHANTS

Is part of the law of the land, II. 78.

## INDEX TO THE NOTES.

### LEASE FOR LIVES.

Whether lease to *A.* his executors and administrators for three lives a descendible estate and shall belong to the heir or executor, II. 320.

### LEGACY.

Vide *Injunction, Marriage, Preference of debts to Legacies, Satisfaction, Security for Legacy, Vested Interest.*

Whether gift over of the residue sufficient to avoid a legacy given on condition of marriage with consent—whether limitation over to executor, I. 20.

Specific legacy under circumstances charged with payment of a pecuniary legacy—distinction between general and specific legacy—bequest of residue not specific, 31.

Legacy not within statute of limitations, 257.

Distinction in expounding between legacy and trust, 324.

Distinction between personal legacy and legacy out of land, *ibid.*

Where tenants in common of legacy and one die *in vita testatoris*, the share subject to statute of distributions, 425.

In what case legacies shall be paid after debts—where equal, 482.

Legacy given to two without words of severance is joint, *ibid.*

Personal legacy *pour autre vie*, how far controlled by condition, II. 36.

In what case where uncertain in the will, e. g. "*as much as executors should think fit*," made certain, 154.

As to survivorship in case of legacy, 208.

Whether where legacy given to *A.* who is willed by testator to give part of it to *B.* and *A.* die in testator's life-time *B.* shall have his part, 208.

The cases where legacy held to be and not to be lapsed though legatee die in testator's life-time—as of annuity to be paid by legatee in consideration of legacy—charity, though trustees die in testator's life-time—how lapse of legacy may be prevented, 378.

General principle of the doctrine of lapsing, *ibid.*

Principle upon which legacy is held to

relate to the death of testator—legatee is in by the executor, 538.

Quere whether the principle applies to chattel real or lease for years, *ibid.*

### LEGACY LAPSING.

To prevent lapse of legacy the intention ought to be specially penned, II. 52. And for the cases in which legacy will not lapse though legatee die in the life-time of testator, 611.

### LEGACY ON CONDITION.

How far legacy given on condition as to dispute the will, held to depend on condition or the condition itself considered *in terrorem*, II. 91.

The principle of such conditions compared with the principle of condition not to marry without consent, *ibid.*

Where legacy given on condition of legatee paying an annuity thereon legatee dies in testator's life-time annuity subsists and shall be a charge on the residue, 522.

### LEGATEE.

Vide *Abatement of Legacies, Contribution, Security.*

In what case legatee decreed to refund, I. 27.

Where not, 94; II. 205.

Specific legatee of a mortgage not bound by an account settled between the executor of the mortgagee and the mortgagor—not bound to contribute costs in aid of pecuniary legacies—contra, as to costs of inquiry respecting his own specific legacy cannot have satisfaction out of the surplus on diminution of his legacy because testator had not power to give him the whole of it, I. 31.

Of the general power of legatees to follow assets of testator disposed of by executor in the hands of third persons, II. 76.

### LENGTH OF POSSESSION.

As to the effect of length of possession in case of mortgage, I. 418.



## INDEX TO THE NOTES.

Where livery presumed on length of possession, II. 4.

Further in general on the effect of length of possession as against mortgagee—on bill for specific performance of covenant—in the case of a questioned right of common, where disabilities stated in the case of a purchaser of *cestui que trust* under a term to raise a sum of money—general principle that courts both of law and equity will presume in favour of length of possession, 391.

### LENGTH OF TIME.

*Vide Demurrer, Laches.*

As to operation of length of time where lands held under an extent, I. 398.

No bar in the case of mortgagee in nature of tenant by elegit, 468.

Where it shall operate in case of infant mortgagor even after decree to redeem, II. 419.

### LESSEE.

In what case and to what extent lessee rendering rent and assigning over, is bound by the covenant in respect of the rent—and herein of the effect of lessor's acceptance of the assignee and of rent, I. 88.

Whether lessee rendering rent can avoid a voluntary conveyance, 108.

Where gift of lease by lessee fraudulent even at law, II. 727.

### LETTERS OF ATTORNEY FROM SEAMEN.

As to the method to be observed in making and attesting such letters of attorney, II. 391.

### LETTERS PATENT.

*Vide Jurisdiction.*

Where set aside on information—by what power repealed by Lord Chancellor, I. 55.

Letters patent themselves form a sufficient record whereon to found *sci. fa.* for repeal, 385.

If patent be void in itself *non concessit* may be pleaded, *sci. fa.* not necessary to repeal it, 388.

Purchaser claiming under one who claimed under letters patent in which there was a trust affected with notice of that trust, II. 663.

### LIEN.

*Vide Policy of Insurance.*

In what cases vendor shall have a lien on the lands sold, for the purchase-money—whether extended to third persons, I. 268.

General principle of lien, II. 117.

### LIVERY.

In what case livery presumed on length of possession, II. 4.

Where supplied in equity, 164.

### LIMITATION.

*Vide Statute of Limitations.*

Distinction between conditional limitation and condition, I. 403.

In what case remainder over after a limitation, which if a person who would have been entitled under it, had come into esse would have been vested, held good, II. 601.

### LIMITATION OF USES.

*Vide Condition.*

### LIS PENDENS.

*Lis pendens* is notice—what is a *lis pendens*, I. 287.

Alienation *pendente lite* void, 460.

### LONDON.

*Vide Children, Hotch-pot, Mortgage.*

Where widow of freeman barred before marriage of her customary part, the orphanage part of the personal estate of such freeman dying, leaving a child or children, is a moiety, I. 6.

And what shall bar in respect of settlement and jointure, *ibid.*

## INDEX TO THE NOTES.

In respect of covenant, 16.

In what case necessary to be expressed to be in bar, in what not, *ibid.* and 6.

Where, and by what means child barred of orphanage share, and where he must elect, 88.

Where he must bring into hotch-pot and where not—where money, and how and under what circumstances considered as advancement or not—and how far lands given and accepted in bar considered as a bar—whether the value of the advancement need appear with certainty—father's declaring child to be fully advanced of no avail unless it appears what the advancement is—how the quantum of advancement should appear, 89, 181, 216.

The custom as to survivorship—where orphan is capable of devising his part, and what he may devise—how if orphan die intestate after, 21, 89.

Dead-man's share subject to the act of distribution, orphanage share subject to debts, 133.

Money to be laid out in land not taken as advancement, 216.

A jointure out of land if not expressed to bar will not bar the wife's customary part—*secus*, if expressed to be in bar, *ibid.*

Nor will legacy bar if sufficient out of testamentary part to pay the same, *ibid.*

Legacy for mourning paid out of legatory part, 345.

Distinction between customs of London and York, 465; widow and orphan of freeman are in the nature of creditors, II. 202.

Where parties let into proof whether sum mentioned to be given to child in freeman's will should be taken to be the whole of what testator had given, 630.

### LORD CHANCELLOR.

*Vide Great Seal.*

### LORD OF MANOR.

Decree against lord of manor will not bind copyholders in fee or freeholders for life who are not parties, II. 103.

The estate of the lord will preserve contingent remainders against a forfeiture where the preceding estates are expired, 243.

### LUNACY.

Courts of equity here will take notice of proceedings of a foreign court of competent jurisdiction in cases of lunacy, I. 21.

### LUNATIC.

*Vide Demurrer, the King, Specific Performance.*

Duty and power of the King in regard to lunatic and his estate—whether lunatic's property may be varied—how the residue of lunatic's estate is to be distributed, I. 9, 437.

Power of great seal in relation to lunatic, 11; where lunatic ought and ought not to be made a party to a suit or action brought in his name, 106

Effect of committee of lunatic investing lunatic's personal estate in purchase of lands, 434.

As to the course pursued where settlement made by lunatic, II. 414.

### M.

### MAINTENANCE OF WIFE OR CHILDREN.

In cases where no agreement, the court will not allow maintenance to wife eloping and living in adultery; in what cases court, after decree for separate maintenance, has refused to continue it, I. 54.

### MARRIAGE.

*Vide Conveyance.*

In what cases conveyance by intended wife of her property without knowledge of intended husband established, in what cases set aside, I. 18.

As to legacies given on condition of marriage with consent, how and in what cases avoided, 20.

## INDEX TO THE NOTES.

Whether marriage is an extinguishment of a bond or covenant—marriage with legatee no revocation, 409.

Where equity has and has not a jurisdiction in respect of the rights and duties of marriage, II. 47.

As to marriage by *A.* being *infra annos nubiles* being a performance of a covenant to marry, though disagreed to after the age of consent, 336.

As to marriage between obligor and obligee being at law a release of the bond, 481.

### MARRIAGE-ARTICLES.

Vide *Children, Marriage-Settlement, Parol Evidence.*

In what case wife not bound by marriage-articles to convey her own lands although she had accepted a jointure, I. 285.

In what case marriage-articles varied, 320.

Distinction between construction of marriage-articles and wills in regard to raising estate for life and estate tail, II. 527, 705.

### MARRIAGE BROKAGE-BONDS.

The principle on which equity decrees against marriage brokage-bonds, II. 446.

### MARRIAGE-PORCION.

Bond given to return or refund any part of marriage-portion without the father's privity is void, I. 348.

As to husband being considered purchaser of wife's portion under a settlement, II. 503.

### MARRIAGE-SETTLEMENT.

Vide *Children, Marriage-Portion.*

In what case children may compel settlement though portion of parent not paid, I. 69.

In what cases and under what circumstances courts of equity will construe and reform marriage-settlement by  
VOL. II. PART. II.

reference to articles, 246; II. 659, 705.

As to provision by marriage-settlement being in bar of dower or thirds, I. 346.

How far and in what cases marriage-settlement will constitute husband a purchaser of wife's *choses en action*, 396; and further, II. 503.

In what case agreement to settle, and settlement in pursuance thereof, good against bond-creditors, II. 221.

### MARSHALLING ASSETS.

As to marshalling assets in general and for or against legatees—a charity—judgment-creditors—simple contract creditors—the general principle of marshalling, I. 231, 455.

Further on the subject, and as to copyholds, II. 709.

### MASTER AND APPRENTICE.

As to the jurisdiction of the court in the case of master and apprentice, I. 460.

If apprentice in London marries without his master's consent, the master cannot turn him away, but must sue his covenant, II. 292.

As to liability as between master and apprentice, in case of embezzlement by apprentice, 518.

### MASTER IN CHANCERY.

Whether court will make an order, a master of Chancery being in court and opposing it, I. 265.

### MASTER AND SERVANT.

Whether on bill for discovery and account of monies by master against his servant, defendant may plead he received the money only as a menial servant, I. 95.

### MASTER OF THE ROLLS.

As to the judicial authority of the Master of the Rolls, I. 274.

## INDEX TO THE NOTES.

### MASTER'S REPORT.

As to the practice of calculating interest on money due, by the master's report, II. 392.

### MASTER OF A SHIP AND SHIP'S HUSBAND.

How far a servant of the owners, and how far personally liable in respect of contracts for and on account of the ship, II. 643.

### MEADOW LAND.

In what case where application to the court for an injunction against converting ancient meadow land an affidavit that the land is *ancient meadow* is necessary, I. 23.

### MESNE PROFITS.

Nature of bill for *mesne profits*, I. 105.  
Action of trespass for *mesne profits* will lie after reversal of outlawry, II. 315.  
Whether title to *mesne profits* but from time of entry, 519.

### MESSENGER.

*Vide Sequestration, Sheriff.*

### MISAPPREHENSION.

As to the effect of misapprehension of party to avoid his release, I. 19.  
Relief against misapprehension and mistake in drawing and executing a deed, forms a head of equity, 32.

### MISTAKE.

*Vide Surety.*

### MISPLEADING AT LAW.

Whether equity will relieve in matters purely of mispleading at law, I. 119.

### MONEY.

*Vide Repayment.*

Whether money invested in purchase of lands can be followed, I. 265. And further, II. 441, 480.

Where money to be considered as land, I. 299, 345.

In what case' money under articles bound by the articles, and not assets, 471.

### MONTHS.

Whether the law computes by lunar or calendar months, II. 222.

### MORTGAGE.

*Vide Answer, Account settled, Baron and Feme, Contribution, Interest of Mortgage Money, the King, Power, Redemption, Tacking, Welch Mortgage.*

Where mortgage shall and shall not be considered as personal estate, I. 4, 271.

Whether mortgage can be extinguished by any covenant or agreement at the time of making thereof. In what cases length of time will bar a mortgage—where it may be revived—where it may be rendered irredeemable, 8.

In what cases, where more than one mortgage, court will decree redemption on payment of one only—and where not, 29.

A mortgage shall be paid out of the personal estate in preference to the customary or orphanage-part by the custom of London, 37.

Covenant not necessary to make a mortgage, 171, 215.

Mortgage is not in all cases completely mutual, 192.

Mortgage in fee not a revocation of a will, 330.

As to bill for redeeming old mortgage and effect of length of possession, 418.

Mortgage after voluntary settlement, held good, 464.

As to courts of equity considering absolute conveyance as mortgage, II. 289.

### MORTGAGE-MONEY.

*Vide Dowress.*

In what cases mortgage-money considered as part of the personal estate, I. 413

## INDEX TO THE NOTES.

### MORTGAGEE.

*Vide Account, Decree for Foreclosure, Length of Time, Term out-standing.*

In what cases estate of mortgagee in fee considered as personal estate—in what cases not—by what words mortgage in fee will pass, I. 4.

As to distinction between passing the legal and beneficial interests of mortgagee, *ibid.*

In what case prior mortgagee shall not bring subsequent mortgagee buying in a precedent statute, to account above the extended value, 50.

In what case arrear of interest shall not carry interest where mortgagee enters, and where the costs and charges shall, 169.

In what case mortgagee shall be compelled to answer for profits, 258, 270.

Where deprived of his costs, and ordered to pay costs, *ibid.*; II. 536.

Where mortgagee must see to the application of mortgage-money, I. 301; II. 7.

Mortgagee not entitled in this court to any allowance for his care and trouble, though an agreement between him and mortgagor for that purpose, I. 316.

Where assignee of mortgagee being in possession, decreed to account for rents and profits, 336.

As to third mortgagee getting in first incumbrance, and thereby protecting himself against the second mortgagee, II. 29.

In what cases and to what extent mortgagee favoured in equity as to inadequate security—possession—possession of title-deeds, 41.

As to mortgagee's right of pursuing all his remedies at once, 235.

Where mortgagee after forfeiture attainted and the King seised, whether mortgagee may redeem, 313.

As to nature of the interest of mortgagee in a naked advowson, 401.

Mortgagee not considered in all respects as trustee for mortgagor, 550.

Where first mortgagee ordered his costs as between solicitor and client, and profits to be applied to pay costs, charges, and disbursements without waiting for the account, 663.

Where court will and will not postpone prior mortgagee—the principle, 727.

### MORTGAGOR.

*Vide Covenant, Mortgagee, Redemption.*

In what case mortgagor may elect to pay to heir or executor of mortgagee, I. 4.

Infant mortgagor may show error in decree, but he may not unravel the account, nor is he intitled to redeem, 295.

Feme covert mortgagor is foreclosed absolutely, and no time to show cause after the death of her husband, *ibid.*

In what cases and to what extent mortgagor favoured in equity as to possession—foreclosure—computation of time—inspection of deeds—bygone rents and profits—interest considered as principal—arrears—interest in case of bankruptcy, II. 41.

Whether mortgagor may redeem where mortgagee, after forfeiture, attainted and the king seised, 313.

### MUTUALITY OF AGREEMENT.

How far necessary to render agreement binding, II. 416.

### N.

### NE EXEAT REGNO.

Writ *ne exeat regno* may issue against a feme covert executrix whose husband is out of the jurisdiction, II. 614.

### NEGRO.

Whether negro is an inheritance—trover will not lie for a negro—as to evidence in trespass brought for negro, I. 453.\*

### NEW TRIAL.

On the head of court granting new trial, II. 419.

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\* Vide 1 Comm. cap. 14.

## INDEX TO THE NOTES.

### NOMINE PŒNÆ.

Where the whole *nomine pænæ* shall be paid, distinction between bond for services only and *nomine pænæ* in leases to prevent a tenant from ploughing, II. 119.

### NON EST FACTUM.

Where *non est factum* pleaded at law upon forged bond, the bond must not be destroyed—where delivered to the plaintiffs—where deed found forged, destroyed, I. 66.

### NOTICE.

*Vide Decree for Foreclosure, Letters Patent, Lis Pendens, Plea.*

A purchaser with notice from one who bought without notice may shelter himself under the first purchaser—as to notice of proceedings in court—alienation—pending suit, how far void—in respect to the registry in Middlesex and Yorkshire—what is notice—the principle on which a party is affected with notice in equity, I. 61.

How far decree of the court is notice, 127.

Acts of court are notice, 237.

Though purchaser pay his money without notice, yet notice before execution of the conveyance will affect him—as to what will be sufficient denial of notice by answer—as to what will amount to notice, 364, 486.

And further on the general principle of notice, II. 385, 575.

As to notice to the agent being notice to the party, 610.

### NUDUM PACTUM.

II. 765.

### O.

#### OATH OF PARTY TO SUIT.

In what case sums of money allowed on party's own oath, II. 176.

### ORPHAN.

*Vide London.*

Orphan of a freeman of London is in the nature of a creditor—effect of it in the case of insolvency of executors of freeman, II. 202.

### ORPHANAGE SHARE.

*Vide London.*

A daughter of a freeman marrying without her father's consent, loses her orphanage-part, unless he is reconciled to her before his death, 216.

### OWELTY OF PARTITION.

Where rent is granted for owelty of partition, it will go as land, I. 133.

### ORDER OF COURT.

As to amending order of court, II. 435

### OBLIGEE.

*Vide Bond.*

If feme obligee take obligor to husband, that is a release in law—so where two femes obligees, and the one take debtor to husband, II. 290.

### OBLIGORS.

*Vide Bond, Obligee.*

### ODIUM SPOLIATORIS.

*Vide Presumption.*

### OFFICE FOUND.

To what time in particular office shall have relation in respect to ideots, I. 9; and in general, 10.

### OFFICER.

*Vide Ecclesiastical Officer.*

How far officer bound to sign a return I. 216.



## INDEX TO THE NOTES.

### OFFICER IN THE ARMY.

Whether the half-pay of an officer in the army is in any case assignable, II. 595.

### OFFICES.

*Vide Sale of Offices.*

### ORDINARY.

*Vide Plea.*

At law upon *plene administravit* pleaded, account given to the ordinary not to be given in evidence, II. 47.

Whether ordinary has discretionary power to grant administration either to wife or next of kin, 125.

### OUTLAWRY.

The king has no interest in lands by outlawry, but only perception of the profits, II. 314.

Action of trespass for *mesne profits* after reversal of outlawry will lie, 315.

### OCCUPANCY.

In what case estate by occupancy liable to legacies, I. 233.

### P.

### PARISHES.

In what case and manner certain parishes entitled to part of a charity the subject of an information, but which were not parties to the suit, were permitted to have the benefit of the suit, II. 597.

### PAROL.

A will in writing before the statute of frauds might be discharged by parol, I. 240.

### PAROL AGREEMENT.

*Vide Part-Performance.*

Where parol agreement for partition decreed to be executed, I. 133.

And further, as to parol agreement ge-

nerally with reference to the statute of frauds, 160.

Parol agreement may be discharged by parol, 240.

Where parol agreement confessed in the answer founded on a written agreement which was lost, it shall be executed, II. 561.

### PAROL DEMURRING.

Where lands descend on an infant, the parol shall demur; *secus*, where he takes as special occupant, I. 173.

### PAROL EVIDENCE.

As to the extent and the cases in which parol evidence admitted in respect of latent ambiguity in will, I. 31; II. 593, 647.

In respect of deeds or agreements, I. 321.

In marriage-articles in particular, *ibid.* As to the old doctrine on parol evidence, at law, 240.

Where parol evidence in case of devise of lands would not have been received before the statute of frauds, II. 337.

### PARSON.

*Vide Action under Penal Statute.*

### PARTIES TO SUIT.

*Vide Cestui que Trust, East India Company, Foreclosure, Ideot, Lunatic, Parishes, Trustee.*

Whether any are bound by a decree except such as are parties to the suit, I. 124.

All the proprietors of an undertaking need not be parties to suit for an account, 140.

*Secus*, as to parties to a vestry order, *ibid.*

In what case part of a great number of persons interested may be parties plaintiffs—as to *cestuys que trust* being made parties—as to part-owners, II. 422.

## INDEX TO THE NOTES.

### PARTITION.

*Vide Parol Agreement.*

### PARTNERS.

How far and by what means in mercantile transactions one partner may bind the rest, II. 278.

As to the nature of the interest of partners and the effect of assignment of partnership stock where one partner had embezzled part thereof, 293.

### PART-OWNERS.

How far part-owners are intitled to account as against each other—a majority can conclude the rest, I. 297.

### PART-PERFORMANCE.

What shall and shall not be deemed part-performance of a parol agreement so as to take it out of the statute of frauds, I. 160.

As to possession delivered being part-performance, 365.

And further, as to part-performance generally, II. 456.

### PAYMENT.

How the rule of law "*quicquid solvitur, solvitur secundum modum solventis*," is to be applied, I. 24.

Whether payment of money, due on security, good without delivering up the security, 150.

### PLANTATIONS ABROAD.

*Vide King in Council, Sequestration.*

Whether lands in the plantations abroad are within the jurisdiction of the court, I. 77.

As to the method of making plantations abroad liable to a debt contracted in England, 453.

### PLATE.

As to the words by which plate will pass under a will, II. 512.

### PRACTICE.

*Vide Answer, Bill, Interrogatories, Plea, Replication, Sequestration, Writ.*

### PRAYER IN AID.

As to devisee praying in aid of the personal estate to discharge the real, II. 469.

### PEER.

Peer disinherited has a right to have deeds and writings brought into court, II. 463.

### PENALTY.

*Vide Compensation.*

As to bond-debt being carried beyond the penalty, in what cases it is done, I. 350.

Distinction in this respect where action upon bond and upon judgment, *ibid*.

### PERFORMANCE.

*Vide Specific Performance.*

As to distinction between performance and satisfaction, I. 346.

### PERPETUITIES.

On the doctrine of perpetuities, I. 478.  
In equity you cannot come nearer perpetuity than at law, II. 557.

### PERSONAL ESTATE.

What passes by a devise of all one's personal estate, II. 137.

### PERSONAL ESTATE APPLIED IN EASE OF THE REAL.

In what case personal estate applied in ease of the real, and *à contra*, I. 37411; II. 709, 719.

## INDEX TO THE NOTES.

### PLEA.

Vide *Decree for Foreclosure, Dismissal of Bill, Exchequer, Court of, Non est factum, Uncore prist.*

Plea of heirship where ambiguity must not control a plain and express will, I. 22.

In what cases a release may be a good plea, 120.

Plea must aver and charge and answer facts and dates as well as answer, 139.

Plea of purchase for valuable consideration, must deny notice, but need not set forth consideration, 179.

Further, as to plea in respect of notice, 486.

As to plea of former suit depending for the same matters, 332.

In a suit against *A.* as executor, plea in bar that he was administrator disallowed, 473.

Plea of privilege ought to be put in on oath, II. 37.

On a bill for distribution of intestate's effects, plea that the ordinary is judge, not good, 47.

Rule for plea of title and denial of notice principle of the plea, 701.

### PLEA TO JURISDICTION.

Where and how far a plea to the jurisdiction of a court must set forth what other court has jurisdiction—in what case party must plead to jurisdiction and not object at the hearing, I. 59.

Where plea of non-jurisdiction must be tendered in the inferior court, 301.

### PLEADING.

The principle of pleading in case of thing given or payment made, I. 24.

The same strictness required in pleading in equity as at law, 139.

### PLENE ADMINISTRAVIT.

When pleaded at law, the account given to the ordinary shall not be produced in evidence, II. 47.

### PREBENDARY.

If prebendary alien his whole possession, he nevertheless continues prebendary, I. 42.

### PREFERENCE OF CREDITORS.

Vide *Executor.*

By what rule executor is to prefer creditors of his testator after a decree, *quod computet*, I. 457.

### PREFERENCE OF DEBTS TO LEGACIES.

Formerly court of opinion debts and legacies should be paid *pari passu*; now debts paid in the first place, I. 482; II. 248.

### PRESUMPTION.

Vide *Stale Demand.*

As to presumption of right from length of enjoyment, I. 196.

In what cases legacy or debt presumed to be satisfied, 256, 257, 482.

Every thing shall be presumed *in odium spoliatoris*, 453; II. 604.

Where livery presumed on length of possession, II. 4.

Court will not presume abuse of trust in case of charity established by charter, 400.

Further on the doctrine of presumption in general, 516.

Deeds are presumed to be lost, 561.

### PRICE.

See *Inadequacy.*

### PRINCIPAL AND SURETY.

Vide *Surety.*

### PRIORITY OF INCUMBRANCERS.

In what cases priority of puisne incumbrancers allowed or refused, I. 188.

And further, as to the precedency of incumbrances in general, II. 712.

## INDEX TO THE NOTES.

### PRIVATE ACTS OF PARLIAMENT

Substituted in the place of recoveries suffered under privy seals formerly used, I. 461.

### PRIVITY.

Where administrator *durante minoritate* and a new administration during minority granted, whether such second administrator can carry on the account—whether, when infant comes of age, he can go on in respect of privity, I. 25.

### PRIVY SEAL.

As to the effect of granting privy seal—of recoveries formerly suffered under them now disused, I. 461.

### POLICY OF INSURANCE.

In what case court of equity will relieve against breach of a policy of insurance, II. 11.

In what case factor may retain and have a lien on policy of insurance against his principal, 117.

As to costs where policy of insurance for insuring a life gained by fraud, 206.

As to policies *interest or no interest*, 269.

### POOR.

If money given for the relief of the poor be laid out to build a conduit, it is a misemployment, I. 44.

### PORTION.

Vide *Heir, Marriage-Settlement, Marriage-Portion*.

Where a portion shall sink as well for the benefit of an *hæres factus* as of an *hæres natus* secured by will or deed, I. 37, 205.

Where it shall be paid to the personal representative of the child to whom it was originally made payable, 205.

As to distinction between portion to arise out of land, and from personal estate, 462.

In what case trustees decreed to sell and raise portion, though no power to sell, II. 2.

Where land charged with portion for child with which wife is *præsentensient*, child is born and dies, portion extinguished; whether revived in equity for creditors, 208.

### PORTIONS RAISING IN THE LIFE-TIME OF PARENTS.

Where portions may be raised and where not, I. 104; II. 461.

### POSSESSION DELIVERED

Is sufficient part-performance of part agreement to take it out of the statute of frauds, II. 456.

### POSSIBILITY.

A possibility may be released in equity and at law, II. 563, 564.

And will pass by commissioners' assignment of bankrupt's estate, if it be such a possibility as bankrupt can disclose upon his examination—so by husband if for valuable consideration—will go to executor or administrator—if coupled with an interest is deviseable—as to *possibilities* and *choses en action* being put on the same footing, *ibid*.

### POSTHUMOUS SON.

In what cases posthumous son cannot take by a settlement, II. 579.

### POWER.

Power to wife to sell land after death of husband if no issue, husband died leaving issue, which issue sometime after died without issue, power good, I. 472.

Whether power to give to children extended to grandchildren, II. 80.

## INDEX TO THE NOTES.

Power to dispose of money by will is assets, 319.

Where power to charge lands in settlement as against remainder-man, whether borrowing the money and mortgaging the lands a good execution of the power, 364.

Court may aid the defective execution of a power, although generally speaking it cannot supply the non-execution, 379.

Where on the ground of uncertainty or non-performance power held to devolve on the court, 421.

And further on this subject—in what cases it will supply even non-execution of a power—as to evidence of intention to execute a power—distinction between naked power and power coupled with an interest—and the construction of them, 465.

### POWER OF APPOINTMENT.

*Vide Appointment.*

In what cases words of a power will uphold an appointment that would otherwise be deemed illusory, I. 67.

As to distinction between defective execution and non-execution of a power—whether court will supply—or will execute—as to effect of intention to execute—how it appears—as to necessity of executing a power in respect of creating a charge or an interest—whether a power is apportionable—may be executed at different times—whether equity will correct excess of execution—whether good in part and bad in part—as to execution *cy pres*—what considered as a good execution of power—whether reference to power necessary—whether power executed is assets, 407, 410.

Distinction between a power with a particular description and limitation of the estate, and where given generally, II. 182.

### POWER OF REVOCATION.

Where in a deed power of revocation and to appoint new uses: in the deed appointing the new uses ex-

press revocation must be reserved, or it will be executed and irrevocable, II. 511.

### PROBATE.

Whilst probate is in force, this court will not intermeddle as to fraud in obtaining will, II. 47.

### PROCEEDINGS.

*Vide Attachment.*

### PRÆCIPE.

After length of time tenant to the præcipe will be presumed—A deed, &c., executed the same term shall be good to make a tenant to the præcipe, I. 13.

### PROFERT.

Whether action can now be brought on bond without profert, II. 299.

### PROFITS.

*Vide Account.*

In what case mortgagee shall answer for profits, I. 258.

As to setting profits against interest, and where court will decree an account in the case of Welch mortgage, 395.

### PROHIBITION.

Prohibition will lie at law to the spiritual court in the case of executor sued there for account—where it will and will not in case of administrator, I. 25.

As to prohibition to inferior courts in general, 276.

### PUBLICATION PASSED.

*Vide Depositions, Examination of Witnesses, Interrogatories.*

### PURCHASER.

*Vide Executor, Letters Patent, Scire Facias, Term out-standing.*

In what cases purchaser bound to look

## INDEX TO THE NOTES.

to application of purchase-money, I. 261.

After suit commenced, 460; and further, II. 7, 616.

In what case obliged to enter into the account, I. 303.

How far purchaser *pendente lite* without actual notice bound by decree, 460.

As to agent, assignee of bankrupt, solicitor, and trustee becoming purchasers, 466.

As to subsequent purchaser protecting himself by getting in satisfied incumbrance, II. 30, 271.

Purchaser of a trustee after notice of the trust bound by the trust, 159.

Purchaser for valuable consideration without notice shall not have his title impeached in equity—nor be compelled to discover writings—nor any advantage taken from him which may defend him at law, 701.

Nor can such purchasers be affected by variance between articles and settlement in case of marriage, *ibid.*

### Q.

#### QUO WARRANTO.

As to the writ of *quo warranto*, I. 156.  
Against corporation, 311.

### R.

#### RELATIONS.

*Vide Statute of Distributions.*

#### REMAINDERS.

Whether recovery suffered of legal estate will affect equitable remainders, *et vice versa*, I. 14.

Where devise is void, remainder shall take place as if no devise, II. 139.

In what case remainder over after a limitation, which if the persons who would have been intitled under it, had come into *esse*, would have been vested, held good, 601.

In what case remainder good, although the particular estate defeated, 723.

#### REMAINDER-MAN.

*Vide Condition.*

#### REPAYMENT.

Whether repayment of money borrowed after act of bankruptcy good repayment, I. 28.

#### RECEIVER.

The appointment of a receiver will not prevent the operation of the statute of limitations, I. 74.

#### REDEMPTION.

*Vide Dowress. Mortgage, Mortgage.*

If mortgagor covenant or even take oath not to bring a bill to redeem yet he may redeem, I. 215.

#### RELEASE.

*Vide Plea.*

How far court will restrain the construction of general words at the conclusion of a release to the particular consideration recited therein for granting the same, I. 19.

As to the effect of misapprehension of party to avoid his release, *ibid.*

As to marriage between obligor and obligee being at law a release of the bond, II. 481.

#### REVERSION IN FEE.

As to reversion in fee being assets, I. 134.

By what words reversion will pass, 460.  
And further, 560.

#### RENT.

*Vide Incorporal Inheritance, Owelty of Partition.*

As to action of covenant and debt for rent reserved, I. 88.

A bill in equity will lie for a rent where no remedy at law, 209.

Rents, whether the demise be by parol or by deed, are of an equal nature



## INDEX TO THE NOTES.

and rents and debts by specialty are also equal, 490.

A rent is a tenement and cannot pass by will without three witnesses, II. 80.

### RENT-CHARGE.

Distinction between an agreement or mortgage of a rent-charge issuing out of land and the land itself, I. 8.

### RENTS AND PROFITS.

*Vide Outlawry.*

How far raising by rents and profits extended—and where court will decree a sale—how long they may accumulate, I. 104; II. 311.

As to the application of rents and profits during the minority of heir-at-law, 174.

As to devise of rents and profits of land passing the land itself, II. 60.

As to operation of statute of limitation in action for rent, 236.

In what case account of rents and profits by infant against intruder where verdict against infant's title—account of rents and profits always decreed from time of title accruing, 724.

### REPLICATION.

In what case answer shall be taken as true where replication—where replication permitted to be filed after examination of witnesses and a decree, I. 140.

Special replications now out of use, 351.

### RECOGNIZANCE.

Whether court will allow recognizance entered into by order of the court to be sued otherwise than by a *sci. fa.* I. 313.

Recognizance not inrolled adjudged to be a bond, II. 751.

Rule of the statute of frauds as to recognizances, *ibid.*

### RECOVERY.

Whether where devise to trustees for payment of debts and legacies remainder in tail, recovery by remainder-man in tail good, I. 226.

Equity ought rather to supply defects in recoveries than assist in annulling them, and the principle, 369.

Where recovery defective as to a tenant to the *præcipe* sufficient to bar an equity, II. 151.

### RESPONDENTIA BONDS.

For difference between respondentia bonds and bottomry bonds, II. 718.

### REVOCATION OF WILL.

*Vide Conveyance, Marriage, Mortgage, Will.*

On the doctrine of revocation, I. 330. Revocation not favoured in equity beyond the plain intent, *ibid.*

Where a will though void good as a revocation of former will, II. 80.

Further on revocation, 209, 496, 721.

As to revocation of a will by an instrument insufficient to constitute a will, 499.

As to revocation by obliterations and alterations, by which a will may be partly revoked and partly stand, *ibid.*

### REFUNDING.

*Vide Legatee.*

### REPUBLICATION OF WILL.

As to republication of will in respect of implication in the case of a will of lands—of a codicil whether relating to real or personal estate—on the doctrine of annexation, II. 209.

Republication of will favoured in equity, 722.

### RETURN.

How far officer bound to sign a return, I. 216.

### ROLLS.

Whether an appeal from decree of commissioners of charitable uses may be heard at the Rolls, I. 42.

## INDEX TO THE NOTES.

S.

### SALE OF OFFICES.

Whether stat. Edw. 6. extends to the sale of military offices, I. 99.

### SATISFACTION.

*Vide Land.*

In what case satisfaction may be presumed—need not be co-extensive with the thing satisfied—distinction between performance of covenant and satisfaction—between satisfaction of a legacy and a debt—in what cases court not inclined to presume satisfaction—whether legacy to servant satisfaction for a debt, I. 346.

As to the extent of provision by marriage-settlement being in satisfaction of dower and thirds—whether in case of presumption of debt by a legacy there is any distinction between legacies given by parent and those given by any other person, *ibid.*

And further, on the head of satisfaction generally, II. 299, 479, 498, 710.

### STALE DEMAND.

Every fair presumption made against a stale demand, II. 516.

### STATUTES.

Difference held between statutes 13 and 27 Eliz. as to their operation, II. 327. Words of stat. 11th Hen. 7. as to the prohibiting the alienation of wife's estate, 489.

Debtor being beyond sea, his right saved, as well as creditor's by stat. 4 Ann, cap. 16., 541.

For discussion of stat. 21 Jac. 1. cap. 19., 565.

### STATUTE OF CHARITABLE USES.

Whether appeal from decree in Chancery on stat. of charitable uses, I. 42 ; II. 118, 747.

### STATUTE OF DISTRIBUTIONS.

Where the statute of distributions ap-

plied to restrain devise to relations, poor relations, &c. I. 226. ; II. 381. Nephew cannot claim under the stat. with uncle or aunt of intestate, II. 170.

As to representation beyond brothers and sisters to intestate, 233.

As to statute affecting the rights of husband, 303.

### STATUTE OF FRAUDS.

*Vide Copyhold, Estate pour auter vie, Parol, Parol Evidence, Trust Resulting.*

Writings of what nature (e. g. letters) will take agreement out of statute of frauds, I. 114, 366.

In what case defendant may insist on statute of frauds, 151.

Distinction as to the effect of the statute between making void the estate and the agreement, *ibid.*

In pleading the statute of frauds it is necessary to say that the agreement was not reduced into writing, 210.

Whether the statute relates to any other trusts than those concerning lands and hereditaments, 297.

Statute of frauds does not apply to personal estate, 366.

Is confined to such estates only as pass by the statute of wills, II. 499.

And further, 598.

The statute embraces equitable as well as legal estates in freehold lands, 598.

Before the statute of frauds a will in writing not supplied by parol proof, 619.

Where the court has relieved by passing over the statute, 627.

An estate by occupancy before the statute of frauds not subject to debts, 720.

Where will good within the statute though not signed by testator, 742.

Rule of the statute as to recognizances, 751.

### STATUTE OF LIMITATIONS.

*Vide Election, Receiver.*

Statute of limitations will run upon judgment in a foreign court—effect

## INDEX TO THE NOTES.

of statute in the case of plaintiff and defendant being beyond sea, I. 21.

In what case court will not permit advantage to be taken of the statute at law, 74.

As to the operation of the statute in case of dower, 219.

Legacy not within the statute of limitations, 256.

In what case debts barred by the statute shall be paid, 432.

In what case statute of limitations does not bar a trust, 433.

Where bar to account for rents and profits beyond six years as against trustee, 445.

Whether the exception to the statute of limitations extends to transactions between principal and agent—does not extend to the case of a tradesman and his customers, 456.

As to the operation of the statute in action for rent, II. 236.

Is saved as to debtor being beyond sea, as well as creditor by stat. 4 Ann, cap. 16—saves only open, not settled, accounts, 695.

### STATUTES REGULATING THE INTEREST OF MONEY.

How far such statutes have a retrospect, II. 145, 377.

### STATUTE STAPLE.

*Vide Mortgagee.*

Chancery will relieve against infant in case of a statute staple, I. 344.

### STATUTE OF WILLS.

This stat. 34 and 35 Hen. 8. cap. 5. does not extend to customary estates, II. 499.

### GREAT SEAL.

Power of great seal in relation to ideots and lunatics, I. 11.

In relation to setting aside or repealing letters patent on holding plea of *Sci. Fa.* 55.

A grant of lands within the county palatine of Lancaster under the great seal only is not good—so grant of

next avoidance where advowson belongs to the dutchy—*Secus*, as to presentation, 386.

### SECURITY.

*Vide Courts Ecclesiastical.*

This court will compel guardian to pay interest for infant's money in his hands, and also to give security, I. 27.

Legatees not obliged to give security to refund in case of deficiency of assets, 93.

### SECURITY FOR LEGACY.

In what case court will order executor to give security for legacy, II. 249.

### SECURITIES UNDULY OBTAINED.

On the head of securities unduly obtained, II. 188.

### SEPARATE MAINTENANCE.

*Vide Feme Covert, Maintenance of Wife.*

Where wife saves money out of separate maintenance, she may dispose of it as a feme sole, I. 244.

The cases in which court will carry into effect an agreement for separate maintenance for the wife—and in what manner and under what circumstances court will act upon the separate maintenance, II. 386.

### SEPARATE PROPERTY.

In what cases the court will not assist wife in recovering her separate property, I. 54.

How far, where power reserved to wife to dispose of her personal estate, all she dies possessed of is to be considered as her separate property, II. 535.

## INDEX TO THE NOTES.

### SEQUESTRATION.

*Vide Fee-Farm Rent, King in Council, Serjeant-at-Arms.*

In what case sequestration will go against the heir—in what case discharged as against the heir where a decree to account had—will extend to land copyholds and personalty, I. 58.

*Quære* if sequestration will extend to Ireland and the plantations, 76.

Sequestration will not bind lands in Cornwall, 77.

Sequestration on *mesne* process determines by the death of the party, 247.

Sequestration awarded upon a return of a serjeant-at-arms not of a messenger, 345.

Sequestration to sequester estate cannot issue but upon *non est inventus*, 421.

As to the effect of sequestration on *mesne* process, *choses en action*—executed or not with respect to judgment at law—as to plaintiffs proceeding where sequestration had for want of an answer, *ibid.*

### SEQUESTRATORS.

How accountable for profits, and how far they may retain, I. 58.

### SERJEANT-AT-ARMS.

*Vide Sequestration.*

Serjeant-at-arms must return *non est inventus* before a sequestration can issue, I. 58.

### SETTLEMENT.

*Vide Deeds and Writings brought into Court, Marriage, Marriage-Settlement.*

In what case settlement by freeman on wife shall bar her customary part, I. 6.

In what case agreement to settle, and settlement in pursuance thereof, good against bond-creditors, II. 221.

As to the course pursued where settlement made by lunatic, 414.

As to settlement of stock in the public funds, 491.

### SHERIFF.

*Vide Action at Law.*

The sheriff cannot take a bail-bond upon an attachment for not paying costs, but in such case a messenger is to go to bring in the party, I. 116.

### SPECIFIC PERFORMANCE.

*Vide Joint-Tenant, Voluntary Agreement.*

Specific performance of marriage-agreement made abroad decreed here, I. 81.

Specific performance decreed where one of the parties afterwards became lunatic, 106.

Where agreement in writing signed by one party only, II. 456.

And further on specific performance generally, and the principles on which equity decrees or refuses to decree specific performance, *ibid.*

### SPERATE DEBTS.

In what case sperate debts set forth by executor shall be accounted assets, II. 147.

### SIGNIFICAVIT.

The recital of significavit in writ *de ex-comm' capiend'* must be certain, I. 24.

### SIGN MANUAL.

The effect of the king's sign manual, and in what case it is necessary to be countersigned, I. 386.

### SIMONY.

General bonds of resignation are declared simoniacal, I. 131.

### SIMPLE CONTRACT DEBTS.

Where testator mortgagor dies indebted by mortgage and on simple contract,

## INDEX TO THE NOTES.

executor shall not redeem mortgage without payment of simple contract debt also, I. 29.

### SCIRE FACIAS.

*Vide Great Seal, Recognizance.*

In what cases *scire facias* necessary, and not, to repeal letters patent, I. 388.

Whether purchaser or assignee who come not in privity not intitled to bring *scire facias* to revive a decree—should bring an original bill, 417.

### SPIRITUAL COURT.

*Vide Courts Ecclesiastical.*

### SPIRITUAL PERSONS.

As to demise of benefice for years by spiritual persons, II. 205.

### STINT OF COMMON.

As to agreement for stinting common being confirmed or carried into execution by this court, I. 456.

### SOLICITOR.

Where bill for his fees will lie by a solicitor, I. 203.

Act 3. Jac. I. cap. 7. extends only to attornies of the courts at Westminster, 312.

As to solicitor becoming purchaser, 466.

### STOCK IN THE PUBLIC FUNDS.

As to settlement of stock in the public funds—As to the jurisdiction of the court over such stock in favour of creditors, II. 491.

### STOPPAGE.

In what cases stoppage allowed as payment, I. 122.

And further on the doctrine of stoppage, II. 429, 699.

### STOPPING IN TRANSITU.

*Vide Consignor.*

### SUBJECT-MATTER OF SUIT LYING OUT OF THE KINGDOM.

In what cases the court has jurisdiction, though the subject-matter of the suit lie out of the kingdom, I. 77.

### SUBPOENA.

If *subpœna* returnable in Ireland and defendant will not appear, whether any further proceedings can be had upon it, I. 406.

### SURETY.

*Vide Devise for Payment of Debts.*

Where court will compel surety to execute collateral security, I. 197.

As to liability of surety to contribution, 456.

In what cases and upon what principle surety discharged though the debt remains, II. 393.

Surety only engages to make good the deficiency, 608.

Further as to principal and surety where time given or contract altered as between principal and creditor only, *ibid.*

And as to surety compelling creditor to prove under commission of principal, he being bankrupt, 609.

### SURRENDER.

The court will not supply surrender against *hæres natus*; although it will as against devisee, I. 37.

Nor in favour of grandchild, 40.

And further in what cases court will and will not supply surrender, 133; II. 625.

As to surrender on condition, II. 17.

Ground of supplying surrender for younger children unprovided for, is that they are considered as creditors, 165.

## INDEX TO THE NOTES.

In what case parol evidence of surrender and of mistake upon the roll admitted, 547.

How far covenant in the case of *Free Bench* is equal to bar with surrender at law, 584.

As to the efficacy of common surrender to bar intail in copyhold, 585.

No surrender necessary in case of devise of equitable interest only in customary estate, 680.

As to surrender made by tenant for life barring where no custom for suffering common recoveries, 704.

### SURVIVORSHIP.

Whether survivorship over again upon what accrues by survivorship, II. 388.

Where condition attached to original legacy shall attach upon survivorship, 620.

### T.

#### TACKING SECURITIES.

In what case bond-debt may be tacked to mortgage—where not, I. 174, 245.

Further on tacking, II. 177, 699.

#### TAXES.

As to the effect of covenant to pay free from taxes discharging the covenantor from taxes, or the contrary, II. 307.

The word *Taxes* in a covenant to pay without deduction of taxes can have no other respect but to parliamentary taxes, II. 207.

#### TRADE.

Clauses generally restraining trade under forfeiture void, I. 130.

So bond promise or contract, though with consideration, void, 307.

#### TRANSFER OF STOCK.

Whether court of equity will decree

specific performance of an agreement for the transfer of stock, II. 394.

#### TENANCY IN COMMON.

What words will create a tenancy in common—court leans in favour of a tenancy in common, I. 353.

#### TENANT AFTER POSSIBILITY OF ISSUE EXTINCT

May not do acts that may destroy inheritance, I. 23.

#### TENANT BY THE COURTESY.

As to the nature of right of tenant by the courtesy, II. 324.

Of what estates and matters tenancy by the courtesy may be, 537, 681.

#### TENANT FOR LIFE.

*Vide Contribution.*

Tenant for life *without impeachment for waste* may not do acts that may destroy the inheritance, I. 23.

Nor cut ornamental trees or saplings, *ibid.*

As to the effect of covenant to settle a jointure by tenant for life having power, II. 306.

#### TENANT TO THE PRÆCIPE.

No tenant to the præcipe in a copyhold, II. 243.

#### TENANT IN TAIL.

In what manner tenant in tail of a trust with remainders over may bar, I. 14.

As to the effect of a covenant to levy a fine by tenant in tail, II. 306.

#### TERM ATTENDING INHERITANCE.

*Vide The King, Term outstanding.*

When at law—in what cases in equity may be made to attend the inheritance



## INDEX TO THE NOTES.

in what cases not—distinction between term and trust of term—consequences of term being assigned to attend the inheritance—in what cases term may be disannexed—and where not—the principle on which courts of equity declare terms to be attendant on the inheritance—the present state of the doctrine at law as to satisfied terms set up in trial on ejectment, I. 2.

Where mortgagee or purchaser with notice may protect himself by an out-standing term, 359.

Further on the subject of term attending inheritance, II. 52.

### TRESPASS.

*Vide Action at Law.*

### TIMBER.

*Vide Tenant for Life.*

In what cases timber is and is not considered as part of the inheritance, II. 153.

### TIME.

How far time is material in the performance of a contract, I. 472.

### TITHES.

• *Vide Action on Penal Statute.*

On what ground this court will grant injunction as to suit in ecclesiastical court for subtraction of tithes, II. 47.

### TITLE DEEDS.

In what case tenant for life permitted to retain title deeds as against mortgagee or others claiming title to the land, I. 480.

### TITLE OF HONOUR.

May not be acquired for money—cannot be barred by fine or recovery, I. 5.

VOL. II. PART II.

### TITLE AT LAW.

How far the rule that a man shall not come to equity to establish a legal right until he has tried his *title at law* extends, I. 22. 129, 309.

Whether the court will by its decree bind up a title at law after one trial only in ejectment, 489.

### THIRDS.

A leasehold settled on wife previous to marriage in bar of dower and for provision, not a bar of thirds, I. 216. As to provision in marriage settlement being in bar of thirds, 346.

### TROVER.

*Vide Action at Law.*

### TRUST.

*Vide Letters Patent, Statute of Limitations.*

Action on the case will not lie for breach of trust, I. 344.

Distinction between use and trust—devise to *permit* A. to receive and dispose, &c. construed a trust, and vests in trustees, 415.

What will create a trust in equity, *ibid.*

### TRUST ARISING BY IMPLICATION.

Whether they must not be such trusts as arise upon the face of the deed, I. 109.

In what case a trust may be raised by implication from letters and other papers, 114.

### TRUST ESTATES.

By what words trust estates with power of appointment will pass, I. 4.

In what cases a husband cannot intermeddle with or dispose of a trust term of the wife—whether husband can bar wife of any equity by disposition—distinction between particular and general assignees of husband

## INDEX TO THE NOTES.

of the trust term of wife—distinction between a term in trust to raise a sum of money for a woman and a trust of the term itself—distinction in the case of a particular assignment between a trust term and a *chose en action* of the wife—whether husband may make a voluntary assignment of wife's *chose en action*—a voluntary assignment by husband will alter the property, 7.

Whether intail of trust estate barred by fine or recovery unless upon consideration, 14.

Whether husband may dispose of term in wife as executrix or administratrix, 19.

### TRUST RESULTING.

In what case where lands devised to executors to be sold for several purposes there can be no resulting trust for heir at law, I. 31.

Where purchase by father in the name of his eldest son, an advancement for the son, not a resulting trust for the father—In what case parol evidence not admitted to create resulting trust for mortgagee for half the mortgage money not a party to the deed, 109.

Where purchase, resulting trust for purchaser by implication of law—where created by parol evidence—where raised by letters and by operation of law—from advances of money, 366.

Resulting trusts of copyhold as well as freehold within the statute of frauds, 416.

As to resulting trust of residue undisposed of for next of kin in the case of an executor, 473.

And further on the doctrine of resulting trusts, II. 20.

### TRUSTEE.

*Vide Costs, Devise for Payment of Debts, Guardian, Laches, Statute of Limitations.*

In what case and manner trustee for charitable use shall be charged, I. 44.

Distinction between voluntary acts of trustee and acts done under the direction of the court, 94.

Trustee in general, his character, how he is to be charged, 144.

Where charged with interest, 197.

Where trustee need be party to a suit, 261.

In what case trustee may be declared intitled to an allowance for his care and trouble, 316.

Court will decree trustee in a bond to let his name be made use of, 429.

As to the law of trustee becoming purchaser, 466.

In what case trustee in settlement decreed to sell and raise portion though no express power of sale given, II. 2.

Whether, where charge of a certain sum of money on land, and trustee raises more and becomes insolvent, the trustee or the land shall bear it, 85.

As to liability of trustees for the acts of each other, 516.

### TRUSTEE BUYING IN INCUMBRANCE.

May under circumstances be allowed on account the whole money due thereon, I. 335.

### TRUSTEES FOR PRESERVING CONTINGENT REMAINDERS.

In what case decreed to join in a sale I. 182.

If they join in a conveyance, it is a breach of trust, 344.

In what cases court will direct trustees to join in destroying contingent remainders, II. 755.

The principle, *ibid.*

Trustee ought not to do so in any case without the direction of the court, *ibid.*

### TRUSTEE PURCHASING.

*Vide Trustee.*

U.

### USE.

Distinction between use and trust, I. 415.

## INDEX TO THE NOTES.

### USE EXECUTED.

What a use executed, I. 415.

### UNIVERSITY.

The universities shall claim no privilege where the freehold may come in question, I. 212.

As to the extent of the jurisdiction of university to sequester lands or execute agreements in specie, *ibid.*

### UNION OF ESTATES FOR LIFE AND IN TAIL.

*Vide Estate for Life.*

### UNCORE PRIST.

As to plea of *uncore prist* by executor on action to fulfil the will, I. 262.

### USURY.

On this head, II. 172.

V.

### VENUE.

In what cases the court will and will not change a venue, I. 177. 267. 439.

### VERDICT AT LAW.

In what cases equity will relieve after verdict where the defence might have been made at law, I. 119. 177.

### VESTED INTEREST.

In what cases legacy held to be vested, I. 205. 324.

Where no time appointed for payment, II. 74.

And further, 199.

### VICAR.

*Vide Action on Penal Statute.*

Where no vicarage endowed the impropiator of the small tithes has not the nomination of the vicar, I. 247.

### VICARAGE UNENDOWED.

*Vide Vicar.*

### VISITOR.

Where a special visitor is appointed there shall be no commission on statute of charitable uses—otherwise of a collateral trust or charity, I. 42.

### VOLUNTARY AGREEMENT.

In what case the court will and will not assist a voluntary agreement, I. 101.  
Court will not decree specific performance of voluntary agreement, II. 693.

### VOLUNTARY BOND.

Where postponed to simple contract debts, I. 484.

How far voluntary bond in favour of two of the children established as against younger children, II. 476.

### VOLUNTARY COVENANT.

Equity will not construe such a covenant beyond the letter, II. 584.

### VOLUNTARY DEEDS.

*Vide Mortgage.*

In what case the court will and will not carry voluntary deed into execution—where two voluntary deeds, he that has the advantage at law ought to keep it—must be tried at law, I. 38.

Voluntary settlement without power of revocation not defeated by subsequent will, though premises charged by such will with payment of debts, 100. II. 272.

In what case of two voluntary deeds the second shall prevail, I. 101.

Whether court will set aside voluntary conveyance in favour of a subsequent will, 428.

## INDEX TO THE NOTES.

It is discretionary in a court of equity whether it will aid voluntary conveyances where there is no remedy at law, 457.

Where court may decree a conveyance fraudulent merely for being voluntary without trial at law, II. 262.

But conveyance not necessarily fraudulent because voluntary, 491.

How far voluntary settlement in favour of two of the children established as against younger children, 476.

Voluntary conveyance bad in equity against bond debts contracted afterwards, 511.

How far in the case of voluntary deeds and voluntary appointments the first is to take place, 531.

### VOLUNTARY SETTLEMENT.

In what cases and upon what principles voluntary settlement held fraudulent or good against creditors, II. 491.

In what manner and upon what ground creditor can impeach voluntary settlement, *ibid.*

And further on the doctrine of voluntary settlement on wife, 684.

### VOLUNTEERS.

In wills where all are volunteers the words may be varied, I. 38.

### VOUCHERS.

On the ground of fraud a general account decreed and securities to stand only for the balance, though the vouchers had been destroyed by general consent, I. 207.

### W.

### WARRANTY.

In what case warranty shall bind an infant, I. 343.

### WARDEN OF THE FLEET.

As to escape of prisoners being a forfeiture of the office of warden of the

fleet—where one has the office for life, reversion in fee to another, forfeiture is to him in the reversion and not to the king, II. 174.

### WASTE.

*Vide Feme Covert Executrix, Impeachment of Waste.*

### WELCH MORTGAGE.

*Vide Profits.*

All Welch mortgages are without a covenant. I. 171.

As to profit being set against interest in Welch mortgages, 477.

### WIDOW OF FREEMAN.

*Vide London.*

Widow of freeman of London is in the nature of a creditor—effect of it in the case of insolvency of executors of freeman, II. 202.

### WILL.

*Vide Bill for Discovery, Parol, Revocation of Will, Republication of Will.*

As to the diversity of jurisdiction of courts of equity in setting aside deeds and wills, I. 19.

Will of personal estate has relation to time of testator's death, 31.

How far in wills where all are volunteers the words may be varied, 38.

Whether court will direct an issue to try will of lands in Ireland, 77.

In what cases will held to be revoked, 97. 330.

If will made in foreign country disposing of goods in England it must be proved here, 397.

This court has not jurisdiction to set aside will of lands nor of personals for fraud, II. 9.

And further on this point, 700.

## INDEX TO THE NOTES.

As to the power of this court to order a will out of the office of the spiritual court, 47.

Distinction between the construction of marriage articles and wills as to raising estate for life or estate tail, 527. 705.

A void will cannot operate as an appointment, 598.

Will in writing not supplied by parol proof before the statute of frauds, 619.

The court will not construe a will to relate to persons not in being unless the contrary intention plainly appear, 705. *quod vide* for the cases on the subject of restriction or extension of bequest to persons born before or after the making of the will, death of testator, &c.

In what case will good will within the statute of frauds though not signed by testator, 742.

### WITNESSES.

*Vide Corporation, Depositions, Examination of Witnesses.*

How far witness interested at the time of examination and afterwards becomes disinterested may be read, I. 126.

Where the evidence of a single witness may prevail against answer, 137.

As to a defendant being examined as a witness for plaintiff, II. 99.

As to the nature or extent of interest that will go to the competency of witness, 318.

Whether mere witness shall be made a party to a suit, 380.

### WRIT.

*Vide Ne exeat Regno.*

In what cases the court will grant supersedeas to writ *de excomm' capiend'*—to whom the writ *de excomm' capiend'* is to be directed, and where and when returnable—this court no authority to quash it—jurisdiction of this court remains till return of the writ—must be made out in term

time—recital of *significavit* must be certain, I. 24.

Whether court will grant writ of assistance after injunction as to lands lying in Cornwall, 77.

Nature of the writ "*De cautione admittenda*," 119.

Return of *Cepi Corpus* is an end of all process, 154.

### WRIT OF ERROR.

Where writ of error lies out of the *Petit Bag* into B. R. I. 131.

Writ of error is due of right in all cases except treason and felony, 170.

### WORDS.

*Vide Charge of Debts, Joint Tenancy, Tenancy in Common.*

As to the effect of the word *elsewhere* in a devise, I. 4.

By what words an idiot may be found, 137.

As to the effect of the words *shall and may* in acts of parliament, private constitutions and deed, 153.

As to the effect of the words *all my estate* in carrying the fee, 341.

How far the word *estate* may in that respect be qualified, *ibid.*

As to the words *dying without issue, leaving no issue*, &c. 478. II. 88.

As to the words *descendants, issue, children*, comprehending grandchildren, 108. 545.

As to the words *desire, recommend*, &c. creating a condition, 116.

As to the effect of the words *paying my debts and legacies*, 121.

Of the words *rendering rent* as creating a covenant to pay rent, 307.

Of the word *issue* as *nomen collectivum*—of the word *heir* in the singular number, 325.

As to the word *and* construed *or*, and the contrary, 389.

As to the construction of the statute 13 Eliz. on the word *consideration*, as against creditors in case of a settlement, 491.

How the words *estate of inheritance* are expounded by the statute of wills, 34 and 35 Hen. VIII. cap. 5. 499.

## INDEX TO THE

As to the force of the words *to his children and their heirs*, in a devise of lands, 545.  
 As to the force of the word *paying*, 668.  
 As to the effect of the words *all* *all* in a nuncupative will before the statute of frauds, 690.  
 And in general as to what words will pass a fee, 562.

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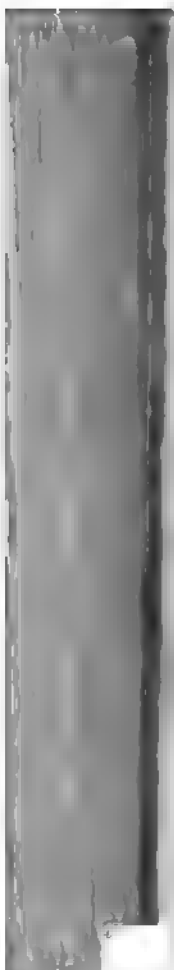
As to the custom of the province of York in case of settlement on the eldest son, II. 82.

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12



